

Oppression or Unfairness by Controllers

Introduction

There will always be disputes among the members of companies and between the members and the management. In any major conflict the minor shareholders, especially in small, private or 'closely-held' companies (that is, companies in which shares are held in a few hands) are vulnerable to the majority. Shareholders who command a majority can look after themselves. They can dictate the board's composition and indirectly much of its management policy. They can pass resolutions and, if numerous enough, change the constitution of the company. They can generally grant or deny dividends, set corporate salaries and appoint office holders. These can be controversial matters indeed, especially in closely-held companies. But the realities of corporate life dictate that majority decisions usually prevail and that decision-making rests with relatively few persons in the company hierarchy. Not every complaint should preoccupy management unduly and inhibit the proper pursuit of the company's objects.

But this is also the rationale of the wrongly sanctified rule in *Foss v Harbottle*¹ and the rough and ready concept of majority ratification of the wrongful acts of management. As noted in the previous chapter, it was often very difficult to challenge managerial wrongs. Majority justice was sometimes rough. Now we see reflected increasingly in the legislation the belief that, while usually the majority should be able to vote as it wishes and prevail in company decision-making, no longer should it do so unfairly. In the 19th century the courts interfered little with the internal management of companies. Now the legislature, especially through s 320 of the Code, sanctions intrusion in the interests of those who suffer the rigours of unfair majority rule.

Powerful shareholders and directors sometimes misuse their powers, especially in smaller, proprietary companies. They may ignore, deprive or push out their business associates. Or they may act in a manner careless of other members' welfare. As Prentice pointed out recently,² most

1. (1843) 2 Hare 461; 67 ER 189.

2. Prentice, 'The Closely-Held Company and Minority Oppression' (1983) 3 Oxford J of LS 417 at 421.

members of closely-held companies expect to take part in the management of their companies. They also normally get their return on their investment not as dividends but in the form of salaries and fees as directors or employees of their companies. Dividends in such companies are rare, and there will be restrictions on the transfer of shares.³ Dismissal from management may thus deprive them of the rewards of their investment.

Examples of unfairness by controllers towards a hapless minority abound. In one case a majority shareholder, who was also governing director, threatened to use his considerable voting power to change the articles to permit him, as governing director, to acquire compulsorily the petitioner's shares and oust him from the company.⁴ Then there is the celebrated case of the autocratic 88-year-old philatelist with voting control who ignored the finer points of company procedure, was contemptuous of the board (he told a prospective employee that one of the director/sons was 'wrong in the head') and persistently overrode his two sons who were the majority beneficial shareholders.⁵ And, in another typical example, the chairman of directors, who owned one-third of the family company's shares, was locked out of management and found his shareholding diluted by a share issue.⁶

The Jenkins Committee⁷ listed a few other typical oppression situations — for example, where directors appoint themselves to posts in the company and pay themselves excessively (thus depriving members of dividends), issue themselves shares on overly advantageous terms, or discriminate against the minority when issuing dividends. Wrongful deprivation of reasonable dividends, where the net profits and the nature of the business justifies it, has been a popular weapon of capricious controllers.

To the Jenkins Committee's list we can add some of the colourful situations collected by O'Neal under his expressive title 'Squeeze-outs':⁸ withholding information and failure to hold meetings; siphoning earnings through disadvantageous contracts and 'sweetheart' loans favourable to majority shareholders; appropriation of the company's assets, credit, or contracts for the personal advantage of the majority, and other 'looting' of the company's assets; advantaging other companies in the group at

3. See s 34(1)(a) of the *Companies Code*.

4. *Re Anti-Corrosive Treatment Ltd* (1980) ACLC 34,165.

5. *Re HR Harmer Ltd* [1958] 3 All ER 689.

6. *Re Dalkeith Investments Pty Ltd* (1985) 3 ACLC 74. See also the South Australian Supreme Court decision of Millhouse J in *Re City Meat Company Pty Ltd* (1984) 2 ACLC 149 where petitioners sought remedies under s 222 and s 186 of the UCA (equivalent to s 364 and s 320 of the Code). Millhouse J held it would be just and equitable to wind up the company because the petitioners' "rights, expectations and obligations" [on entering the company] have been quite ignored. It is just not fair to them' (at 157). In *Re East West Promotions Pty Ltd* (1986) 4 ACLC 84 it was held to be oppressive to appropriate some of the company's property and effectively to close down its place of business.

7. UK Cmnd 1749 (1962) at para 205.

8. See O'Neal, 'Squeeze-Outs' of Minority Shareholders: *Expulsion or Oppression of Business Associates* (1975, Callaghan & Co).

the company's expense; changing the company's articles and dilution of shareholding through share issues; 'squeezes' by mergers and acquisitions; selling the company's assets at an inadequate price; and excessive use of legal processes.

Such situations call for remedies of some sort. In some countries the minority shareholders have potent weapons. In Canada, for example, they have the ability to bring derivative or corporate suits (on behalf of the company) unencumbered by the restrictions of the rule in *Foss v Harbottle*.⁹ They also have in most jurisdictions the right to seek the winding up of the company, a drastic remedy for serious breakdown of the company's affairs. They can seek injunctions to stop breaches of companies legislation. And they have the statutory oppression remedy, a major weapon for minority shareholders.

In Australia the shareholder can turn to s 320 and s 574. Section 320 of the *Companies Code* was significantly amended in 1983. Its predecessor, s 186 of the *UCA*, had glaring deficiencies. Legislators and reform lawyers were disappointed at the lack of power of the provision. The 1981 legislation did not improve matters much.¹⁰ However, at last, in 1983 the recommendations of the *Ghanaian Companies Report* of 1961 and the *Jenkins Committee Report*,¹¹ essentially the works of the English company law reformer and writer Professor LCB Gower, provided the inspiration for change.

The 1983 version of section 320

320 Remedy in cases of oppression or injustice. (1) An application to the Court for an order under this section in relation to a company may be made —

- (a) by a member who believes —
 - (i) that affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members, or in a manner that is contrary to the interests of the members as a whole; or
 - (ii) that an act or omission, or a proposed act or omission, by or on behalf of the company, or a resolution, or a proposed resolution, of a class of members, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be contrary to the interests of the members as a whole; or
- (b) by the Commission, in a case where —
 - (i) the Commission has received a report by an inspector under Part VII or under the provisions of a law in force in a partici-

9. Above n 1.

10. The new Australian version replaced s 186 of the *Uniform Companies Act 1961*, which was itself modelled on s 210 of the UK *Companies Act 1948*. Section 210 was enacted in response to the recommendations of the UK *Cohen Committee Report*, Cmnd 6659 (1949) para 60.

11. Above n 7.

- pating State or in a participating Territory that correspond with that Part; or
- (ii) The Commission has made a report, under Part VII or under the provisions of a law in force in a participating State or in a participating Territory that correspond with that Part, to the relevant authority within the meaning of that Part or of those provisions, as the case may be.
- (2) If the Court is of the opinion —
- (a) that affairs of a company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members (in this section referred to as the 'oppressed members or members') or in a manner that is contrary to the interests of the members as a whole; or
- (b) that an act or omission, or a proposed act or omission, by or on behalf of a company, or a resolution, or a proposed resolution, of a class of members of a company, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members (in this section also referred to as the 'oppressed member or members') or was or would be contrary to the interests of the members as a whole,
- the Court may, subject to sub-section (4), make such order or orders as it thinks fit, including, but without limiting the generality of the foregoing, one or more of the following orders:
- (c) an order that the company be wound up;
- (d) an order for regulating the conduct of affairs of the company in the future;
- (e) an order for the purchase of the shares of any member by other members;
- (f) an order for the purchase of the shares of any member by the company and for the reduction accordingly of the company's capital;
- (g) an order directing the company to institute, prosecute, defend or discontinue specified proceedings, or authorizing a member or members of the company to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;
- (h) an order appointing a receiver or a receiver and manager of property of the company;
- (j) an order restraining a person from engaging in specified conduct or from doing a specified act or thing;
- (k) an order requiring a person to do a specified act or thing.

Standing under section 320

Section 320(1) gives standing only to 'a member' and the Commission. A Commission application must follow an inspector's report or a report by the Commission conducted under Part VII of the *Companies Code*.

Proceedings by the Commission

Under s 306(11) of the Code, the Commission can bring proceedings in the company's name, providing it thinks the public interest is served. But such action has to follow a report or at least an examination by an inspector or the Commission under Part VII. Minority members can apply for such investigations (s 290(2)). But this preliminary procedure can be time-consuming. A shorter route may be available if the court chooses to interpret s 320(2)(k) widely. Under it the court may make 'an order requiring a person to do a specified act or thing'. The Commission is 'a person', being a body corporate under the national scheme.¹² It would be simpler for the court, during s 320 proceedings, to ask the Commission to act on the company's behalf. Recovery of damages or company property would be the immediate aim of such proceedings. But action by the Commission may be often justified by the need to reinforce investors' and the public's confidence in corporate affairs.

Proceedings by members

Members can also bring s 320 applications. 'A member' now includes a legal personal representative of the member and others to whom a share has been transmitted by will or operation of law.¹³

Presumably a majority shareholder can complain of oppression by a minority. But action under s 320 by a majority shareholder would rarely be necessary given a majority's power in controlling management and general meetings. There have been occasions, though, when minorities have been held to be oppressive and where deadlocks gave grounds for actions for oppression.¹⁴

Creditors and others have no standing

The new s 320 limits the rights of application to members and the Commission. It does not include creditors. In overseas statutes, creditors and others have standing to apply. By ss 232–234 of the *Canada Business Corporations Act 1974–1975*, a 'complainant' has standing. This includes a holder of a 'debt obligation of a corporation'. The Canadians also include former legal and beneficial shareholders, former directors and officers of the company or any of its affiliates and 'any other person who, in the discretion of the Court, is a proper person to make an application . . .'. This is wide indeed. A flood of applications did not ensue in Canada. And, of course, the court can always refuse ill-based applications.

A comment on the wide Canadian federal definition, which has been taken up in Canadian provincial legislation, notes that 'the extensions on

12. See s 10(1) of the *National Companies and Securities Commission Act 1979*.

13. See s 320(4A)(a).

14. See a good discussion of deadlocks and oppression by Flower, *Judicial Intervention in Corporate Affairs: Legislative Initiatives*, unpublished LLB (Hons) dissertation (1984, University of Adelaide) at 78–84.

the whole appear to be desirable in the interest of ensuring that relief is not denied in proper cases for technical reasons'.¹⁵ For the same reason Australia could have been more adventurous and extended standing to creditors and others without great risk.

Grounds for an oppression application by a member

Single act/omission or continuing process. Oppression can be a continuing process or a single act or omission. The former law insisted the practitioner showed a continuing process of oppression. Furthermore, it had to continue up to the date of presentation of the petition.¹⁶ However, it was recognised by the legislature that there was no good reason for this limitation. Isolated acts could be quite as damaging to minority shareholders as any continuing process. For example, the improper allotment of shares to dilute a member's voting power is an isolated act, but nonetheless potentially very damaging for the member.

The Jenkins Committee¹⁷ suggested changes to the UK provision to ensure that it covered 'particular acts which are oppressive to or unfairly prejudice the interests of the complaining members as well as to courses of conduct having those effects'. This was taken up in s 75 of the 1980 UK Act and in s 459 of the 1985 consolidation Act. The 1980 NZ *Companies Amendment Act* made a similar change. Such enlargements were sensible and uncontroversial. Australia followed in 1983. Section 320(1)(a)(ii) and (2)(b) now refer to 'an act or omission' and 'a resolution'.

Past and proposed acts are caught. The legislation talks of an act that 'was or would be oppressive or unfairly prejudicial'. 'Omissions' are also covered. Refusal to declare adequate dividends when there are plenty of distributable profits within the company is one example of an omission that may qualify. In *Scottish Co-operative Wholesale Society Ltd v Meyer*,¹⁸ inaction by nominee directors amounted to oppression.

The alternative grounds. The member must show *either* that the affairs of the company are being conducted in a manner that is, *or* that an act or omission or proposed act or omission, by or on behalf of the company, or a resolution or a proposed resolution, of a class of members was or would be

- oppressive to, or
- unfairly prejudicial to, or

15. Institute of Law Research and Reform, Edmonton, *Proposals for a New Alberta Business Corporations Act*, Vol 2 (1980) at 326. Cf the comment of Waldron, 'Corporate Theory and the Oppression Remedy' (1981-1982) 6 Canadian Bus LJ 129 at 138: 'a complaint of oppression is often not carefully analysed by the court and rarely does the matter reach an appellate level at which a more carefully reasoned judgment might be expected.'

16. See *Re Tivoli Freeholds Ltd* [1972] VR 445 at 453; *Re Jermyn Street Turkish Baths Ltd* [1971] 1 WLR 1042 at 1058-1059.

17. Above n 7 at para 204.

18. [1959] AC 324 (HL).

- unfairly discriminatory against a member or members, or
- contrary to the interests of the members as a whole.

The 'affairs of a corporation' were widely defined by Bowen C J in *Re Cumberland Holdings* to mean 'all matters which may come before the board for consideration'.¹⁹ The term 'affairs of a corporation' (emphasis added) is defined widely but not exhaustively in s 6 of the Code. The term 'corporation' embraces 'any body corporate' (with special exceptions).²⁰

Because of the 1983 changes it is now more accurate to call s 320 the 'injustice' rather than the 'oppression' section. Actions may well be unfairly prejudicial to, or discriminatory against, or contrary to the interests of, members and not amount to 'oppression' in the ordinary or judicially-adopted meaning of that word. While not actually oppressing someone you can unfairly prejudice or discriminate against or act contrary to his or her rights. You can do it without meaning to. You may even think it is for the good of the company. The section is now a good deal broader than the title 'oppression' suggests.²¹

Oppressive conduct

Unlike the United Kingdom, Australia retains oppression itself as one of the grounds of application under the section. 'Oppression' connotes wilful or careless imposition of pressure, or unfair dealing or tactics of a reasonably serious kind. Some courts have stretched the meaning of the word, anxious to relieve beleaguered shareholders. But most attempts at definition suggest fairly serious misbehaviour is required, short though of fraud and illegality.²²

An American jurist, Justice Hershey, in *Gidwitz v Lanzit Corrugated Box Co* tried to limit the meaning of 'oppressive':

The word does not necessarily savor of fraud, and the absence of 'mismanagement, or misapplication of assets', does not prevent a finding that the conduct of the dominant directors or officers has been oppressive. It is not synonymous with 'illegal' and 'fraudulent'.²³

English and Australasian cases agree. Fraud and illegality are not required. But in *Scottish Co-operative Wholesale Society Ltd v Meyer*, Viscount Simonds suggested that 'oppressive' did mean 'burdensome, harsh and wrongful'.²⁴ That is difficult to muster without some element of mala fides.

19. (1976) ACLC 28,515 at 28,529.

20. Section 320 does not, as s 6 suggests, contain references to 'affairs of a corporation'. It refers instead to affairs of the/a company. While in this instance it is probably inconsequential, such looseness of terminology can be unfortunate.

21. See discussion of wide ambit of words 'unfairly prejudicial' in *Diligenti v RWMD Operations Kelowna Ltd* (1976) 1 BCLR 36.

22. 'Prima facie . . . the word "oppressive" must be given its ordinary sense': per Jenkins L J in *Re HR Harmer Ltd*, above n 5 at 698.

23. (1960) 170 NE 2d 131 at 135.

24. Above n 18 at 342 (HL).

There are other formulae.²⁵ Lord Cooper in *Elder v Elder & Watson Ltd* called for elements of foul play:

The essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.²⁶

The Jenkins Committee suggested the section was originally 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.²⁷

The Committee here anticipated the redrafting of the oppression provision by implying that acting unfairly and prejudicially may not amount to the ordinary meaning of oppression.

Lord Keith in *Elder's* case stated the test of oppression to be 'lack of probity or fair dealing'.²⁸ But he rephrased that in *Meyer's* case to 'lack of probity and fair dealing'.²⁹ Jenkins L J in *Re Harmer Ltd*³⁰ and Menhennitt J in *Re Tivoli Freeholds Ltd*³¹ adopted the latter formulation.

Lush J in *Re Dalley & Co Pty Ltd* took a wider view:

In my opinion want of probity is only one of the ways in which oppression can manifest itself, as indeed the use of the alternative 'lack of probity or fair dealing' by Lord Keith [in *Elder's* case] indicates. One person may subject another to continual injustice by insisting, however honestly, on a proposition that is wrong or by using his strength to maintain, however honestly, a position unjustified in law.³²

In *Dalley* the directors obdurately insisted that the petitioner's shares were not ordinary shares but employee shares. The difference was vital. Employee shares could be expropriated at the direction of the board once the holder ceased to be an employee of the company. Ordinary shares could not. Even if they were honestly of this wrong view, Lush J ruled, the directors were acting oppressively both in their assertion and in

25. See some listed by Russell, 'The Companies Amendment Act 1980' [1981] NZLJ 71 at 74-75; McPherson, *The Law of Company Liquidation* (2nd ed, 1980) at 122-124; the *Jenkins Report*, above n 7 at para 204; Rajak, 'Oppression of Minority Shareholders' (1972) 35 MLR 156 at 162ff.

26. [1952] SC 49 at 55. See also *Re Jermyn St Turkish Baths Ltd*, above n 16 at 1060, per Buckley L J: 'Oppression must, we 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 oppressor.'

27. Above n 7 at para 204.

28. Above n 26 at 60.

29. Above n 18 at 364 (emphasis added).

30. Above n 5.

31. Above n 16 at 452. See also Olney J in *Re East West Promotions Pty Ltd*, above n 6 at 88.

32. (1968) 1 ACLR 489 at 492.

purporting to expropriate the petitioner's shares at an undervalue. The oppressors

were fixed in their determination to classify the petitioner's shares as employee shares and so to remove her from the company at relatively small cost and to their own and their children's advantage.³³

The fact that the oppressors in *Dalley* were trying to advantage their families should be irrelevant to the issue of oppression. The purpose or object of the oppressors may make their actions more culpable, but, objectively, has no effect on the level of oppression suffered. It is the action and its effects and not the motivation of the oppressor that is all important at the initial stage.³⁴ This cuts both ways, of course. Legitimacy of motive is no defence for the oppressor. Motive becomes important when the court decides what remedy, if any, is appropriate. Motive can indicate whether there is hope for the company or for a reasonably effective solution to the problems within the existing framework. Intractability in the oppressors, for example, bodes ill for any solution short of giving the oppressed a suitable exit from the company.

'Oppression', then, has received varied definition from the courts. Sometimes, in the interests of justice, they stretched its meaning. Aware of the word's limitations, and increasingly concerned about the potential for mischief by corporate controllers, our legislatures introduced broader grounds such as prejudice, discrimination and, widest of all, acts contrary to the members' interest.

Unfairly prejudicial or discriminatory

The phrases unfair prejudice and unfair discrimination overlap in their meanings. One thing is clear — they can be interpreted more widely than the word 'oppression'. It can be argued that any example of unjust, inequitable or harmful activity is covered by their ordinary meanings. Ongle J at first instance³⁵ and Richardson J in the NZ Court of Appeal³⁶ in *Thomas v HW Thomas Ltd* noted the broadening. Baxt cautiously endorses the *Thomas* line of Richardson J and a wide reading of the redrafted s 320.³⁷

McPherson J in *Re Dalkeith Investments Pty Ltd*³⁸ pointed out the widening of the ambit of the provision. 'It is enough,' he said 'that there is action, which if not "oppressive" is at least "unfairly prejudicial to"

33. *Ibid* at 493. The High Court reversed Lush J's judgment on another point.

34. See *Re H R Harmer Ltd*, above n 5 at 84, per Jenkins L J: 'It seems to me the result rather than the motive is the material thing.' See also Lush J in *Re M Dalley & Co Pty Ltd*, above n 32 at 492.

35. (1983) 1 ACLC 1256 at 1261.

36. (1984) 2 ACLC 610 at 616–617.

37. 'The New Remedy in Oppression — A Rewarded Provision or a New Remedy' (1985) 3 C & SLJ 21. See also Corkery, 'Oppression or Unfairness by Controllers — What Can a Shareholder Do About It? An Analysis of Section 320 of the Companies Code' (1985) 9 Adel LR 437.

38. (1985) 3 ACLC 74 at 80.

or "unfairly discriminatory against" a particular member.' Crockett J in *Re G Jeffery (Mens Store) Pty Ltd* added: "The new subsection has made the task of the applicant shareholder less onerous in respect of the conduct about which he is entitled to complain. . . ." ³⁹

British Columbia produced a case of major importance on the words 'unfairly prejudicial' in *Diligenti v RWMD Operations Kelowna Ltd*.⁴⁰ It was a typical 'squeeze-out' situation.⁴¹ One of four equal founding co-members and directors was voted off the boards and out of his job as salaried manager of two restaurant services companies which the directors operated. Fulton J conceded that his removal as a director could not be oppressive to the applicant as a member. But he did find it was 'unfairly prejudicial' to the applicant as a member.⁴² His Honour reasoned that the rights of which the applicant was deprived were enjoyed by him as 'a member as part of his status as a shareholder . . . amongst these rights are the rights to continue to participate in the direction of that company's affairs'.⁴³ Fulton J added:

Second, although his fellow members may be entitled as a matter of strict law to remove him as a director, for them to do so in fact is unjust and inequitable, and is a breach of equitable rights which he in fact possesses as a member . . . such unjust and inequitable denial of his rights and expectations is undoubtedly 'unfairly prejudicial' to him in his status as a member.⁴⁴

The High Court recently scrutinised the new wording of s 320 in *Wayde v New South Wales Rugby League Ltd*.⁴⁵ Brennan J noted that s 320: requires proof of oppression or proof of unfairness: proof of mere prejudice to or discrimination against a member is insufficient to attract the Court's jurisdiction to intervene.⁴⁶

His Honour added that 'oppression' did not have a settled meaning. At the very least, he thought, it meant unfairness. Many management decisions will prejudice or discriminate against certain members in a company. *Wayde* stresses that, of itself, this does not give those members the right to complain under s 320. In addition, that behaviour or activity must be unfair. And, where the company is trying to advance the objects for which it was incorporated, and does so bona fide and in the best interests of the company, the courts will be reluctant indeed to entertain a s 320 application from shareholders prejudiced by the activity.

39. (1984) 2 ACLC 421 at 426

40. (1976) 1 BCLR 36.

41. Other good examples of 'squeeze outs' arose in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 and *Re North End Motels (Huntly) Ltd* [1976] 1 NZLR 446.

42. The words 'unfairly prejudicial' appear in s 224(1)(b) of the 1979 British Columbia *Company Act* (formerly s 221(1)(b) of the 1973 Act).

43. Above n 40 at 51.

44. *Ibid.*

45. (1985) 3 ACLC 799. For a discussion of this case see Cameron, 'Rugby League Footballers and "Oppression or Injustice"' (1985) 8 UNSWLJ 236.

46. *Ibid* at 806.

Lawful activity can be unfair or oppressive. All the same, lawful activity may be unfair and oppressive. For example, the 'constitutional' removal of a director may in certain circumstances be oppressive. When it is specifically provided for in the articles and there is no long-standing 'family-type' arrangement between quasi-partners, the removal may be businesslike, justified and not 'unfair' or 'oppressive'. But black-letter legitimacy will not save controllers prepared to use unfairly the full rigour of the articles. What appear to be legitimate exercises of power by controllers may nonetheless amount to unfairness or oppression.

On the other hand, several courts have cautioned that as a general rule 'locked in' minorities cannot look upon s 320 as a convenient means of quitting their shares in the company to other shareholders at a price determined by the underlying assets of the company. Oppression or unfairness must first be shown. And refusal to buy out a minority shareholder on request of *itself* will not be unfair or oppressive.⁴⁷

Manner contrary to the interest of the members as a whole

These words are also wide in meaning. They may have most impact in the widening of the oppression remedy. For example, a case of genuine management deadlock in a company, where equal shareholders and co-directors were in a stand-off position, could be used in a s 320 application on the ground that such a stand-off or deadlock is contrary to the interests of the members as a whole. So, too, negligence and wasting of corporate assets is certainly contrary to the interests of the members as a whole.

We can hope that the unhappy wording '*members as a whole*' (emphasis added) will not tempt courts to interpret the provision restrictively. Such an interpretation — that is, that the misbehaviour must detrimentally affect *all* the members — would serve no useful purpose. Even if the acts complained of benefit a majority of members, they may still be contrary to the interests of the members as a whole.⁴⁸ A minority is part of the whole. They too must be considered.

Detriment suffered in capacity as a member or in any other capacity

Under the *UCA* and then the 1981 *Code's* drafting of the oppression provision, relief could only be provided to the member who was being oppressed as a member. There was no relief if he was being oppressed or unfairly treated in some other capacity.⁴⁹ Although you were also a member, if you suffered as a director, officer, employee, creditor or in

47. See *Re G Jeffrey (Mens Store) Pty Ltd* (1984) 2 ACLC 421 at 427, relying on *Re A Company* [1983] 2 All ER 36 at 45.

48. See Richardson J in *Thomas v H W Thomas*, above n 36 at 616–617, and Rowland J in *Re Overton Holdings Pty Ltd* (1984) 2 ACLC 777 at 781–782.

49. See *Re Lundie Bros Ltd* [1965] 2 All ER 692; *Elder v Elder and Watson Ltd* [1952] SC 49.

some other capacity, you could not use the oppression remedy. This was not satisfactory. With most closely-held companies especially, it was not easy except on paper to distinguish between your roles as shareholder, director or employee. As the New Zealand 1973 Special Committee to Review the *Companies Act* and the Explanatory Memorandum to the Australian 1983 Companies Bill pointed out, the most common forms of oppression or unjust treatment in the small partnership companies affect the interest of the members, directors or employees. Further, in the closely-held company, members usually get the fruits of their investment by being paid as employees or directors. Thus deprivation of employment or dismissal from the board may put an axe to the roots of the member's financial interest in the company. For such reasons the ambit of s 320 was broadened in 1983 to include detriment suffered in capacities other than as members.

But what are the limits, if any? Can we foresee, to use Lord Grantchester QC's example from *Re A Company*, applications from 'a shareholder who objected to his company carrying out some operation on land adjoining his dwelling house, which resulted in that house falling in value'⁵⁰ The wording of s 320(4A) is wide — 'whether in his capacity as a member or in any other capacity'. Will we get litigants buying shares in, for example, mining companies to give them standing to bring s 320 applications over land rights or uranium mining? Can we now argue that standing under s 320 is available to us in our capacity as concerned members of the public? Or, more plausibly, can we argue, for example, that the mining of sites of religious or cultural importance unfairly prejudices or discriminates against us in our capacity as members of a race or religion?

In time the courts will limit the 'capacities' under which we can assert oppression or injustice. The court has a discretion. It can make such orders as it thinks fit. Persons who have sought membership solely to use s 320 may well get an unsympathetic hearing. But the potential is there for s 320 to be used for non-corporate or at least non-financial ends.

Who can be the oppressor?

Section 320 is silent as to the range of persons who can be 'oppressors'. Jenkins LJ in *Re HR Harmer Ltd* insisted that

the phrase 'the affairs of the company are being conducted' . . . is wide enough to cover oppression by anyone who is taking part in the conduct of the affairs of the company, whether de facto or de jure.⁵¹

Thus the actions of directors, even de facto directors (those not properly appointed to the board), and indeed of anyone who conducts affairs of the company, could found an application or petition. Actual or proposed resolutions of classes of members can also provide grounds: s 320(1)(a)(ii).

50. *Re A Company*, above n 47 at 44.

51. Above n 5 at 698.

Section 320(1)(a)(ii) and (2)(b) add actions 'by or on behalf of the company' as possible grounds for proceedings. The company itself may be oppressive in the sense that general meeting resolutions⁵² and decisions of the board or a managing director are acts by or on behalf of the company. In *Re Overton Holdings Pty Ltd* the company itself was held to be oppressive because it would not take action to sue the others (defendants) in 'circumstances where on the information before me there is disclosed sufficient to give a reasonable cause of action against those others [defendants]'.⁵³

The Australian 1981 legislation limited itself in subs (1)(a)(ii) only to the acts of directors. Recognising that the unfairly or unjustly acting controllers will not always be directors, or acting in their capacity as directors, the legislature widened the wording to embrace all actions by or on behalf of the company. On this matter the Explanatory Memorandum of the 1983 Bill noted that s 320

will apply irrespective of whether the conduct complained of is that of the directors, of the controlling shareholders in general, of the de facto controllers of the company or, as in *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324 of an associated company.⁵⁴

Nature of relief available under section 320

As commented earlier, s 320 gives the court a wide discretion to make such orders as it thinks fit. The legislation then sets out possible orders, without limiting the courts' discretion.⁵⁵ Some of the more important remedies suggested are:

An order for winding up: subsection (2)(c)

This will often be too drastic. Section 320(4) adds that a winding up cannot be ordered where the court thinks the winding up would 'unfairly prejudice the oppressed member or members'.⁵⁶

Under the grounds for winding up provision — s 364 — there are two new grounds (added in 1983) — subss (1)(fa) and (fb). They list

52. See discussion of whether or not shareholders' resolutions are acts of the company by Burridge, 'Wrongful Rights Issues' (1981) 44 Mod LR 40 at 60–66 and Shapira, 'Minority Shareholders' Protection — Recent Developments' (1982) 10 NZULR 134 at 139–140, esp n 33. This writer prefers Shapira's view. See also *Wayde v NSW Rugby League Ltd*, above n 45 at 803–804.

53. Above n 48 at 782.

54. Companies and Securities Legislation (Miscellaneous Amendments) Bill 1983, Explanatory Memorandum, para 482(b). In *Re A Company* [1986] 1 WLR 281, Hoffmann J held that s 461 of the UK *Companies Act 1985* was wide enough to allow relief to be granted against someone who was no longer a member of the company.

55. See s 320(2)(c)–(k).

56. Section 320(4) talks only of the 'oppressed member or members'. Does this mean that the unfairly prejudiced or discriminated against member (who is not also oppressed) cannot have his interests taken into account when a winding up order is being considered? Or is the term 'oppressed member' intended to embrace all successful applicants under s 320(1)(a)?

oppression, unfair prejudice, unfair discrimination and activity contrary to the interests of members as specific grounds for a winding up application. Often members bring applications for oppression and, in the alternative, for winding up the company (on the 'just and equitable' ground usually). *Re Tivoli Freeholds Ltd*⁵⁷ is an example of this.

Strictly speaking these two new grounds were not needed. The court has power under s 320 itself to wind up a company, providing one of the s 320 grounds is established. But under s 320 only members and the Commission have standing. Under s 364, the winding up section, a much larger group can seek a winding up — creditors, contributories (who include some past members) and even the company itself, among others. Presumably, then, someone who is not himself oppressed or treated unjustly can use those very grounds to seek the winding up of the company under s 364. There does not seem to be anything wrong with that. The court has a discretion to wind up or not, after all, and can exclude busybodies. But it does mean the oppression and injustice pleadings are going to get a greater airing than before. The new provisions — s 320(1)(fa) and (fb) — may only mean that the traditional 'just and equitable' pleadings (s 364(1)(j)) will become more complex. Paragraphs (fa) and (fb), which will rely on the same facts as a 'just and equitable' application, will be thrown into the ring too.

Generally the court settles for some less severe remedy than winding up. These include:

An order regulating the affairs of the company: subsection (2)(d)

In *Re HR Harmer*⁵⁸ the aged and dictatorial stamp dealer was removed from office as chairman of the board and managing director. He was also ordered not to interfere in the company's affairs unless invited to do so by the board.

An order for the purchase of the shares of any member by other members or the company itself: subsections (2)(e) and (f)

In *Meyer*⁵⁹ the co-operative society, which through its nominee directors on the company's board subordinated the interests of the company to those of the co-operative society, was ordered to buy the petitioning minority's shares. In *Re M Dalley*,⁶⁰ where the board wrongly insisted the petitioner's shares were employee shares, the company was ordered to buy the petitioner's shares. So too, in *Re Dalkeith Investments Pty Ltd*,⁶¹ McPherson J ordered the oppressors to buy the applicants' shares.

57. Above n 16. The petitioner was unsuccessful in establishing oppression (under s 186 of the UCA) but did show it was just and equitable to wind up the company (under s 222(1)(h) of the UCA). A winding up was ordered in a s 320 application in *Re East West Promotions Pty Ltd*, above n 6. The company appeared to be insolvent and its activities had ceased.

58. Above n 5.

59. Above n 18.

60. Above n 32.

61. Above n 38.

This order is useful in dealing with feuds in 'quasi-partnership' companies — that is, in those companies which have a background of mutual confidence between members and understanding that all will participate in the management, along often with restrictions on the transfer of shares. A buying out of one of the 'partners' at a reasonable price per share may be the only way, short of winding up, of settling an internal dispute. Applicants often request orders for purchase of their shares.

Valuation of shares. Especially in closely-held or quasi-partnership corporations, valuation of shares can be very difficult.⁶² While there are few helpful general rules for this procedure, several principles seem clear. First, one calculates the value which the shares would have had as at the date of the petition. Second, where the oppression or injustice has itself depressed the value of the applicant's shares, the valuation is made as if the oppression or injustice had not happened.⁶³ Third, to use the words of Fulton J in *Diligenti's* case, 'the court is concerned not with the market value of the shares, but with the fair value or price to be set in the circumstances'.⁶⁴

The 'market' value of shares in a closely-held company to an outsider will usually be very low indeed. There may in fact be no market for them. So too the value of traded shares may be low for a variety of reasons: low dividends, small numbers of shares traded and so on. For their part, minority shareholders may overvalue their shares, clinging to some inflated value in, for example, a sentimental view of the family business assets or its competitive abilities or some suspicion that the controllers have a clandestine deal awaiting their departure for consummation. On the other hand the majority may indeed be keen to squeeze out the minority at an unfair price for personal advantage. The difficulties of valuation only promote suspicion and discord.

To reach a fair valuation a combination of factors must be considered.⁶⁵ There can be little mathematical precision in this process. A recent North

62. For a discussion of valuation of shares on a minority shareholder's petition see Ravinsky, 'The Statutory Protection Against Oppression' in Sarna (ed), *Corporate Structure, Finance and Operation* (1980) 51 at 70–76; Birds, 'Valuation of Shares on a Minority Shareholder's Petition' (1984) 5 Co Law 34–35. See also the discussion of valuations and their difficulties that arose in *Re A Company*, above n 47 per Vinelott J. Hartwig, 'Valuing on Interest in a Closely-Held Business for the Purpose of Buy/Sell Agreements and for Death Tax Purposes' (1974) 26 So Calif Tax Inst 215 is also helpful. See also Rubner, *The Ensnared Shareholder* (1964, Penguin) at 120–131 on the market valuation of shares.

63. See, for example, *Scottish Co-operative Wholesale Society Ltd v Meyer*, above n 18 at 369, per Denning L J, and at 364, per Keith L J; *Diligenti v RWMD Operations Kelowna Ltd*, above n 21 at 166; *Re Dalkeith Investments Pty Ltd*, above n 38 at 81, per McPherson J.

64. *Ibid* at 166. See also Nourse J in *Re Bird Precision Bellows Ltd* [1984] 2 WLR 869 at 876: 'it is axiomatic that a price fixed by the court must be fair.'

65. Some of these are summarised by MacFarlane J in *Re Wall & Redekop Corp* (1974) 50 DLR (3d) 733 at 735–738.

American commentary observes that valuing the private non-listed company is

not a science, but an art — an imprecise one at that . . . for smaller businesses and for many larger private firms . . . valuation is done by the seat-of-the-pants method.⁶⁶

The realities of power affect values. As an American newspaperman reputedly commented on a corporation of 100 shares: 'There are 51 shares that are worth \$250,500. There are 49 shares that are not worth a —.'⁶⁷ A bare majority can sometimes indeed be that powerful, especially where the articles do not provide for cumulative voting on directors.⁶⁸ The courts, of course, try to see fairness done, and will if necessary defy the majority's domination.

Valuation techniques are beyond the scope of this chapter. Briefly, there are four favoured methods.

1. The price that the assets would attract on liquidation may be estimated and used as a valuation basis. This is, though, not a satisfactory way of valuing shares in a vigorous operating or trading company that is not about to fold up. A going concern is invariably worth much more than simply the value of a company's assets.
2. There is the valuation based on the earnings or income flow of the private company producer (the earnings capitalisation method). This is more suitable for established operating companies, the true worth of involvement in such companies being not their assets but their ability to generate income. A company with a poor earnings record may find its earnings based value to be even lower than the dissolution value of its assets.⁶⁹
3. We have the dividend returns valuation. Basically this entails an estimate of what the shares would fetch on the market if they were listed and paid dividends typical of that sort of company. This method depends on finding comparable companies with traded shares, rarely an easy task.
4. If any sales of shares have occurred recently, the prices will be a guide 'provided that those sales are at arm's length in conditions which approximate to the "open market" requirement'.⁷⁰

66. Faris, Holman and Martinelli, 'Valuing the Closely Held Business' (Fall 1983) *Mergers and Acquisitions* (Philadelphia) at 53.

67. See quoted in *Humphrys v Winous Co* 165 Ohio St 45 at 50; 133 NE 2d 780 at 783 (1956).

68. For discussion of cumulative voting in Canada see Select Committee on Company Law (Lawrence, Chairman) *Interim Report* (1967) Ch 8.

69. See discussions of assets earnings valuations in O'Neal, above n 8 at paras 2.16, 5.24 and 8.12.

70. Eastaway and Booth, *Practical Share Valuation* (1983, Butterworths) at 209.

Sometimes one or two factors may dominate the valuation process. On other occasions a composite approach — taking all methods into account — may be appropriate.⁷¹

In *Re Bird Precision Bellows Ltd*,⁷² Nourse J decided a fair value of the shares in the quasi-partnership company at issue was to be 'fixed pro rata according to the value of the shares as a whole and without any discount'. The value of the company's tangible assets and its earnings were determining factors. Because a quasi-partner's shares were being bought they could not be acquired at a low, discounted price by another quasi-partner, especially where prejudicial conduct or oppression led to the purchasing order. The fair value is generally the pro rata, not a discounted value. A valuation based primarily on dividend returns is likely only where the company has historically significant dividends and these payments are a realistic or fair return on the investment in the shares.⁷³

Section 320(2)(j) and (k) suggest orders restraining or requiring actions

The wording indicates prohibitory (para (j)) or mandatory (para (k)) injunctions. Such injunctions can be issued on wider grounds than those issued under s 574. The latter are limited to controlling contraventions of the Code only. Successful petitions under the Canadian federal oppression provision, s 234, often result in injunctive relief.

An order directing the company to bring proceedings or authorising a member to bring proceedings on behalf of the company: subsection (2)(g)

The court can now authorise or order civil derivative actions to recover property or damages on behalf of the company. This takes the section into a wider sphere of complaints — that is, wrongs to the company. The history of the oppression section has been tied up mainly with members' personal complaints in closely-held companies. Paragraph (g) will attract a wider interest.

As concluded in the previous chapter, the difficulties of a minority shareholder seeking to bring a derivative action are legendary. The rule in *Foss v Harbottle*,⁷⁴ even with its 'exceptions', stultifies minority shareholder action against corporate mischief. Simply proving standing is very difficult, let alone showing the alleged misbehaviour by the controllers.

71. Faris, Holman and Martinelli (above n 66) discuss these three methods and offer their own 'weighted composite value method' which, they hope, gives a 'more systematic and theoretically based approach to the valuation of the smaller business' (ibid at 59). Hartwig (above n 57 at 254) is no doubt right:

'The dividends which are paid by a closely-held corporation are usually determined by the tax brackets of the controlling interests, the reasonable compensation which they may deduct for income tax purposes, the fringe benefits which the controlling interests choose to enjoy and the working capital requirements of the business.'

72. Above n 64 at 882.

73. Ibid.

74. Above n 1. See also *Mozley v Alston* (1847) 1 PH 790; 41 ER 833.

The costs of such proceedings are daunting. As we have seen, defining and proving fraud on the minority, showing the wrongdoers are in effective control of the company and grappling with the intricacies of corporate ratifiability, befuddle minority shareholders who lack influence and access to corporate funds, information and procedures. Genuine grievances went unremedied.

Several jurisdictions have, with some success, tried legislative solutions to *Foss v Harbottle*. But we saw no similar changes in Australia. Australia has not introduced a provision into its Codes, simply allowing shareholders to apply to the court for leave to bring derivative suits. But the redrafted s 320 offers an indirect route. If it fulfils its promise it may be a solution in this very difficult area of the law. We may not need the other provision if para (g) works.

The Jenkins Committee⁷⁵ first recommended the measure now drafted into our legislation. In the last few years both New Zealand and the United Kingdom have adopted similar provisions.⁷⁶ The Jenkins Committee, when putting forward the suggestion in 1962, had condemned the limiting effect of the rule in *Foss v Harbottle*. The UK s 461(2)(c) (then s 75(4)(c)) was first enacted in the 1980 Act amid hopes that derivative suit standing problems may be settled there, by the back door as it were.

Prima facie case sufficient? Before a court can order derivative suit proceedings under the Australian para (g) it must be satisfied that at least on the face of things either oppression or injustice exists: s 320(2)(a) and (b). Rowland J in *Re Overton Holdings Pty Ltd*⁷⁷ was satisfied by the applicant's establishment of a 'prima facie case' of oppression, the defendants having 'chosen to remain silent'. There was no full trial of the issues. Rowland J relied on assertions of fact and belief, supported by documents. The petitioner had verified the petition by affidavit. No answering affidavits had been filed by the company. His Honour did not feel compelled to investigate beyond this.

This approach is similar to that suggested years ago by Lord Denning in *Wallersteiner v Moir (No 2)*⁷⁸ for seeking standing to bring a derivative suit. A speedy procedure for getting permission to bring such derivative suits is desirable. This first authority on para (g) offers hope of that. Some further guidance may also be sought by our courts from the approach adopted by the Canadians in *Re Marc-Jay Investments Inc and Levy*.⁷⁹ It would rid us of long-standing and complex problems and clear a path for effective action by minority shareholders taking up genuine grievances on behalf of the company. If an expeditious method of seeking standing

75. Above n 7 at paras 206–207 and 212(e).

76. The NZ s 209(2)(d), a 1980 amendment, is virtually identical to s 320(2)(g) of the Australian Code. Section 461(2)(c) of the UK 1985 Act is similar.

77. Above n 48.

78. [1975] 2 WLR 389 at 403–409.

79. [1975] 5 OR (2d) 235 at 237; (1974) 50 DLR (3d) 45 at 47.

to bring a para (g) suit does not become established, a Canadian-type specific derivative suit permission procedure will be needed.

Grounds for paragraph (g) 'derivative suit' action. Derivative suits are usually initiated for expropriation of company property or other breaches of duty by directors who control the company. Such breaches will nearly always fit into one of the categories of misbehaviour set out in s 320(1) and (2). Canadian experience supports this.⁸⁰ For example, it must be 'contrary to the interests of the members as a whole' for the directors to act negligently, usurp a business opportunity that belongs to the company, misuse or misapply the company's funds in some way, or otherwise become involved in a conflict of duty and interest. In fact a much wider range of misdeeds comes under the s 320(1)(a) umbrella than that group which satisfied the 'fraud on the minority' derivative suit criteria. Unjust or unfair resolutions or oppressive assertion of rights under the articles, for example, would rarely found derivative suits at general law. The scope for actioning s 320(2)(g) — the derivative suit paragraph — is considerably wider.

Presumably, though, only activities or abuses of power that are injurious to the company could found an order under para (g). Thus, only activity that is *both* unjust to members and hurts the company will give grounds for the use of para (g). But this should not be a problem if the courts accept that actions that hurt the company also prejudice or hurt the members' interests in the company. Injury to the company — for example, through misappropriation of assets, improper use of powers and negligence — depreciates the value of its shares and thereby hurts members. Indirectly the company's property is the shareholders' property.⁸¹ There are, though, breaches of duty that do not hurt members — for example, taking up a corporate opportunity where the company itself cannot for some reason or other.⁸² Hopefully Australia will have few problems working out this relationship between derivative (company) and personal (members) actions.

Applied liberally, para (g) will sweep away the troubles of *Foss v Harbottle*. It could give members (but not creditors, unfortunately) a reasonable chance of pursuing wrongdoers on the company's behalf. And the court, which must authorise or order derivative action, can still filter out frivolous and misconceived complaints. Providing they can establish,

80. In *Re Peterson and Kanata Investments Ltd* (1975) 60 DLR (3d) 527 several actions including misuse of corporate property for personal profit and generally acting in conflict of duty and interest — almost certainly in fraud on the minority — were held to be oppressive. As counsel suggested in argument, a derivative suit would have been open, no doubt. But the matter was dealt with under the oppression provision much more cheaply and speedily.

81. Cf *Macaura v Northern Assurance Co Ltd* [1925] AC 619 at 626–627 (HL) where the possession of a legal interest by shareholders in the company's property was denied.

82. See Birds, 'Making Directors do their Duties' (1980) 1 Co Law 67–74; cf views of Instone (1981) 131 (2) NLJ 1316–1318.

to a prima facie standard,⁸³ grounds under s 320(2)(a) or (b), minority shareholders, by seeking permission to bring a derivative suit as a remedy from the court, should be in a position akin to that of Canadian minority shareholders.

Costs for paragraph (g) suits. Under para (g) the court can require the company itself to take proceedings. And where this is likely to be carried out diligently, the court will no doubt prefer the company to take the initiative. As actions begun as a result of s 320 proceedings are 'in the name and on behalf of the company', the companies themselves should bear any costs of the actions, whether the actions are brought by the companies or members. After all, the benefits of successful proceedings or settlements would go to the companies. The legislation could have clarified this by actually saying the company would pay, or indemnify a member, for the costs of pursuing civil suits on the company's behalf under a para (g) order. The courts can deal with this, anyway, when authorising or ordering derivative suits. If the court authorises the action there should be no truly unmeritorious suits. So the threat of imposing costs on the member should not be needed.

If the costs are to be met by the companies, then a major hurdle to minority shareholder action is removed. So too are the complexities of proving fraud, dealing with the potential absurdities of ratification, and showing control by the wrongdoers — the problems that have dogged derivative suit proceedings in the past.

Oppression remedy and failing companies

Often unfairness or oppression may arise in a failing company. In fact it may be the cause of the failure. Lord Denning noted in *Scottish Co-operative Wholesale Society Ltd v Meyer*⁸⁴ that he did not think the oppression remedy was only available where the company was 'in active business'. Bleak prospects do not rule out the remedy. It is available, his Lordship ruled, even 'when the oppression is so great as to put the company out of action altogether'.⁸⁵ Calloway⁸⁶ agrees, but cites *Irvin and Johnson Ltd v Oelofse Fisheries Ltd*⁸⁷ in pointing out that the court should be aware of realities. Reynolds J in *Irvin and Johnson*⁸⁸ said that, while the

83. *Re Marc-Jay Investments Inc and Levy*, above n 79. In *Re Northwest Forest Products Ltd* [1975] 4 WWR 724 at 735 the applicants only had to show 'the action sought is prima facie in the interests of the company' and not to prove a prima facie case. This low standard was set down because this was 'in the nature of an interlocutory application because it decides nothing more than that an action may or may not be commenced'. See again, *Re Overton Holdings Pty Ltd*, above nn 77 and 48.

84. [1959] AC 324 at 368–369.

85. *Ibid* at 369. See also Lord Keith of Avonholm at 364.

86. Calloway, *Winding Up On The Just and Equitable Ground* (1978, The Law Book Company) at 109.

87. [1954] 1 SA 231 at 241.

88. *Ibid* at 241.

court must try to end the matters complained of, often 'it would be futile to grant an order which would leave the company so to perish'.

Overseas experience

The Canadian jurisdictions mentioned already — federal, British Columbia, Alberta and Ontario — do not need to use their oppression provisions to initiate derivative proceedings. As noted in Chapter 9, they have separate derivative suit provisions in their legislation allowing members to apply to the court for leave to bring actions on the company's behalf.⁸⁹ The Canadian jurisdictions also specifically mention the derivative suit option in their oppression provisions. But it is there apparently only to 'avoid a situation in which an application must be dismissed merely because the applicant made the wrong choice of procedure'⁹⁰ — that is, for where the applicant neglected to ask for derivative suit permission as well as pleading oppression. It merely backs up the derivative suit provision.

Some argue that a separate statutory derivative suit procedure is preferable.⁹¹ When commenting on the original Jenkins Committee oppression provision proposal which was adopted into Ontario law, Schreiner concluded:

It seems something of an unnecessary confusion . . . to import into a section dealing primarily with wrongs done to a group of members a provision for suit for a wrong done to the company.⁹²

Any confusion would probably only be of academic concern. Often the one act will offend both the company and the shareholders. The provision allows the courts to deal with both expeditiously.⁹³

Section 574 injunctions

The s 320 application can be a complex and relatively slow procedure for an impatient or distressed shareholder. For speedier action a minority

89. See s 245 of the *Ontario Business Corporations Act 1982*; s 232 of the *Canada Business Corporations Act 1979*; s 232 of the *Alberta Business Corporations Act 1981*; s 225 of the *British Columbia Company Act 1979*.

90. Alberta, Institute of Law Research and Reform, *Proposals for a New Alberta Business Corporations Act*, Report No 36, vol 2 (1980).

91. See, for example, Shapira, above n 52 at 159–160.

92. Schreiner, 'The Shareholders Derivative Action — A Comparative Study of Procedures' (1979) 96 *South African LJ* 203 at 232.

93. The recent English experience has been disheartening for those who hoped their s 75, enacted in 1980 (now replaced by ss 459–461 of the 1985 Act), would markedly increase protection for English minority shareholders. But the discouraging decisions do not concern the derivative suit paragraph in their provision, and, because of different drafting, they should have little effect in Australia. See Corkery, above n 37 at 461–462. The broad interpretation of the UK s 461 adopted by Hoffmann J in *Re A Company*, above n 54, may signal a new approach.

shareholder can look to s 574 of the Code. It empowers the Supreme Court to grant an injunction to stop contraventions of the Code. The injunction may issue on the application of the Commission or 'any person whose interests have been, are or would be affected by' any contravention of the Code. The Court can also grant an injunction where there is a failure or refusal, or proposed failure or refusal, to do an act or 'thing' that a person is required by the Code to do.

If they qualify as persons whose interests have been, are or would be affected by the conduct, minority shareholders can use this injunction procedure, for example, to stop breaches of statutory duty by directors. It is another weapon in their arsenal. Not just minority shareholders have standing to seek these s 574 injunctions. Creditors too would be persons whose interests may be affected by contraventions of the Code. Likewise employees of the company. Could it be argued that a member of the public has standing under s 574 based on interests that would be affected by directors' breaches of the Code? The breadth of the wording does not discourage such applications. But Hampel J in *BHP v Bell Resources*⁹⁴ found that 'interests' in s 574 referred to the interests of any person (including those of a corporation) which go beyond the mere interest of a member of the public. Nonetheless, in his Honour's words, a 'broad interpretation' of the section is appropriate.⁹⁵

The section does not require the 'interests' that are 'affected' to be major ones. Nor does it require them to be directly affected. Nor does it require them to be financial, corporate or proprietary in nature. Again, like s 320(4A), where we considered members' interests 'in any other capacity', we have a potentially wide ambit of operation. Only breaches of the Code can be acted against, though. This is the main limitation on the ambit of the provision.

What sort of breaches of the Code may attract applications under s 574? Breaches of the directors' statutory duty of care under s 229(2), or of their duty to disclose interests in contracts under s 228, or their duty to convene a general meeting on requisition in writing under s 241, or obey notice requirements under the Code are possible examples. If such breaches directly or indirectly cause, or threaten to cause, the value of members' shares to fall or a creditor's security to be undermined, for example, then s 574 may provide the most expeditious remedy. Furthermore, there is the interim injunction procedure available under s 574(3) whereby urgent cases can be controlled until the application is finally determined.

It is noteworthy, too, that the Court may, either alternatively or in addition to an injunction, award damages to affected persons: s 574(8).

94. (1984) 2 ACLC 157.

95. *Ibid* at 161-162: 'The Companies Code . . . is legislation which is clearly concerned in the broadest sense with the protection of the public in respect of commercial activities of corporations.' See also Baxt's comments, (1980) 8 A Bus L Rev 406.

Conclusion

The scope and potential of s 320 are wide. Clearly the legislature envisages a larger role for the provision. Hopefully the courts will take this opportunity to dispense justice within companies and aid unjustly-treated minorities. Because the court has a wide discretion, the fewer judicial fetters on the application of the section the better. Reasonably applied, the provision should help keep corporate controllers honest and industrious. As a threat alone the section will check misbehaviour.

The days when majority shareholders could simply vote and ratify as they pleased and vote only in their own best interests are gone. No longer do the controller-oriented notions that the company can manage itself and is the only proper plaintiff when it is wronged unduly fetter shareholders' action over management misbehaviour. Majority actions do not have to be fraudulent before they can be challenged. It is enough to show they were unfair.⁹⁶ In this the statute has brought real change. Section 320 may have a profound influence on the development of duties between majority and minority shareholders. It is a small step now to the US position where the majority owes fiduciary duties to the minority.

96. Young J commented in *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692 at 704: 'In my view a court now looks at [s 320(2)(a)] as a composite whole and the individual elements mentioned in the section should be considered merely as different aspects of the essential criterion, namely commercial unfairness.'