IMPRACTICABILITY AND THE COURT'S POWER TO CONVENE A COMPANY MEETING

INTRODUCTION

Most company law statute in the Commonwealth confer on courts the power to convene a general meeting of a company in situations where it is "impracticable" for the meeting to be called under the provisions of the company's articles or memorandum.[1] This is to be distinguished from the power of the court to call an *annual* general meeting of the company if it fails to hold one in accordance with the provisions of the law.[2]

The power to convene a meeting when it is "impracticable" was introduced for the first time into English company law by the Companies Act of 1929. A meeting may be "impracticable" due to various reasons. A minority group, without whose attendance the quorum called for by the constitution of the company would never be satisfied, deliberately decides not to attend any meeting of the company. The company is paralysed and cannot function. In such situations, the controllers of the company may attempt to checkmate the minority by having the court convene a meeting. At that meeting, they may alter the constitution to take away valuable minority rights.

There may be numerous other circumstances in which the company finds that a meeting is "impracticable". The reason may not be that a group of members insist on exercising their rights under the

[1] Section 150, Companies Act, Singapore (Cap. 185); s. 150, Malaysian Companies Act; s. 135, U.K. Companies Act (1948); s. 106, Canada Corporations Act, R.S.C. 1970, c. C-32; s. 246 of the Australian Companies Act, 1980 (s. 142 of the Uniform Companies Act, 1961); s. 62 of the Companies Act of South Africa (46 of 1962); s. 186 of the Indian Companies Act, 1956. After an amendment implementing the Cohen Committee recommendation the power to convene an *annual* general meeting has been now conferred on the Company Law Board of the Government of India.

The typical wording of the provision is as follows:

> "If for any reason it is impracticable to call a meeting in any manner in which meetings may be called or to conduct the meeting in the manner prescribed by the articles or this Act the court may, either of its own motion or on the application of any director or any member who would be entitled to vote at the meeting or the personal representative of such member, order a meeting to be called, held and conducted in such manner as the Court thinks fit, and may give such ancillary or consequential directions as it thinks expedient, including a direction that one member present in person or by proxy shall be deemed to constitute a meeting or that the personal representative of any deceased member may exercise all or any of the powers that the deceased member could have exercised if he were present at the meeting."

[2] The power to convene an *annual* general meeting is of much greater antiquity than the power to convene a meeting when it is "impracticable" for one to be held or conducted. The former was present even in the 1862 English Companies Act (section 52) See, for example, s. 143 of the Singapore Companies Act, for a contemporary descendant of this power.

company's constitution. It may be "impossible" to hold a meeting regardless of the desire of the members to meet. In such instances, the court's intervention may be needed to break the company free from an immobility that even action by all the members cannot cure.

It may thus be clearly seen that the power of the court has the potential, if invoked in the context of intra-corporate factional struggle, to interfere with the distribution of control under the company's internal regulations. It can also sometimes form the basis for unwarranted intrusions of the regulatory mechanism into the realm of private business law.

Very often, it is the misconceived desire to protect majority opinion in the company that prompts courts to convene a meeting and thereby force the hand of a recalcitrant minority, in order to uphold the quasi-parliamentary notions of majority rule and "shareholder democracy". Parliamentary fantasies haunted company law for many years. The rise of modern Anglo-American company law occured in the 19th century, simultaneously with the rise of the *laissez faire* economic philosophy and in the midst of the passionate democratic and parliamentary obsessions of the elite groups in that period.

Much proverbial water has, to use the worn cliche, flowed under the bridge since that day and age. It is now possible for a company, if it so desires, to completely abandon the principle of majority rule by constructing any scheme of control that it desires.[3] Yet, some courts appear reluctant to finally abandon the compulsive instinct to ensure that the majority, somehow more "the company" than the minority, should be permitted to carry on the affairs of the company.

This article examines leading cases in the United Kingdom, Canada, Australia, South Africa, India, Singapore and Malaysia (all of which have borrowed this provision from the same British source) in order to establish the circumstances in which courts exercise these powers. The cases seem to demonstrate that courts do, in the majority of cases, exercise restraint in invoking discretion and take particular care not to interfere either in the contract embodied in the articles and memorandum or to take sides in factional intra-corporate struggles. However, the cases in which courts have interfered with the arrangement in the articles seem to suggest that the power conferred on courts to convene meetings should be expressly limited, to prevent any such unjustified assumption of judicial power.

The leading decision of the English High Court in *Re El Sombrero*[4] is the cause for some of the confusion that persists in the area. Whereas (as will be demonstrated shortly) most courts have, implicitly, interpreted "impracticable" as being roughly identical to "impossible", this decision gave a wider interpretation to the word and specifically said that "impracticable" was *not* synonymous with "impossible".

In that case, a shareholder, who had recently acquired a major stake in the company, and was desirous of removing the directors,

3 See, for example, the Singapore Companies Act (Cap. 185) under which it is not necessary to have directors elected by the general meeting, thus leaving such matters to contractual arrangements.

4 [1958] 1 Ch. 900.

requisitioned a general meeting of a company. The directors refused to call the meeting. The refusal of the directors to call a meeting also resulted in a failure in statutory duty.

Wynn-Parry J. said that the test of "practical difficulty" would be the factor that would oblige the court to call a meeting whether or not a meeting *could* in fact be called. He rejected the suggestion that since it was not "impossible" to call a meeting the court should not convene it. He was concerned that the majority shareholder was being deprived of his right to remove the directors and this offended the parliamentarian sensibilities of the court,

It may be argued that alternative remedies, such as an action for breach of directors' duties, could have been found to obtain the desired result of compelling the directors to call a meeting. It could also be said that the refusal of the directors had, in fact, made it "impossible" to call a meeting. In as much as the directors were not relying on any right in the articles or memorandum in refusing to call a meeting, no contract amongst the shareholders would be indirectly breached even if the court compelled the members to meet. Thus the result in *Sombrero* is not fundamentally inconsistent with the majority of cases.

The problem with the decision is that its broad interpretation of "impracticability" has proved to be misleading.

The leading cases in which courts have discussed "impracticability" will now be considered. Have courts in fact equated impracticability to impossibility and respected the sanctity of shareholder contracts? Or has the opinion of Wynn-Parry J., cited above, won greater acceptance?

The situations in which courts have ordered company meetings can broadly be grouped under six categories. Of these, perhaps only the first involves a clear broadening of the meaning of "impracticability" and a potential interference in intra-corporate contractual arrangements. The situations are:

1. in the context of factional struggles in private companies;
2. where there are rival "boards of directors" in existence and there is uncertainty as to which body is in fact the board that has been appointed under the terms of the articles. This seems to be the most common ground for the exercise of the power;
3. where it is impossible (in a physical sense) to obtain a meeting with a quorum as required under the articles and memorandum;
4. where the majority (or controlling group) refuses to convene a meeting, even after requisition by the minority, contrary to the provisions in the articles;
5. where there is the likelihood of protracted litigation which can be averted by the holding of a meeting or where the interests of the company are at stake;
6. where there is a failure in statutory duty as a direct result of not holding the meeting.

ANALYSIS OF SITUATIONS:

1. *In the context of factional struggles in private companies*

The potential for an intervention by the courts contrary to the agreement in the articles and memorandum by using their power under the impracticability provisions is best seen in relation to small private limited companies which are, in substance if not in law, little more than incorporated partnerships. The majority shareholder may covenant to give a minority member the power to paralyse the company by agreeing to a quorum which cannot be achieved without the presence of the minority.

Economically, it is reasonable to assume that the minority member would have paid a price for obtaining this concession from the majority investor. When, subsequently, the minority member chooses to exercise this power of paralytical veto, the majority member will attempt to seek the intervention of the court to break the deadlock, thereby breaking his covenant with the minority member and depriving the latter of a right which he has paid for. For the majority member, there is a double take — on one hand he obtains a concession by providing in the rules of the company that the minority member will have a veto. On the other hand, he gets away without having actually to be bound by the veto for which he has received value from the minority member.

The consequences of ignoring the "contract perspective" can be quite disastrous for the minority. A good example is the recent decision of the Penang High Court in *Foo Tong Eng* v. *Po Gun Suan*.[5]

The majority shareholder in a two man company held 5,000 shares while the minority shareholder owned 1,000 shares. They were also the only two directors of the company. It was mutually covenanted between them in the articles and memorandum that the quorum for both general meetings and board of directors meetings shall be two. Differences arose between the two members and the majority shareholder desired to attempt to squeeze out the minority. He therefore summoned general meetings of the company which the minority member refused to attend on the communicated basis that these meetings would culminate in the oppression of the minority. In the face of this apparent deadlock, the majority shareholder decided to seek the exercise of the court's discretion under s. 150 of the Malaysian Companies Act.

The majority shareholder made several other allegations in the petition which essentially alleged that the minority member was deliberately causing harm to the corporate interests by retaining valuable documents of the company, receiving payments from creditors on behalf of the company, retaining account books, etc. There was also an allegation of inability to comply with statutory duties due to the paralysing absence of the minority from meetings.

The reasoning of the court is poorly articulated. In fact, nowhere in the judgment is reference made even to the statutory basis of the power of the court.

5 [1982] 1 M.L.J. 337.

It may be possible to justify the ultimate decision of the court on various grounds including failure in meeting statutory duties, harm to corporate interests by the continuing deadlock, etc. It will, however, emerge from the analysis of cases, *infra* that courts are not often persuaded even on these grounds. One of the main reasons advanced by the court seems to be its belief that "the company should be allowed to function". The court also felt that the remedy for the minority shareholder would lie in his "petitioning for dissolution of the company as an oppressed minority and not (in) his stultifying operations of the company" and causing it irreparable harm. The court was not moved by the argument of the minority shareholder that the convening of a meeting would cause him "irreversible harm".

This line of reasoning, though exceptional, is cause for serious concern for minority groups who obtain rights of veto built into the constitution of the company. It does not seem that the court has any legitimate authority to decide that the company should be allowed to "function" contrary to the manner in which the members contracted that it should function. In fact, if it should become impossible for the company to function in that manner, it should be wound up. Particularly in a small private company, the members invariably bargain for control provisions. The court should, under all circumstances, enforce such bargains. If members cannot agree even to the extent necessary for the functioning of the company, there clearly is a break down of the fundamental consensus underlying the existence of the company and there is no legitimacy in the continued existence of the company.

In situations such as the above where the minority holds the majority at ransom on the basis of the terms of their contract, there does not seem to be any duty on the minority to do anything more than what they have agreed to do under the articles and memorandum. Even in a large public company (though the larger the company, the chances of a minority having such veto power will be unusual) there is no justification for the court to step in to rescue the company (or, more specifically, the interests of the majority) by compelling the minority to give up any veto powers as long as neither the regulations of the company nor the Act are being violated. The implicit suggestion of the court that the minority has a duty not to stultify the functioning of the company — even when it merely exercises rights conferred by the regulations — is not supported by any authority. The burden, if any, to seek the winding up of the company will be on the majority as long as the minority just chooses to wait on the side-lines. There is no duty placed by the law on the minority to waive the exercise of the veto remedy under the articles in order to seek a statutory remedy of winding up.

This decision goes against the reasoning of Suffian J. of the Federal Court of Malaysia in an earlier case.[6] It is significant that the Penang High Court did not even refer to this earlier decision. Suffian J. was faced with a company whose dissatisfied members were

6 *Leong Ah Heng* v. *Hup Seng Co. Ltd.* [1963] 29 M.L.J. 194.

engaged in an effort to oust the directors. Their effort to requisition a meeting to remove the directors was ineffective as the legality of this meeting was yet to be determined by the court. They petitioned the court to convene a meeting as it was now "impracticable" to hold one. Suffian J. distinguished the *Sombrero* decision and held that "it is not enough for the applicant to satisfy me that it is impracticable to call or conduct a meeting; he must further satisfy me that it is impracticable to call a meeting *in any manner in which meeting of that company may be called* or to conduct the meeting of the company *in a manner prescribed by the articles of the Ordinance."*

The learned judge refused to convene a meeting. Admittedly, his judgment implied that he may have been ready to follow the *Sombrero* decision in a situation where a minority invoked a quorum provision to block the holding of a meeting. The case before him did not deal with such a situation. What is significant, however, is that the judge clearly declared that impracticability *simpliciter* was insufficient to warrant judicial intervention. He was looking for a higher standard that was closer to "impossibility". He also emphasised that the power of the court can be exercised only if the cause of impracticability lay outside the articles & memorandum: in other words, the hurdle that blocked a meeting should not be a matter covered by the articles and memorandum.

Another instance in which a court intervened in a factional fight in a private company where a quorum requirement conferred a veto on the minority member was in the South African case *Ex Parte Pollack.*[7]

In this case, the court authorised the majority shareholder, owning 98 out of 100 shares to convene a meeting and constitute a quorum even without the presence of the only other living shareholder, who held one share. The quorum at the general meeting as well as directors' meeting was two.

The minority shareholder expressly raised the defence of deprivation of contractual rights under the regulations. The judge rejected this and based his decision on the quasi-parliamentary spirit of majority rule. He decided that the majority shareholder was "practically proprietor of the whole company" and that the minority shareholder did not therefore have the right to prevent him from giving expression to his wishes as to corporate decisions. The judge seems to have taken the concept of corporate personality very seriously so that he painted the picture of a shackled corporation struggling to speak, but gagged in an inequitable manner by a small minority shareholder. In this case, there was also a parallel dispute about shareholding in which the minority shareholder was claiming that he was entitled to one-third of the share capital, and not just one share. The judge declares, in true parliamentary tradition that the majority shareholder is "the voice of the company, the legal voice of the company".

Thus the essential contractual notion was ignored, the bargain between the shareholders was not honoured and the eventual victor in the case was the misconception of a company as a democratically (as against, contractually) administered entity.

7 [1950] S.A.L.R., W.L.D. 701.

2. *Where there are rived boards of directors*

Unlike in the first category, here the concept of "impracticability" is closer to that of "impossibility". The inability to hold a meeting is not due to the refusal of one group to act. On the contrary, here there are contending groups claiming to act on behalf of the company and no one is sure who in fact controls the company. So the rights bargained for and secured under the articles cannot even be exercised as no shareholder knows who is in control. It is quite "impossible" to convene a meeting because no one knows who has the legitimate right to do so. Only the court can break the deadlock by convening a meeting.

This is what the Quebec Superior Court did in the context of a fierce fight for control between two factions that resulted in the "election" of two parallel boards of directors.[8] The uncertainty regarding the control of the company had seriously disadvantaged the company, with a bank even cutting off the credit line of the company. The court found it necessary to call a meeting to stop damage to the assets of the company arising from the functioning of the parallel boards. The general meeting of the company had also not been held as required. The management was not ready to seek a mandate from the shareholders. The court also considered the animosity and extreme distrust that prevailed between the factions and the prospect of long drawn out litigation between the factions.

A series of Indian cases also feature similar situations of uncertainty as to control over the company. In *Re Malhati Tea Syndicate Ltd.*[9] the four majority shareholders of a company were engaged in a factional fight. Several suits questioning the validity of the appointment of directors were pending, the managing agency firm had been dissolved so that the company was virtually without management. The court found that it was necessary to convene a meeting as there was no body with legitimate authority to call a meeting. The court opined that "impracticable" must be interpreted from a reasonable point of view and that the court must "take a common sense view of the matter and act as a prudent person of business" would under the circumstances. This is language that does not assist in the understanding of the concept of impracticability, but we learn from the situation in which the court invoked its discretion to call a meeting.

In another case[10] there was, again, a serious controversy as to who the directors of the company were. The judge cautioned that the power of the court to convene meetings must be exercised "with caution and only when it is not practicable to call a valid meeting" and declared that the court "would not ordinarily interfere in the domestic management of the company." The judge decided to convene a meeting after saying that if he "could even *prima facie* (hold) who are the directors of the company, (he) would have held that it is not impracticable to call a meeting of the company in accordance with its articles of association".

[8] *Re Canadian Javelin Ltd.* and *Boon-Strachan Coal Ltd. et al* 69 D.L.R. (3d) 439.

[9] [1951] 21 Company Cases 323.

[10] *Re Lothian Jute Mills Co. Ltd.* (1951) 21 Company Cases 290. See also, *Indian Spinning Mills Ltd.* v. *H.E. The Maharaja of Nepal* A.I.R. 1953 Cal. 355.

Indian courts have unequivocally sounded the caution that they would not ordinarily interfere with domestic management, nor would they involve themselves in any factional fights,[11]

Re Motion Pictures Association[12] again witnessed a struggle for corporate control. There was doubt as to the existence of a board of directors validly appointed. It was, under the circumstances, not practicable to call a meeting to elect an executive committee. After reiterating its reluctance to exercise power in this respect, the court held that the situation was one where it was impracticable for a meeting to be held under the articles or memorandum.

The attitude of the courts that emerges from the above cases seems to be that a meeting is being convened because it is impossible, under the circumstances, for a meeting to be convened in any other way. The intervention of the court is on the express assumption that there is effectively no board that can call the meeting.

The following line of cases confirm the above trend of judicial opinion and involve instances in which the courts refused to convene meetings essentially because it was not shown that it is "impossible" that a meeting can be held in any other manner. The "practical difficulties" that clearly existed in these cases still fell short of "impracticability".

In *Shrimati Jain* v. *Delhi Flour Mills Co. Ltd. & Ors.*[13] the court refused to grant an order convening a meeting even in a situation where the board was of doubtful authenticity, essentially because the court held that a meeting could have been called, and further, it was not shown to the court that the petitioner has no other option except under the impracticability provision.

The conservative attitude adopted by courts comes through clearly in this decision. It seemed necessary not only to show that a situation like the existence of directors of doubtful validity was current in the company, but also that no other remedy was available. In an Australian decision[14] the court again refused to intervene in an intra-company factional fight essentially because the remedy of requisitioning a meeting was available to the members, even if there were not enough legally elected directors to call a meeting. Reflecting its intention to hold the members to their bargain, the court remarked that the company would have to find its own way out of the difficulty, failing which, it ought to be wound up.

In these and other decisions, courts have refused to use their power to intervene in factional fights and have compelled shareholders to stick to their bargains as expressed in the articles and memorandum.[15]

[11] *In the Matter of Ruttonjee & Co. Ltd.* [1970] 40 Company Cases 491.
[12] [1974] 44 Company Cases 298 (Delhi).
[13] [1974] 44 Company Cases 228 (Delhi).
[14] *Omega Estates Pty. Ltd.* v. *Ganke* [1963] NSWR 1416.
[15] *Re Morris Funeral Service Ltd.* 7 D.L.R. (2d) 643; *Re Zimmerman* and *Commonwealth International Leverage Ltd. 56* D.L.R. (2d) 709, reversed in 58 D.L.R. (2d) 160; *Yende* v. *Orlando Coal Distributors (Pty.) Ltd.* [1961] 3 SALR (WLD) 315.

Re Zimmerman and Commonwealth International Leverage Limited[16] witnessed a bitter proxy struggle which saw the president successfully obtain a stay order from a Quebec court. Bell J. of the Prince Edward Island Supreme Court held that it had become impracticable to hold a meeting and ordered one to be convened under the orders of the court. Following the SOMBRERO line, the court adopted a broad construction of impracticability and reiterated that it was not synonymous with the (rather higher) standard of "impossibility". It held that a meeting could be convened where "as a practical matter, upon an examination of all the circumstances, a meeting could not be conducted in a proper manner."

On appeal, a three judge bench of the same court reversed the decision and interpreted impracticability from a strict standpoint. The appeal court adopted the formula that an order would be made only where a meeting cannot be convened for reasons which the articles of association do not provide for. Here, the obstacle to the holding of the meeting related to proxies. This was a matter that was covered by the articles and should therefore be resolved under its terms. It is submitted that the decision of the appellate court is clearly right and in line with the approach taken by the majority of cases. In fact, this latter decision is an implicit rejection of the *Sombrero* philosophy. The language used in *Zimmerman* is a very useful guiding principle for courts when they decide whether or not to convene a meeting.

It is thus clear that in this category of cases, "impracticability" is interpreted as being more than "practical inconvenience". A standard of "impossibility under the articles" seems to be accepted by the courts. There can be little doubt here, unlike in the previous category, that the decision of the court will not amount to an interference in the contractual scheme of the company.

3. *Where it is impossible (in a physical sense) to obtain a meeting as prescribed in the articles*

In this category, "impracticability" is at its most "impossible" and it is indubitable that a meeting cannot be convened under the constitution of the company. Without the intervention of the court the company is condemned to the limbo for ever.

The classic example in this category is *Re Noel Tedman Holdings Pty. Ltd.,*[17] an Australian case in which a husband and wife, the only two shareholders and directors of a private company were killed in a car accident. Under the articles of association, the shares could not be transferred to the beneficiaries without the approval of the company Such approval could not be procured. The court had little hesitation in ordering a meeting and making consequential directions pertaining to the exercise of rights under the shares.

[16] 56 D.L.R. (2d) 709, reversed in 58 D.L.R. (2d) 160.
[17] (1967) Qd. R. 561.

Other situations in which impossibility was the basis of the court's decision to convene a meeting include the case of the South African Company whose members could not constitute a quorum.[18] The remaining shareholders were in occupied France (a Second World War scenario) and could not be contacted. The court invoked its power to hold a meeting. In another case[19] one of the three shareholders died. He was also one of the two directors. The quorum for the general meeting was three while that for the board was two. The death paralysed the company till the court altered the quorum and called a meeting. A Scottish court convened a meeting when it was established that it was not possible to obtain the requisite quorum at a meeting due to the fact that only a small number of members lived in Edinburgh.[20]

The strictness with which courts in fact interpret "impracticability" is seen in the case of a company which had its register of members destroyed by enemy action during the war and therefore pleaded inability to call a meeting in order to table a resolution for winding up the company. The court refused to convene a meeting under this provision. It was held that it was still possible for a meeting to be convened by giving notice through the newspapers and the company was ordered to do so.[21] If "impracticability" arises in this manner, due to classical impossibility, there is again little doubt that courts are justified in convening a meeting so that an impasse not forseen by the articles may be resolved.

4. *Where the majority (controlling group) refuses to convene a meeting, even after requisition by the minority, contrary to the articles and memorandum.*

This category raises some interesting questions. The factor obstructing a meeting is not impossibility in the unequivocal sense referred to in the two categories above. At the same time, it is not a result of any group of members exercising rights under the articles (as in the first category discussed above).

The impracticability here arises from a failure of those in control to discharge a statutory duty and hence must expose them to either civil or criminal liability (or both). In some jurisdictions it could also constitute the basis for an action under the "oppression" provisions (for example, in Singapore where it is not necessary to establish grounds sufficient for a winding up before a petition for oppression will succeed). On this ground alone, it may be argued that courts should prefer alternative remedies to an order calling a meeting.

On the other hand, the refusal of the majority to call a meeting, if shown to be persistent and obstinate even in the face of the personal liability they are exposing themselves to, and if it is clear that there are no prospects of a meeting being held, may persuade the court to

[18] *Ex Pane X Co. Ltd.* [1942] E.D.L. 74.
[19] *Re Beckers Pty. Ltd,* [1942] 59 W.N. 206.
[20] *Re The Edinburgh Workmen's Houses Improvement Co. Ltd.* [1935] S.C. 56.
[21] *Payne and Anor.* v. *Coe* [1947] 1 All E.R. 841 (Ch. D.).

deem it "impossible" that the meeting will take place. An order convening a meeting under such circumstances will not be a violation of any compact embodied in the articles. On the contrary, it may be necessary to preserve the sanctity of the constitutional documents to prevent the illegitimate paralysis of the company by the majority.

We have already seen a similar obstructionist position that persuaded the court to exercise power in *Re El Sombrero*[22] and in *Canadian Javelin*[23] where the managements were persistently unwilling to seek the mandate of the shareholders. In the latter case, there were clearly other grounds on which the court based its decision. The former case has already been commented upon: though the result is probably correct, the *dicta* were highly misleading.

In *Re Routley's Holdings*[24] a Canadian court summoned a meeting where one had not been convened for about 7 years. Proxies were improperly refused and the controllers were acting in a manner that enabled the court to hold that it was not likely that a proper meeting would be held. In another case, *Indian Spinning Mills Ltd.,*[25] where the requisition by the majority shareholders was ignored by the directors who refused to call a meeting, the petitioning shareholders succeeded in having a court-ordered meeting.

In each of these cases, including *Sombrero,* it is clear that more than "practical difficulty" caused the failure of the meeting. Under the circumstances, the controllers were abusing their position under the articles and the court's orders did not detract from any contract embodied in them.

If the controllers acted on the basis of any special rights they had bargained for and won under the articles, an order of the court may have been unwarranted.

5. *Where there is the likelihood of protracted litigation that can be averted by the holding of a meeting, or, where the company's interests are at stake.*

This category again poses issues that are not easily resolved. On one hand, it is clear that if the convening of a meeting will save the interests of the company and its members the courts must seriously consider the possibility of calling a meeting. On the other hand, why should a court take a paternalistic interest in protecting corporate interests when it should, ideally, be a neutral and disinterested party in the success or failure of companies?

If the reason that a meeting is not being held is an intra-corporate factional fight, then the court should be very careful in acting. It should first check whether any group has a special interest in the holding of the meeting — or in its not being held. If so, it should

[22] *Supra,* note 4.
[23] *Supra,* note 8.
[24] 22 D.L.R. (2d) 410.
[25] *Supra,* note 10.

scrupulously stay away from doing so. If not, it should ask whether the continued failure to hold a meeting is causing losses to company property. If so, a meeting should be called with a limited agenda: to take steps to preserve the property. If in the process, any right under the articles will be violated, or any factional fight influenced, the court should decline to convene a meeting. This approach will be consistent with the line of reasoning referred to above.

In *Canadian Javelin Ltd.,*[26] *Indian Spinning* [27] and *In Re Motion Pictures Association,*[28] the court took into consideration the fact that the alternative to a court convened meeting was protracted and expensive litigation that was bound to severely hurt the interests of the company. In each of these decisions, this ground was only incidental and not central. In each of these cases, it would not have been possible to justify an order calling a meeting on the ground of protection of corporate property alone.

6. *Where there is a failure in statutory duty*

This is clearly a matter that calls for the intervention of the court as no private contract can be above public interest as expressed in a statute. In fact, as one saw in *Re El Sombrero* and in *Re Routley's Holdings,* courts do not hesitate in calling meetings where not to do so would certainly be the cause for a violation of statutory duties. However, two distinct sub-categories of cases involving failure in statutory duties must be distinguished. The first arises from a failure to hold the *annual* general meeting. The solution for this category is not to be found in the impracticability provisions, but in the separate power of the court to convene annual meetings where there is a failure to do so.[29] Hence no arguments relating to the refusal to hold annual meetings should be entertained by a court when hearing petitions under the impracticability section.

The second sub-category deals with statutory failure due to reasons other than the failure to hold an annual meeting, or which cannot be resolved by calling an annual meeting. In this category, the courts can clearly justify an order convening a meeting invoking power under the impracticability provisions. The court must, however, take care to limit the agenda so that the failure in statutory duty may be recognised, but nothing more is done. Under the guise of ensuring the carrying out of statutory duties by the company, the court should not intervene in the internal power struggle of the company.

GENERAL OBSERVATIONS

All the decisions above may be grouped broadly into three. One group involves the inability of a company to hold a meeting because of "impossibility" in a methodological sense: either because

[26] *Supra,* note 8.
[27] *Supra,* note 10.
[28] *Supra,* note 12.
[29] *Supra,* note 2.

there is a reduction of members below the quorum, the board is unable to function or the company is locked in an evenly matched factional struggle that casts doubt about the control of the company. It could also be caused by an inability to reach the members. In none of these instances is the cause of the inability to hold a meeting *the result of the action of a group of members to act in a manner, authorised by the articles, that is calculated to prevent the holding of a meeting.* In these instances, the power of the court is usefully exercised to remove obstacles in the path of corporate activity and the exercise of judicial discretion does not interfere with contractual rights conferred by the articles of association.

The second group, related to the first, would consist of a situation where the court orders a meeting to ensure that the company is not in default of a statutory duty (other than as a result of a failure to hold an annual general meeting). Discretion must, undoubtedly, be exercised very carefully in these cases and the meeting must be convened only for the limited purpose of ensuring compliance with the law. Care must be taken, by controlling the agenda of the meeting, that decisions are not taken at these meetings that some members have deliberately been blocking.

The third group includes instances discussed above where it would not be impossible to hold a meeting if *a section of the members declines to enforce a right specifically conferred on them by the articles.* Here, the court is exceeding and abusing its discretion by choosing to enable the company to carry on functioning.

In such instances, courts ought to carefully ensure that parties are held to their contractual bargain. The language in the dicta in *El Sombrero* would lead courts on a path of judicial interventionism that is inconsistent with the majority of cases. Minority shareholders have a right to paralyse a company within the provisions of the articles and memorandum, and if the consequence of such paralysis is a deadlock, the right solution would be dissolution rather than a resolution of the deadlock by the intervention of the court.

The above analysis depends on the postulate that voting arrangements, etc., represent a bargain that must be honoured and not interfered with by courts. It may reasonably be asked whether a majority group does in fact bargain to confer a right on the minority — by such arrangements — to paralyse the company by their *refusal to act.* Was it not their agreement that decision making in the company would be carried out in the prescribed manner and that the company would function by *taking decisions* in that manner, rather than by refusing to act at all? Can it be argued that there is, in every company, a *fundamental agreement* that all the members would act in such a way that the company would function? The act of deliberately paralysing the company is, it may be argued, *mala fide,* and not within the bargain of the parties.

If indeed the voting arrangement (or whatever it is in the articles that is preventing the meeting) is only a poorly drafted agreement that was not intended to provide a basis for paralysing the company, the majority will have to pay for the poor draftsmanship if the minority

is acting within the articles. Judicial paternalism will probably extend its reach unreasonably by concluding that the articles represent (in these cases) poorly drafted contracts that then need the help of the court in being correctly interpreted.

An English court specifically considered and refuted the "veto theory"[30] and declared that "quorum provisions in the articles of a company are not to be regarded as a right vested in the minority to frustrate the wishes of the majority shareholders. To refuse in application (to convene a meeting) would deprive the majority shareholders of the right to alter the articles of association. It would confer a veto on the minority which was not commensurate with their shareholding."[31] The court mistakenly equated a veto power with the extent of shareholding, betraying once again its parliamentary sub-conscious. Following its logic, a quorum provision could operate as a veto if the minority had a shareholding that was commensurate with such power. What is a satisfactory extent of shareholding? (It has to be less than control, if the shareholders are to be considered a minority). What is the basis of the court's power to adjudicate on the question as to whether the holding is commensurate with a veto power? Further, it is clear that the corelation of shareholding and veto power is clearly incompatible with the contractual nature of present day companies. The company could decide, in its regulations, to confer a veto on a single shareholder. It could even decide to confer veto power on an outsider (though he will not be able to enforce the contract), as long as these arrangements are clearly expressed in the regulations.

The central question here is not whether the minority can have a veto power exercisable through a quorum provision. The answer to that is that it certainly can. The question really is whether a quorum provision, standing alone without an *express* statement that it is a veto power conferred on the minority, should be interpreted by a court as giving the minority such a power. If it is so interpreted, the court should respect that contract and refuse to convene a meeting. The economic "cost" argument was also not considered by the court in determining, rather superficially, that a quorum provision cannot be the basis of veto power.

The *fundamental agreement* theory will not take away the right of the minority to break it. Perhaps the courts could award damages to the majority if they suffer any loss. This is an interesting alternative a court could explore if it accepts the fundamental agreement argument. Instead of convening a meeting, the court could award damages to the majority and let the association meet its logical fate — dissolution.

The issues discussed here must be seen as clearly distinct from the law relating to the protection of minority/shareholder rights. These latter provisions (those related to oppression, class rights, reversion of management power to the general meeting when the board is deadlocked, etc.) relate to the situation where a minority is being oppressed

[30] *In Re H.R. Paul & Son Ltd. (Times,* London, 17th November 1973).
[31] *Ibid.*

by a majority, in (express or implied) violation of the articles and memorandum. The minority is unable to function within the agreement embodied in the articles and so are permitted to seek the intervention of the court either to restore the primacy of the constitutional documents of the company (embodying the contract amongst the members) or to have the company dissolved. The intervention of the court is justified because the petitioners cannot invoke an act of the company to achieve their end of holding the controlling group to their contract. The acts that form the basis of an action by the minority against the controlling shareholders usually involve a violation of the regulations of the company or the law.

The situation in the context of the "impracticability" situation is quite different. At worst, it may amount to a kind of "oppression of the majority" by a recalcitrant minority. At best, it involves the assertion by a minority of rights derived from the articles. The court does not intervene to restore the primacy of the articles, but is in danger of altering the arrangement expressed in the constitutional documents. In the cases in which intervention is considered undesirable in the above discussion, it is usually the majority that petitions the court and seeks its protection. Considerations and policies in the context of minority rights are therefore inapplicable in this context. What is considered here is the right of the minority to exercise rights conferred on them by the articles, rather than the abuse/misuse of management power on behalf of the corporation.

A concept such as "oppression of the majority" is a contradiction in terms. Oppression (of the minority, as the term is ordinarily used) involves the use (or abuse) of corporate power or property. Without such use, the shareholder will not have a basis for complaint. Where the minority paralyses a company by acting within the articles of association, there is no such use (or abuse) of corporate property. These members are then merely exercising their proprietary rights as owners of shares in the company.

The only question that remains in this context is whether such an exercise of proprietary rights will be in breach of any duty owed by members to the company. The law is clear that a shareholder's vote is a proprietary right which may be exercised in his own interest as he thinks fit. A shareholder owes no fiduciary duty to the company.[32] An English High Court decision suggested that the majority of the general meeting may owe a duty to act *bona fide* when exercising their votes.[33] Even this view is yet to gain wide acceptance. It has never been suggested that the minority is under any obligation in exercising their voting power. Surely it cannot be denied that the right not to attend or vote is as much an exercise of the proprietary rights of shareholders as casting votes. If they are unfettered and owe no duty in casting votes, it follows that they are equally unrestrained by any obligation in exercising such rights negatively, by non-attendance.

[32] *Northern Counties Securities Ltd.* v. *Jackson and Steeple Ltd.* [1974] 1 W.L.R. 1133.
[33] *Clemens* v *Clemens Brothers Ltd.* [1976] 2 All E.R. 268.

CONCLUSION

Statutory provisions enabling the courts to convene meetings where it is impracticable to do so are currently too loosely and widely phrased and are liable to be abused by a paternalistic or interventionist court. These statutes should be amended so that the nature of impracticability is more narrowly defined to include only situations where:

i. there is an actual or potential failure in statutory duties as a result of failure to hold a meeting, and

ii. it is necessary for the court to convene a meeting in order for the company to function in the manner provided in the articles of association, or, it is impossible to hold a meeting.

The statute should also cast a duty on the courts to enforce the contractual bargain expressed in the articles and memorandum. Also the *dicta* in *El Sombrero* should be disregarded so that the concept of impracticability moves closer to that of "impossibility".

These measures will be necessary to ensure that judicial activism will not run amuck to destroy the confidence of shareholders, particularly in private companies, that their bargains will be honoured and not flouted.

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