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A comparative analysis of the extent of judicial discretion in minority protection litigation: the United Kingdom and United States

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Case: Foss v Harbottle (1843) 2 Hare 461 (Ch D)

\*181 This paper compares the extent of judicial discretion in minority protection litigations in UK private companies and closely held corporations in the United States. Whilst English common law formed the basis of American legal jurisprudence, owing to a colonial past, it is widely recognised that American legal jurisprudence has moved further away, in many respects, from British Commonwealth principles. This notwithstanding, a principal concern in all corporate law systems is the protection of minorities within organisations.1 The framework is usually delineated by statutory rights with enforcement mechanisms and case law principles espoused by the courts. The effectiveness of remedies is essentially a product of how the courts perceive the scope of their powers and discretion in the act of judicial interpretation. It is the latitude of the discretionary powers that is explored in this paper.

In setting the framework for the protection of minorities, English and American jurisprudence recognised the preponderant wish of a majority of shareholders in a company. Corporate democracy therefore denotes the prevalence of the will of the majority in the governance of the affairs of the company. The majority of members of the company held the ultimate power. A decision of the majority on any matter, whether by ordinary or special resolution, binds all the members of the company.2 Where a matter is decided by majority vote of members, it is inevitable that the minority must accommodate and succumb to the will of the majority.3 This is part of the contract of membership embedded in the articles of association.4 However it is recognised that minority shareholders may justifiably need some protection in the face of an arbitrary use of the majority's democratic power. Hence the rules on minority protection are by their nature, system failure rules; failure of the basic principles of corporate governance in ensuring fair play and respect of individual rights. Often these system failure rules revolve around issues of fraud and oppression. This happens where the power of the majority is exercised in a manner which oppresses the minority, circumvents the very terms of the articles of association, or expropriates the property or monies of the company for the exclusive benefit of the majority. By the unique features of a private company or closely held corporation, its shareholders suffer greatly where the majority embarks upon an oppressive course. This may manifest in corporate deadlock, fraudulent and illegal acts, corporate waste and mismanagement, complications in transfer of ownership and control, etc.5 In the words of Robert B. Thompson:

“In a closed setting, the corporate norms of centralized control and majority rule easily can become instruments of oppression. Decisions virtually important to participants, such as their employment and salary, are left to the board of directors. When harmony between participants disappears, a minority participant may find that the majority interests can manage the affairs of the corporation in unexpected ways. Those in control of the Board can terminate minority shareholders' employment as officers, thereby diminishing the return on their investments. The corporation may not pay dividends to any shareholders to avoid double taxation, yet \*182 the majority shareholders will continue to receive a return on their investment in the form of salary or perhaps rent or interest on money loaned to the corporation. Indeed these amounts may increase after the minority shareholder is excluded… The permanence of the corporate form further compounds the minority shareholder's dilemma. Without a job and in the absence of dividend, the minority shareholder may face an indefinite future with no return on the capital he or she contributed to the enterprise. The majority may even be able to deny the minority shareholder any return in the long run by siphoning off corporate assets in the form of high salaries or rents, insulated from judicial review by the business judgment rule. Alternatively, the majority may seek to force the minority shareholder out of the enterprise on terms which the minority shareholder believes are unfair”.6

It is in these aberrant cases that this paper explores judicial discretion in protecting minorities under English and American jurisprudence.

Definition of concepts

The English private company and the American closely held corporation share basic common features. The stock is held in a few hands or by persons who had dealt with each other before, often with membership restrictions; the relationships between members are more intimate; the market for transferability of the shares is often non-existent such that shareholders are often stuck with their investment, whether good or bad, once the decision to invest has been taken and acted upon.7 Assumption of this form under the various American states' blue-sky laws is by subscription to elaborate restrictions on share transfers.8 The English private company ismarked with membership limitations and share transfer restrictions.9 Consequently, greater reliance is placed on company participation by its stockholders than in publicly held companies.10 Generally, these shareholders invest not only money, but also a substantial amount of time and energy to make the corporation a success. They usually expect employment and a meaningful role in management as well as a return by way of dividend. Often, they play a triple role as shareholder, employee and officer of the company.11 This description of closely held corporations approximates decimally to the English concept of a private company.12 But in American jurisprudence, the closely held corporation is a species of the non-public or private company, the description of which is more akin to the English consideration of a private company as an incorporated partnership.13 Commentators and courts have noted that the close corporation is often little more than an “incorporated” or “chartered” partnership.14 The stockholders “clothe” their partnership “with the benefits peculiar to a \*183 corporation, limited liability, perpetuity and the like”. In essence, though, the enterprise remains one in which ownership is limited to the original parties or transferees of their stock to the other stockholders have agreed; ownership and management are in the same hands; and the owners are quite dependent on one another for the success of the enterprise.15 Many close corporations are “really partnerships, between two or three people who contributed their capital, skills, experience and labor”.16 Just as in a partnership, the relationship among the stockholders must be one of trust, confidence and absolute loyalty if the enterprise is to succeed. All participants rely on the fidelity and abilities of those stockholders who hold office.

The judicial approach in both jurisdictions

Whilst both jurisdictions may have different approaches to the issue of minority protection in the private company or close corporation, it is contended that the core issues in the problem remain the same and even though different routes may have been followed, the same results are achievable under similar circumstances. It demonstrates the dynamism of legal principles and how the law strives to achieve justice, sometimes using different but similar concepts. Further, it illustrates the essential core values of minority protection in corporate governance.

The courts' primary premise, both in the United Kingdom and United States, was one of restraint and non-interference with the internal management of companies acting within their powers.17 In Carlen v Drury, 18 it was said that:

“the court is not required on every occasion to take over the management of every playhouse and brew house in the kingdom”.

It is this rule of restraint which was examined in the English famous case of Foss v Harbottle, 19 while the exceptions to the rule form the kernel of minority protection rules under English law.20

In identifying the situations where the courts may be justified in interfering with the management of companies, the courts recognise a distinction between individual rights and corporate rights.21 Individual rights inheres in individual members of the company in their capacity qua member, while corporate rights are rights ascribed to the company as an entity, though such rights are expressed by the wish of the majority of members. Individual rights include the right to receive notices and attend meetings of the company,22 right to vote thereat,23 right to dividends and the general right to remain in full membership with the rights and privileges appertaining to that status.24 Examples of corporate rights are the right to preserve its capital for the purposes of its business,25 right to initiate and discontinue litigation in its own name26 and the general right to enforce the regulations of the company.27 An infringement of personal rights affects the individual's proprietary right deserving of intervention by the courts.28 The influence of normative rights jurisprudence ismanifest here as it is in the sphere of human and environmental rights. Rather than the unimpeachable powers vested in superiors and institutions as is the tradition of the Austinian school,29 the clamour for a theory of individual rights30 has indeed influenced the eagerness of the courts to protect individual rights of members in a company. The resolve of the courts is to protect minorities from abuses in the hands of majority shareholders. Where a majority in de facto or de \*184 jure control of a company fraudulently expropriates the company's properties to themselves, the majority rule leaves the minority without a remedy. Such minorities would be trapped in the case of a private company or close corporation. A decision to sell his shares or seek the winding up of the company is in most cases not beneficial. Hence there must be some avenue whereby an aggrieved minority can seek redress of a wrong done to the company while retaining his membership of the company. Despite this peculiar dilemma of a shareholder in a private company as against his counterpart in a public company,31 English law makes no definite rules for protecting him, tailored towards his circumstance. The majority rule applies equally to both private and public companies.

It was readily conceded by the English courts that there must be exceptions to the majority rule but there appears to be no unanimity on the categories of exceptions to the rule. But we may take as a list of headings those offered by Jenkins L.J. in Edwards v Halliwell 32 :

(a) Illegal or ultra vires acts: where the act complained of is illegal or ultra vires the majority, a shareholder will be allowed to sue.

(b) Fraud on the minority: where the majority has perpetuated fraud and being in control of the company has refused to take action to redress a corporate wrong, the minority will be allowed to sue. Fraud on the minority includes abuse of power or discrimination against a section of the membership or errors of judgment from which the directors themselves benefit.33

(c) Act requiring special resolution: if the matter complained of is one which could be validly done not by a simple majority but only by some special resolution, a minority shareholder will be allowed to sue if the majority do not adopt the proper course.34

(d) Personal actions: one brought to enforce a personal right of the plaintiff in his capacity as a member of the company.

Over the years, a lot of juristic time and energy has been spent in attempts to delineate the scope and extent of each of these exceptions. In Pavlides v Jensen, 35 it was contended on behalf of the plaintiff that the exceptions to the Foss v Harbottle rule are not exhaustive and that the court has discretion to grant relief wherever justice requires on any ground and particularly where an otherwise helpless minority shareholder is in need of assistance by the court.36 A number of classical decisions illustrate the vulnerability of the minority. For example, where the company meeting cannot be called in time to be of practical use in redressing a wrong done to the company or to the minority shareholders37 ; or where the directors are likely to derive a profit or benefit or have profited or benefited from their negligence or from their breach of duty.38 Where the minority is acting within the context of the provisions in the articles and memorandum of association, a minority is defenseless. A scrutiny of the socalled exceptions shows there is really only one exception, that is, the second. The others are really no exceptions at all. They appear to be situations in which there is no clear confirmation by the majority and in which therefore the rule will not apply. It suffices to state that the formulation of these exceptions by the courts resulted in the creation of some rigid mechanism for enforcing minority rights against the majority just as the common law forms of actions manifested in the rigidity and compartmentalisation of the right of action. Forms were devised for personal actions,39 representative actions40 and derivative actions.41

Actions brought to enforce corporate rights on the ground that the acts of the majority constitute a fraud on the company generally fall under the scope of derivative action.42 No doubt, the derivative action is an affront to the rule in Foss v Harbottle. However, it is inevitable as earlier explained that where a wrong is being done to the company and the majority being in control are unwilling to redress the wrong, a legal avenue must be provided to enable the vigilant minority to seek redress in the name and on behalf of the company. A number of rules were thus evolved \*185 by the courts to facilitate actions by the minority while at the same time checking frivolous actions by disgruntled minority shareholders.43

First, the plaintiff must show that unless he is allowed to sue nobody else will, because the directors who are the wrong doers are in control of the company.44 One of the easiest ways of proving this is to show that the wrongdoers own a majority of shares in the company.45 Secondly, leave of the court must be sought to institute a derivative action. This is a discretionary power vested in the court to ensure equity and prevent frivolous actions. Judges are generally not inclined to exercise judicial discretion in favour of an applicant unless he comes to equity with clean hands. He must not have participated in the wrongdoing or knowingly benefited from it. Akin to the second rule is the third, which requires the plaintiff to have acted in good faith. His ultimate objective is to benefit the company.46 It must be in the best interest of the company that the action be instituted, defended or discontinued.47 Finally, the minority shareholder is required to enter security for costs should the action ultimately turn out to be frivolous. This may be unnecessarily burdensome to a minority shareholder who is being starved of his just returns from the company or one who is seeking to restrain a loss of the company's funds or assets.48 Other than personal actions, a minority embarking on a derivative action thus faces quite some hurdles in prosecuting his cause however just.49 Indeed, the derivative action has not been very helpful to English lawyers and litigants. By this litany of procedural restrictions, the courts circumscribed the extent of their discretion in redressing corporate wrongs. These restrictions have been vilified severally.50 The Jenkins Committee of 1962 recommended that the then proposed Companies Act should give the courts power:

“to authorise proceedings to be brought against a third party in the name of the company by such a person and on such terms as the court thinks fit”.51

Owing to its common law heritage, American courts also espoused the rule of restraint in its own formulation of the Business Judgment Rule by which the courts will not interfere with the directors' best judgments with regard to the conduct of the company's affairs.52 In a frequently cited 1892 decision, the Illinois Supreme Court observed:

“It is, however, fundamental in the law of corporations that the majority of its stockholders shall control the policy of the corporation, and regulate and govern the lawful exercise of its franchise and business. Every one purchasing or subscribing for stock in a corporation impliedly agrees that he will be bound by the acts and proceedings done or sanctioned by a majority of the shareholders, or by the agents of the corporation [directors] duly chosen by such majority, within the scope of the powers conferred by the charter. And courts of equity will not undertake to control the policy or business methods of a corporation, although it may be seen that a wiser policy might be adopted and that the business would be more successful if other methods were pursued.”53

The American common law system while recognising the rule in Foss v Harbottle and the English remedy by way of derivative action has shown disdain for its inherent uncertainties and the resultant vagaries of justice manifested in the exercise of judicial discretion by different courts. The idea of the derivative action was first dealt with by the US Supreme Court 1855 decision in Dodge v Woolsey. 54 In order to prevent abuses,55 \*186 the Supreme Court established preconditions to bringing derivative actions in federal courts.56 These preconditions were ultimately codified and evolved into r.23.1 of the Federal Rules of Civil Procedure. This rule, in turn, has been the model for many states' laws governing derivative actions.57 In addition to individual state statutes, the American Bar Association's Section of Business Law included a derivative action section in its Model Business Corporation Act.58 The Rules enable shareholders to initiate “direct actions” for infringements of rights of a personal nature and “derivative actions” when shareholders suffer injury to their interests resulting from injury to the corporation (i.e. a derivative injury).59 In Messinger v United Canso Oil and Gas Ltd, 60 the court affirmed that the Federal reforms in this regard were designed to relegate the Foss v Harbottle rule to legal limbo, convinced that the alternative system recommended is preferable to the uncertainties and obvious injustices engendered by that infamous doctrine.61 Under the codified rules, a derivative suit could only be brought by a shareholder if certain statutory prerequisites were met.62 The remedy was not available to every shareholder.63 Only one who was a “record or beneficial owner of shares, or of an interest in a voting trust for shares” at the time the act complained of occurred would have proper standing to bring a derivative action,64 with an exception that gave adequate standing to one not meeting this requirement provided the person's shares had “devolved upon him by operation of law from a person who was such an owner”.65 The plaintiff must show that the action is not a collusive one intended to obtain jurisdiction in a federal court. There is also the need of compliance with the demand requirement, by which the plaintiff/shareholder must show efforts made to have suit brought for the corporation by the board of directors.66 Whilst these rules are not fundamentally different from the English principles embedded in case law, the American codification promotes certainty and reduces the latitude of discretion which English judges have in entertaining derivative suits at the instance of disgruntled minorities.

Whilst the traditional approach is that the rules that apply to large publicly held corporations should also apply to closely held corporations, meaning that shareholder derivative laws apply to closely held corporations,67 US courts have recognised the right of a close corporation shareholder to sue directly, as an individual, on a cause of action which would normally have to be brought derivatively.68 The American Law Institute (ALI) in its formulation of the principle states:

\*187 “In the case of a closely held corporation … the court in its discretion may treat an action raising derivative claims as a direct action, exempt it from those restrictions and defenses applicable only to derivative actions, and order an individual recovery, if it finds that to do so will not (i) unfairly expose the corporation or the defendants to a multiplicity of actions, (ii) materially prejudice the interests of creditors of the corporation, or (iii) interfere with a fair distribution of the recovery among all interested persons.”69

The approach of the ALI70 allows the courts to have discretion, as English judges would have, to decide when to treat a closely held corporation accordingly as a quasi partnership.71 There is no common principle applicable in all the states. Some jurisdictions have begun to carve out exceptions to the general rule favouring derivative actions with respect to close corporations. In Steelman v Mallory, 72 the Supreme Court of Idaho considered the plight of a minority shareholder in the fertiliser application business. The minority shareholder was one of three equal shareholders in the corporation but terminated his employment with the corporation after an apparent dispute. The majority shareholders subsequently doubled their salaries to US$8.00 per hour and declared no dividends. After complaining of being squeezed out of the corporate operations, the plaintiff brought suit individually. The court rejected the defendant's argument that the plaintiff's claim could only be brought in a derivative suit. Reasoning that since the majority shareholders owed a fiduciary duty directly to the minority shareholder and that the wrong done was that the majority had deprived the plaintiff of his lawful share, the court held a direct recovery was appropriate. However, for somewhat different reasons, an Arizona Appellate Court allowed a 50 per cent shareholder to bring an individual action against a fellow 50 per cent shareholder in a close corporation when the second shareholder breached an agreement to sell his land to the corporation. The court reasoned that because the corporation was closely held by only the two parties and that they operated more as partners than as a corporation, partnership law applied. The court emphasised that each shareholder owned 50 per cent of the business and both were before the court. Therefore, the court concluded that there was no danger that a multiplicity of lawsuits would result or that others not before the court would be adversely affected.

The test of conduct which is unfairly prejudicial to the interest of a shareholder

In 1992, Professor Gower had predicted that “it is possible that, in the not too distant future, derivative actions can be relegated to an historical footnote only”.73 This death knell of the rule in Foss v Harbottle and particularly, the forms of actions emanating from the application of the rule is ascribed to the provisions of s.459 of the Companies Act 1985.74 By virtue of these provisions, an application can be made to court by way of petition for relief on the ground that:

“the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interest of ‘its members generally’ or some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including any act or omission on its behalf) is or would be so prejudicial”.75

The concept of “unfairly prejudicial” conduct is certainly wide enough to subsume any wrong which may be done to a member with regard to his personal rights or any corporate wrong alleged to have been perpetuated by a majority in control.76 Its scope would cover oppressive acts which would hitherto have grounded a derivative action or an action for winding up on the just and equitable ground.77 Acts that are essentially discriminatory may also ground an action under the section. The liberal text of the section is reminiscent of the argument of plaintiff's counsel in Pavlides v Jensen, 78 that the courts should grant relief to a minority shareholder wherever the justice of the application requires. The English courts have held that the scope of this remedy removes the shackles of the restrictions on derivative actions. It removes \*188 the link with winding up and further covers isolated transactions, omissions and acts with the possibility of getting reliefs even for threatened acts. The Act tacitly recognises the position of the Lord Denning in Scottish Cooperative Wholesale Society Ltd v Meyer, 79 that the affairs of a company can be conducted oppressively by the directors doing nothing to defend the company's interests when they ought to do something just as they can conduct its affairs oppressively by doing something injurious to its interests when they ought not to do it. It is no longer necessary to show that the act complained of is improper or illegal, for an exercise of a legal right may have an unfairly prejudicial effect.80 The necessity to prove that the majority are the wrongdoers in control,81 or to prove fraud,82 are thus excused. Certainly unfairly prejudicial conduct is wider in scope than oppression.83 In deciding whether an act is unfairly prejudicial, the court will take into account factors such as the petitioner's conduct, any offer made to buy out the petitioner, the motive of the oppressing majority, any delay in petitioning and other relevant factors.84

Though not specifically designed for private companies, the remedy has proved a veritable instrument for addressing injustice and marginalisation in private companies of the quasi partnership types.85 Rather than take the derivative route, a minority aggrieved by acts amounting to a corporate wrong can initiate an action by petition as such corporate wrongs indirectly affect, that is, are prejudicial to the general interest of the member in the company.86 According to Professor Davies, the section launches the courts on a discretionary voyage of discovery as the land marks of established illegalities are obliterated on a judicial interpretation of what action amounts to unfair prejudice.87 As with all discretionary powers, there is always a question of the elasticity of its exercise, for occasionally, judicial discretion may be exercised arbitrarily in the absence of well-defined parameters. If the court is satisfied that the petition is well founded, it may make such orders or orders as it thinks fit for giving relief in respect of the matter complained of.88 These include orders regulating the future conduct of the company's affairs, requiring the company to do or refrain from doing some act and an order under s.461(2)(d) providing for the purchase of the petitioner's shares by other members of the company or the company itself.

The close corporation analogy

Minorities in the American close corporation as well as the English private company elicit the same judicial concerns with respect to acts that are oppressive, discriminatory, prejudicial or which otherwise affect their interests, directly or indirectly, in the company. As we had earlier noted, some American jurisdictions do not apply the rules on derivative actions to closely held corporations.89 While American courts extolled the principle of corporate democracy, the courts would intervene on behalf of a minority to dissolve the enterprise only on statutory authority to do so. The courts hold that the authority of courts of equity to decree the dissolution of a corporation is statutory.90 The Illinois Business Corporation Act of 1933 (the 1933 Act) is often viewed as the first modern corporation code and was the basis for the Model Business Corporation Act. Section 86 of the 1933 Act provides that courts of equity shall have full power to liquidate the assets and business of a corporation in an action by a shareholder when it is made to appear:

“(t)hat the acts of the directors or those in control of the corporation are illegal, oppressive, or fraudulent or that corporate assets are being misapplied or wasted.”91

This was the beginning of a burgeoning jurisprudence on the use of the concept of “oppression” in granting relief to minority shareholders in closely \*189 held corporations. This is no doubt the American counterpart of the unfairly prejudicial principle.92 It is interesting that this statute predates the English Companies Act 1948 which introduced the concept of oppression for minority protection.

In 1957, the Illinois Supreme Court in Central Standard Life Insurance Co v Davis, 93 considered the concept of oppression and took a very broad view. It held that the word “oppressive” as used in section of the Business Corporation Act does not carry an essential inference of imminent disaster, and it can contemplate a continuing course of conduct. It stated:

“[W]e reject defendants' argument that the word [oppression] is substantially synonymous with ‘illegal and fraudulent.’ Misapplication of assets or mismanagement of funds are not, as we read the statute, indispensable ingredients of ‘oppressive’ conduct.”

This perspective was again reflected three years later in Gidwitz v Lanzit Corrugated Box Co. 94 It involved a corporation in which the shares were evenly split between two dissident family factions. The president of the corporation had, for almost ten years, operated it as though it were a sole proprietorship. The following factors combined to indicate oppression within the meaning of the statute: officers were hired and salary increases were given without directors' approval; loans were made to corporations in which the president had an interest without director approval; a subsidiary was organised without directors' approval; thematter of payment of dividends had not been presented to the board of directors; and the other family was excluded from all incidents of control and corporate participation. The court pointed out that it was “not necessary that fraud, illegality or even loss be shown to exhibit oppression” and concluded that the cumulative effects of the aforementioned acts, and their indicated continuing nature, established oppression entitling the plaintiffs to liquidation. Although corporate dissolution was deemed to be a drastic remedy, “when oppression is positively shown, the oppressed are entitled to the protection of the law”.95 Misuse of corporate funds or assets has also led to a conclusion of oppression. Thus, where the defendant has taken excessive salaries or misused corporate assets, the courts have found oppressive conduct justifying dissolution.96 And, in a case in which an accounting was sought, the court indicated that the failure “to pay dividends to minority stockholders, due to large salaries drawn by officer-majority stockholders” could constitute oppressive conduct.97

In the United States, following, at least in part, the lead of Illinois, several other jurisdictions have adopted an expansive definition of oppression.98 In White v Perkins, the Supreme Court of Virginia, in terms similar to the Illinois Supreme Court in Central Standard Life Insurance v Davies held that:

“The word ‘oppressive,’ as used in the statute does not carry an essential inference of imminent disaster; it can contemplate a continuing course of conduct. 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’.”99

As did the Illinois court, the Virginia court agreed with the English case of Elder v Elder & Watson Ltd, defining oppression as:

“a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.”

Quoting from another Commonwealth case, the court stated that oppression also means “a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members.”100

Relying upon the foregoing principles and authorities, the court upheld the trial court's determination of oppression on the part of the defendant.101

\*190 Apparently because corporate dissolution has been judicially viewed as a drastic remedy, courts, as evidenced in the several authorities referred to above, have struggled with the concept of oppression and the conduct that is necessary to establish oppression. In order to assist the courts, a substantial number of states enacted statutes providing for alternative remedies to dissolution.102 These statutes generally included the issue of injunctions, prohibitive or mandatory; appointments of provisional directors or temporary custodians; or a judicially supervised buy-out of the minority by the corporation or the controlling shareholders.103 In judicial decisions in those states which have enacted such statutory alternatives, or in those jurisdictions where the courts themselves have recognised their own inherent equity power to fashion alternatives, there is a trend to liberalise the concept of oppression and to make relief more readily available to minority shareholders.

Under the New York State Business Corporation Law,104 as amended in 1979, shareholders with at least 20 per cent or more of all outstanding shares of a corporation,105 who are entitled to vote in an election of directors may present a petition of dissolution on the ground inter alia that the directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders. However, in determining whether to proceed with involuntary dissolution pursuant to this section, the court shall take into account:

• whether liquidation of the corporation is the only feasible means whereby the petitioners may reasonably expect to obtain a fair return on their investment; and

• whether liquidation of the corporation is reasonably necessary for the protection of the rights and interests of any substantial number of shareholders or of the petitioners.

Dissolution is not to be denied merely because it is found that the corporate business has been or could be conducted at a profit. Any other shareholder or shareholders or the corporation may, at any time within 90 days after the filing of such petition or at such later time as the court in its discretion may allow, elect to purchase the shares owned by the petitioners at their fair value and upon such terms and conditions as may be approved by the court. If one ormore shareholders or the corporation elect to purchase the shares owned by the petitioner but are unable to agree with the petitioner upon the fair value of such shares, the court, upon the application of such prospective purchaser or purchasers, shall stay the proceedings and determine the fair value of the petitioner's shares as of the day prior to the date on which such petition was filed, exclusive of any element of value rising from such filing. In critical situations, the court may wind up the company, though in many cases, it is not in the interest of the oppressed minority to have the company wound up.

The extent of judicial discretion

Before the introduction of the concept of unfairly prejudicial conduct, the English courts explored its wide discretion to wind up private companies where it is just and equitable to do in the face of flagrant violations of the principles of fairness.106 A company could be wound up on the just and equitable ground not only where there is an allegation of a breach of rights and obligations defined by the statutes and the articles of association of the particular company but also where there is a breach of equitable right, obligation and legitimate expectation.107 In other words, a company may be wound up on the just and equitable ground notwithstanding that the conduct of the majority may be within the contractual terms of the articles and memorandum of association.108

The English locus classicus is the case of Yenidje Tobacco Co Ltd, Re, 109 where an impasse between a company's only two shareholders was enough to ground its winding up on the just and equitable ground notwithstanding the prosperous viability of the company. It was held that the \*191 company is in substance a partnership and would be wound up on the same grounds as would justify the court in decreeing the dissolution of a partnership. In the words of Lord Cozens-Hardy M.R.:

“Is it possible to say that it is not just and equitable that state of things should not be allowed to continue, and that the court should not intervene and say that this is not what the parties contemplated by the arrangement into which they entered? They assumed and it is the foundation of the whole of the agreement that was made that the two would act as reasonable conduct in every way towards each other, and arbitration was only to be resorted to with regard to some particular dispute between the directors, which could not be determined in any other way. Certainly, having regard to the fact that the only two directors would not speak to each other, and no business which deserves the name of business in the affairs of the company can be carried on, think the company should not be allowed to continue … we are told that we ought not be do it because the company is prosperous, making large profits, rather larger profits before the dispute became so acute … whether such profits would be made in circumstance like this or not, it does not seem to me to remove the difficulties which exists. It is contrary to good faith and essence of the agreement between the parties that the state of things which we fund here should be allowed to continue”.110

While reasonable expectation can be read as underlying the above dicta, the element of mutual confidence111 and reasonable expectation was not fully developed until the case of Ebrahimi v Westbourne Galleries Ltd, Lord Wilberforce held that:

“it would be impossible, and wholly undesirable, to define the circumstances in which the considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is purely a commercial one, of which it can safely be said that the basis of the association is adequately and exhaustively laid down in the articles. The super imposition of equitable considerations requires something more, which typically may include one, or probably more, of the following element:

(i) an association formed or continued on the bases of a personal relationship, involving mutual confidence--this element will often be found where a pre--existing partnership has been converted into a limited company;

(ii) an agreement, or understanding, that or some of the shareholders shall participate in the conduct of the business;

(iii) restriction upon the transfer of the members' interest is the company--so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.”112

While the court alluded to the imposition of equitable principles in these cases, it was not explicit what equitable principles are in issue. It was contented to decide as the justice of the case required. However a rational analysis of the underlying principle will reveal that the court cannot but be alluding to the imposition of fiduciary duties in a private company where any of the identified special elements exist.113 The fiduciary duties arise from the personal relationship of mutual confidence between the shareholders in the company, the commitment of shareholders and the absence of a ready market for the shares should a member decide to divest.

By and large, the categories of conduct within the just and equitable grounds are not, and should not in any case, be regarded as closed. It has indeed been held that such conduct cannot be delineated in categories; the tendency to create categories or headings is wrong; and the general words of the subsection should remain general and not be reduced to the sum of particular instances.114 However, there are certain headings that are well recognised which can be relied upon when attempting to determine the scope of the just and equitable rules.

• where there is a deadlock or dissention among members115 ;

• where there is loss of confidence and probity116 ;

• where the substratum or the main object of the company has gone117 ;

• exclusion from office: where a person is ousted from the management of the company and thereby lost his say in the company's affairs118 ;

• where the company is a bubble: where the petitioner can show that the company in fact is a bubble or that it is a sham designed for fraud or that the company does not exist.119

It is apparent that cases which do not fall into any of these categories may nevertheless ground an action on the ground that the affairs of the \*192 company are being conducted in a manner that is unfairly prejudicial, discriminatory or oppressive of a minority interest. Generally, it appears that all acts of the majority which deprive the company or any of its shareholders of rights or protection under the articles, the provisions of the Companies Acts and the general principles of company law will ground an action under the unfairly prejudicial ground. And it is submitted that even a ratification of the wrong complained of in general meeting using the votes of the majority wrongdoers would not preclude an action under the new provisions. For ratification of an irregular conduct by the majority cannot belie the unfair and prejudicial nature of the act against the minority.120 Just as in the case of the just and equitable rules of winding up, the statutory formulation of the right to petition on the unfairly prejudicial ground, empowers the courts to have regard to wider equitable considerations than the parties' strict legal rights. In A Company, Re, 121 Hoffmann J. said:

“In the case of a small private company in which two or three members have invested their capital by subscribing for shares on the footing that dividends are unlikely but that each will earn his living by working for the company as a director … the members interest as a member who has ventured his capital in the company's business may include a legitimate expectation that he will continue to be employed as a director and his dismissal from that office and exclusion from the management of the company may therefore be unfairly prejudicial to his interest as a member.”122

It may be worrisome that this position will open a floodgate of actions as every shareholder will be able to maintain an action against every director, officer or fellow shareholder who is found wanting of fairness in the management of the company's affairs. The exact distinction between “legitimate expectations” as explored in this case and “equitable considerations” as in Ebrahimi v Westbourne Galleries Ltd are not clear and will be difficult to navigate by counsel in charting his litigation voyage.

This difficulty was addressed by the Law Lords in the House of Lords decision in O'Neill v Phillips. 123 This is a dispute relating to the affairs of a small private company called Pectel Ltd, the articles of which gave the directors an absolute discretion to refuse to register transfers of shares except in limited circumstances. Its 100 issued shares of £1 each were at one time held solely by Mr Phillips who later transferred 25 units to Mr O'Neill, an employee who progressed to become director of the company. In consequent of improved performance, there was an informal arrangement by which Mr Phillips took back seat while O'Neill took over management with a promise of an equal sharing of the profits of the company which was later acted upon. In 1989 Mr O'Neill gave his personal guarantee to support the company's overdraft at its bank, securing it with a charge on his house. The directors then entered into discussions that would concede a further 25 per cent of the shareholding on Mr O'Neill. Even though documentation was drawn up, the agreements were not concluded before things began to fall apart. Eventually, the fortunes of the company took a downturn, which Mr Phillips attributed to Mr O'Neill. He later resumed as managing director and by a series of actions, reduced the powers of Mr O'Neill as signatory to the company accounts; made him a regional manager and then reneged on the existing arrangement of being entitled to 50 per cent of profits.

On a petition by Mr and Mrs O'Neill against Mr andMrs Phillips and the company as respondents, it was contended the conduct of Mr Phillips was unfairly prejudicial of the O'Neills. The trial judge held that there was no invasion of Mr O'Neill's rights as a member of the company, the fact that he already had 25 per cent of the shares being irrelevant. The judge discounted the share option promise of Mr Phillips. The Court of Appeal overruled the trial court. Relying on Ebrahimi v Westbourne Galleries Ltd, 124 it found that the relationship between the parties is in the nature of a quasi-partnership:

“Although the [trial] judge found that there was no concluded agreement as regards the allocation of further shares in the company to Mr. O'Neill in 1990 or at any earlier time, it seems incontrovertible … that Mr. O'Neill did, as he contends, have a legitimate expectation … that he would receive 50 per cent of the voting shares in the company…

What happened was that on 4th November 1991, without either notice or opportunity to defend himself, Mr. O'Neill was told by Mr. Phillips that he was no longer going to pay him the additional 25 per cent of the profits, with the inevitable corollary, implied if not actually expressed, that Mr. O'Neill would receive no further shares. The legal result was, as Mr O'Neill himself put it in his letter of 17th December 1991, to reduce his position to that of an employee and that to which his shareholding ostensibly entitled him. The practical result, as Mr. Phillips himself appears to have recognised on 6th January 1992, was that Mr. O'Neill could no longer remain with the company and was bound to engage \*193 himself elsewhere. Effectively, he was forced out of the company.”125

The Court of Appeal (Nourse, Potter and Mummery L.JJ.) granted the petitioners relief and ordered Mr Phillips to buy Mr O'Neill's shares. Nourse L.J. gave the lead judgment. He said that although there was no concluded agreement about giving him more shares, he had a “legitimate expectation” that he would receive them when the targets were reached.126 Likewise, he had a legitimate expectation of receiving 50 per cent of the profits. It was therefore unfairly prejudicial of Mr Phillips to deny these expectations without giving Mr O'Neill notice and an opportunity to defend himself or offering to buy his shares at a fair value. The Court of Appeal made the important additional finding that Mr O'Neill had been in effect “forced out of the company”.127 In view of the denial of his legitimate expectations, he could no longer be expected to remain with the company and “was bound to engage himself elsewhere”.128

In the House of Lords, the Law Lords were clearly apprehensive of the wide latitude of discretion which the unfairly prejudicial rule confers on judges, as the disparity between the view of the trial judge and Nourse L.J. indicated. Lord Hoffman in addressing the issue said:

“In section 459 Parliament has chosen fairness as the sole criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in In re Saul D. Harrison & Sons Plc. [1995] 1 B.C.L.C. 14, 17-20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J. said in In re J. E. Cade & Son Ltd. [1992] B.C.L.C. 213, 227: ‘The court … has a very wide discretion, but it does not sit under a palm tree.’ Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others (‘it's not cricket’) it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.”129

The learned Justice went on to hold that the concept of what is unfairly prejudicial is circumscribed and defined by the rights assumed by the parties in the memorandum and articles of association as well as equitable principles on the exercise of those rights. He rejected the concept of “some wholly indefinite notion of fairness”.130 He drew inspiration from the judgment of Lord Wilberforce in Ebrahimi v Westbourne Galleries Ltd, 131 in giving content to the concept of “just and equitable” as a ground for winding up. Upon these considerations, the House of Lords reversed the Court of Appeal that Mr Phillips had the right to have resumed management and not to carry through the promise to concede 50 per cent equity interest and profit rights to Mr O'Neill.

This classic judgment of the House of Lords has thus denied English judges of the kind of latitude of discretion that their American counterparts have in exploring the wide frontiers of legitimate expectations. The House of Lords preferred to delineate equitable consideration with the bargain reached in the memorandum and articles of association.132 This same contractual approach was not favoured by the Law Commission's 1997 Report of shareholders' remedies.133 But in the view of the House, the bargain of the shareholders would facilitate some degree of certainty and prevent costly explorative litigations.

The American perspective

Whilst the English statutory and case law principles on unfairly prejudicial conduct apply to corporations generally, they evoke the case of the closely held corporation. The rules on the availability of the remedy are more readily satisfied in the closely held corporation than a public listed one.134 It has earlier been noted how these rules on unfairly prejudicial conduct can be applied to this special case. In the several American states with closely held corporation statutes, special attention is given to the peculiar circumstance of minority shareholders. The basis of the statutory rules are essentially similar to the English just and equitable rules. It reveals how common law courts weaved their reasoning around statutory provisions of a \*194 general nature to arrive at solutions addressing the peculiar problems of the close corporation.

In addressing the peculiar features of the closely held corporation and granting relief to its grieving minority shareholders, a number of American states devised a legal construct, which sought to establish fiduciary obligations between shareholders and the corporation.135 According to Justice Cardoso:

“Many forms of conduct permissible in a workaday world for those acting at arms length are forbidden to those bound by fiduciary ties … Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behaviour”136

And in the words of Tauro C.J. of the Supreme Judicial Court of Massachusetts in Donahue v Rodd Electrotype Co :

“Because of the fundamental resemblance of the close corporation to the partnership, the trust and confidence which are essential to this scale and manner of enterprise, and the inherent danger to minority interests in the close corporation, we hold that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another. In our previous decisions, we have defined the standard of duty owed by partners to one another as the ‘utmost good faith and loyalty'… Stockholders in close corporations must discharge their management and stockholder responsibilities in conformity with this strict good faith standard. They may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation.”137

Under the common law, shareholders generally owe no fiduciary duties to the corporation. This rule is attributable to the concept of corporate governance which separates ownership from control. American jurisprudence recognised that the separation of ownership from control is lacking in the closely held corporation. There the entity is closely knitted, the company is owned by a small group of shareholders who not only control it but also reserve a direct participation in its management to themselves. Often salaries for their roles as officials serve as the main return on their investment as dividend may not always be forthcoming. The US courts are thus inclined to hold that even though a corporation is an embodiment of the corporate form, it actually resembles a partnership and better legal regulation is achieved by ascribing fiduciary duties to the incorporators as if they were partners under a partnership.138

Having imposed fiduciary duties on the members, it was easy to decimate conduct breaching that duty as amounting to oppression of the minority shareholders.139 In a series of decisions, the courts identified some of these conducts such as officers hired and salary increases without directors' approval; loans made to other corporations without directors' approval; exclusion of shareholders from control and participation.140

It appears the earliest statute to provide legal guideline to the courts was also the 1933 Act. The law imposes upon shareholders of closely held corporations the identical fiduciary duties that partners owe to one another in a partnership venture.141 Each shareholder must treat other shareholders with the utmost honesty and fairness in all corporate affairs and is prohibited from engaging in any form of secret dealing.142 Moreover, because every shareholder has the right to participate in the management and control of the corporation, Illinois law prohibits majority shareholders from depriving minority shareholders of their right to participate meaningfully in corporate governance, providing them with broad protections and wide ranging remedies where those in control of a corporation act in an oppressive or unlawful manner. It has been said that this is a statutory recognition of the commercial realities of the closely held corporation. Often the shareholder's only return on his investment is the salary he receives as compensation for a position within the corporation.

In Illinois, the courts made it clear that in construing the Illinois statute, that oppression is, in itself, an independent ground for relief,143 not requiring a showing of fraud, illegality, mismanagement, wasting of assets, nor deadlock, \*195 though these factors are frequently present.144 However the courts would not find that a single act would be sufficient oppressive conduct to warrant dissolution of the company unless there is evidence of irreparable injury, imminent danger of loss or miscarriage of justice.145 In a progressive categorisation of what conduct would constitute oppression for the purposes of judicial relief to minorities in closely held corporations, a test was evolved whereby the courts would protect what is conceived as the reasonable expectation of the minority shareholder.146 Oppression is thus occasioned by any conduct which substantially defeats the reasonable expectation of the minority shareholder when he committed his capital in the company.147 This approach takes into account the fact that shareholders in close corporations may have expectations that differ substantially from those of shareholders of public corporations.

Topper and Keystone Trade & Development Corp, Re 148 was the first case to explore the reasonable expectation test. In proceeding wherein a petitioner, who held one-third interest in two close corporations, sought judicial dissolution on the ground that the two controlling shareholders engaged in “oppressive actions” in discharging petitioner as employee, after his salary had been raised from $30,000 to $75,000 in the first year; removed him as officer and as a co-signatory on the corporate bank accounts, and changed the locks on the corporate offices to exclude him, the Supreme Court, Special Term, New York County, Norman C. Ryp, J., held inter alia that where the undisputed understanding of the three shareholders at time of formation of corporation was such that the two controlling shareholders' actions, in discharging petitioner shareholder, severely damaged his reasonable expectations and constituted a freeze-out of his interest, such actions were to be deemed “oppressive” within meaning of state statute so as to permit him to petition for dissolution. Whether controlling shareholders discharged the third shareholder for cause or in their good business judgment was irrelevant. Reasonable expectations, such as the expectation on part of some participants in small corporations that their interest is to be recognised in form of a salary derived from employment with corporation, constitute the bargain of the parties in the light of which controlling shareholders' subsequent conduct must be appraised in determining whether such conduct is “oppressive” toward a minority shareholder, within the meaning of statute, so as to permit him to petition for judicial dissolution of corporation. It was found as of fact that the petitioner terminated an employer-employee relationship in the drug business of 25 years' duration with Continental Drug Corporation and uprooted himself and transported his family from North Miami, Florida to New York to begin life as an entrepreneur. The petitioner put his life savings into the venture and the reasonable expectation was that this was a means of livelihood rather than a distant investment.149

This test sooner became a significant statutory guideline in granting relief to aggrieved minorities of closely held corporations. State statutes took up the responsibility of expressly providing that in determining whether to order equitable relief, dissolution, or buy-out, the court shall take into consideration the duty which all shareholders in closely held corporations owe one another to act in an honest, fair and reasonable manner in the operation of the corporations and the reasonable expectations of all shareholders as they exist at inception and develop during the course of the shareholders' relationship with the corporation and with each other.150 Many courts look to the reasonable expectations of shareholders to establish “oppression” or similar grounds for involuntary dissolution or another remedy. The highest courts in Alaska, Montana, New York, North Carolina, North Dakota and West Virginia have the reasonable expectation standard for determining oppression.151 First, the plaintiff shareholder must prove that he had one \*196 or more substantial reasonable expectations that were known or assumed by the other shareholders. The existence of these expectations is a question of fact in each case. It gives rise to the fiduciary duty which the courts seek to protect. Secondly, he must show that these expectations had been frustrated. Thirdly, the frustration was not the result of his own fault and was largely beyond his control; and fourthly, the shareholder must show that the specific circumstance warrant some form of equitable relief.

The latitude of the American judges in the construct of what constitutes reasonable expectation bears similar parameters under the English judicial construct until the decision in O'Neill v Phillips. The O'Neill construct places more emphasis on the contractual bargain of the parties as expressed in the articles of association while the former emphasises the equitable circumstance of the dealings between the parties in conducting the affairs of the corporation. Notwithstanding this difference in approach, the equitable reliefs which the courts in both jurisdictions seek to dispense in deserving cases are essentially the same.

Equitable reliefs

The focus of the American Statutes in proffering alternative remedies to dissolution in the closely held corporation, is the need to bring relief to the aggrieved party without necessarily destroying the company. In other words, winding up is a last option in the list of their considerations. The legislatures have endeavoured to give the courts some parameters in the exercise of this discretion. Under the Illinois Business Corporation Act, the court shall consider and may award any of the following remedies by an order for152 :

(1) the performance, prohibition, alteration, or setting aside of any action of the corporation, its shareholders, directors or officers or of any other party to the proceedings;

(2) the cancellation or alteration of any provisions of the articles of incorporation or byelaws;

(3) the removal of any officer or director;

(4) the appointment of an officer or director;

(5) an accounting with respect to any matter in dispute;

(6) the appointment of a custodian to manage the business;

(7) the appointment of a provisional director;

(8) the submission of dispute to mediation or other form of alternative dispute resolution;

(9) the payment of dividends;

(10) the award of damages;

(11) the purchase by the corporation or one or more other shareholders of all of the shares of a petitioning shareholder at a fair value; or

(12) dissolution of the corporation.

In acceding to any of these alternative remedies, the petitioning shareholders need not establish that the defendants' conduct warrants judicial dissolution.153 Thus relief will be had even if the court held the alleged conduct insufficient to justify dissolution. The latitude of discretion vested in the courts under these provisions is comparable to that in s.461 of the English Companies Act which empowers the court where it is satisfied that a petition under s.459 is well founded, to “make such orders as it thinks fit for giving relief in respect of the matters complained of”. In particular, the court's order may: (a) regulate the conduct of the company's affairs in the future; (b) require the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do; (c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct; (d) provide for the purchase of the shares of any members of the company by other members or by the company itself.154 However, it has been noted that the court has no power under s.461 to order a dissolution.155 In contrasting the two judicial systems, similar reliefs are evidently available and obtainable, the one under well-defined statutory guidelines and the other byway of judicial latitude in granting what the court “thinks fit”.

Conclusion

In summary, this comparative legal analysis on English and American laws on the issue of judicial discretion in minority protection litigation involving a private company or closely held corporation reveals the following:

\*197 (1) Notwithstanding the different approaches, which the issue of minority protection has elicited in the two jurisdictions under consideration, the problem remain the same, that is, one of defining the parameters that will guide an aggrieved minority to judicial relief while achieving certainty and predictability in the law. Even though different routes have been followed the same results are achievable under similar circumstances.

(2) The private company is the formal English concept analogous to the American close corporation. The underlying philosophy is a collection of individuals who believe in their collective enterprise relying on the confidence reposed in one another. Collective industry is expected to bear on its success and the unilateral introduction of a new participant by any of the parties thus has the potential of fundamentally rocking the boat. Thus, there are restrictions on membership and share transfers.

(3) Both jurisdictions recognise that general rules of corporate governance may operate to the prejudice of the minority in these types of companies. Which English judicial case law evolves a concept of an incorporated partnership under the rule that a company may be wound up under the just and equitable rule if it is in substance a partnership and circumstance exists by which a partnership may be wound up, American case law guided by statute developed a concept of the reasonable expectation of the shareholders in a close corporation such that where the conduct of any of the parties fundamentally falls in breach of these reasonable expectations, the company may be wound up. In achieving these ends, both jurisdictions employed yardsticks of oppression and unfair conduct having their roots in English equitable principles. While the American judges readily recognised this in the context of fiduciary duties, the English courts, probably taking the underlying concept for granted simply alluded to when it is just and equitable that a company be wound up.156

(4) The concept of “unfairly prejudicial conduct” has been used by English courts to provide judicial remedy outside the common law majority rule and static forms of action. In contemplating and instituting an action to redress a corporate wrong, rather than embarking on strenuous efforts to frame the action as to constitute a fraud on the minority under the second exception to the rule in Foss v Harbottle, an action simply brought under the unfairly prejudicial model will do. Certainly unfairly prejudicial conduct is wider in scope than oppression. In deciding whether an act is unfairly prejudicial, the court will take into account factors such as the petitioner's conduct, any offer made to buy out the petitioner, the motive of the oppressing majority, parties' reasonable expectations, any delay in petitioning and other relevant factors.157 Again an act or omission may found a ground for a petition. Furthermore negligent mismanagement resulting in breach of a director's duty of care,158 could also ground an action under the unfairly prejudicial rules.159 Though a complaint of unfair prejudice can only be made in a member's capacity qua member, the courts have taken a broad view of what, in quasi-partnership cases, may properly be regarded as a petitioner's interests as a member. This is to give effect to Parliament's evident intention that s.459 should have a wider application than s.210 of the Companies Act 1948. That view was expressed by Robert Walker J. in R&H Electric Ltd v Haden Bill Electrical Ltd. 160 This would prove a veritable instrument for addressing injustice and marginalisation in private companies of the quasi partnership types.161 This concept of unfairly prejudicial conduct is already flowing into the laws of several American state jurisdictions, thereby expanding its application beyond the confines of the close corporation.162

(5) Similarly, the concept of fiduciary duties between members in a close corporation has been designed to achieve the same end in the United States. While under the \*198 English formulation “legitimate expectation” do not lead a life of its own,163 the American courts allow it to run widely with the capability of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application.164 The House of Lords decision in O'Neill v Phillips indicates a departure from the American path.

(6) Both the English and American developments have been very favourable to a minority's direct personal action in situations, which would otherwise have demanded a derivative action with all its limitations. It has been observed further that the English remedy under the just and equitable rule is a terminal surgical remedy. It ends in the dissolution of the company. It frees risk capital of all the members and thus reduces national investment averages. While a minority action under the unfairly prejudicial principles gives the courts the latitude to choose between a list of statutory remedies that may be suitable to the particular case, the just and equitable winding up option gives no such room.165 American law in the same context has provided ample remedies for the court's consideration in granting relief to minority shareholder petitioners.

All these demonstrate the dynamism of legal principles and how the law strives, in several jurisdictions, to achieve justice, sometimes using different concepts while recognising the essential core values of investor protection in corporate governance.

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1. See S. K. Miller, “Minority Shareholder Oppression in the Private Company in the European Community: A Comparative Analysis of the German, United Kingdom, and French ‘Close Corporation Problem’ “ (1997) 30 Cornell Int'l L.J. 381.

2. The majority can alter the articles or the memorandum, restrict or abrogate the power of the board of directors, approve or disapprove directors' objectionable conduct, remove directors, appoint new ones or put an end to the company. If directors cannot function because of dissention or a deadlock on the board, it is the majority in the general meeting that prevails.

3. A shareholder's right to vote or otherwise express his wish on the affairs of the company is a proprietary right which he may exercise as he pleases, even in furtherance of a purely selfish end. See M. A. Pickering, “Shareholders' Voting Rights and Company Control” (1965) 81 L.Q.R. 248. See also Pender v Lushington (1877) L.R. 6 Ch. D. 70; North-West Transportation Co v Beatty (1877) 12 App. Cas. 589; Burland v Earle [1902] A.C. 83.

4. See Rayfield v Hands [1960] Ch. 1; Hickman v Kent or Romney Marsh Sheepbreeders Association [1915] 1 Ch. 881; Beattie v E&F Beattie Ltd [1938] Ch. 708.

5. See W. R. Quinlan and J. F. Kennedy, “The Rights and Remedies of Shareholders in Closely held Corporations Under Illinois Law” (1998) 29 Loy. U. Chi. L.J. 585.

6. R. B. Thompson, “The Shareholder's Cause of Action for Oppression” (1993) 48 Bus. Law. 699 at p.703.

7. The closely held corporation was defined in Galler v Galler 203 N.E.2d. 577 (Ill. 1965) as:“one in which the stock is held in a few hands or in a few families, and wherein it is not at all, or only rarely, dealt in by buying or selling”for other definitions of close corporations, see F. O'Neal, Close Corporations (2nd edn, 1971), s.1.07; Hall, “The New Maryland Close Corporation Law” (1967) 27 MD. L. Rev. 341; Jordan, “The Close Corporation Provisions of the New California General Incorporation Law” (1976) 23 UCLA L. Rev. 1094; Oppenheim, “The Close Corporation in California--Necessity of Separate Treatment” (1961) 12 Hastings L.J. 227 at p.228; Wolens, “A Round Peg--Square Hole: The Close Corporation and the Law” (1968) 22 SW. L.J. 811; Comment, “Separate Statutory Treatment of the Close Corporation in California: Progress and Problems” (1975) 27 Hastings L.J. 433 at p.435. See also Dickinson, “Partners in a Corporate Cloak: the Emergence & Legitimacy of the Incorporated Partnership” (1984) 33 Am. U.L. Rev. 559 at p.565; Soderquist, “Reconciling Shareholder's Rights and Corporate Responsibility: Close and Small Public Corporations” (1980) 33 Vand. L. Rev. 1387 at p.1392-93; D. K. Moll, “Shareholder Oppression & Reasonable Expectations: Of Change, Gifts, and Inheritances in Close Corporation Disputes” (2002) 86 Minn. L. Rev. 717.

8. See for example, Illinois Business Corporation Law, 805 ILCS 5/2A.10 and 6.55; and Wisconsin's Close Corporation Statute, 1983 Wis. Laws c.340 (enacted April 23, 1984 and effective May 1, 1984).

9. See s.81 of the Companies Act 1985; also s.74 of the Financial Services and Markets Act 2004.

10. See G. Cynthia, “The Reasonable Expectations of Minority Shareholders in Closely Held Corporations: The Morality of Small Business” (2002) 14 DePaul Bus. L.J. 381.

11. There is no single, generally accepted definition. Some commentators emphasise an “integration of ownership and management” (Note, Statutory Assistance for Closely held Corporations (1958) 71 Harv. L. Rev. 1498, in which the stockholders occupy most management positions. Kruger v Gerth (1965) 16 N.Y.2d 802; 263 N.Y.2d 1; 210 N.E.2d 355 (Fuld J. dissenting). Foreward (1953) 18 Law & Contemp. Prob. 433. See Helmes v Duckworth (1957) 101 U.S. App. D.C. 390; 249 F.2d 482. Others focus on the number of stockholders and the nature of the market for the stock. In this view, close corporations have few stockholders; there is little market for corporate stock. The Supreme Court of Illinois adopted this latter view in Galler v Galler (1965) 32 Ill.2d 16; 203 N.E.2d 577.

12. Above fn.1.

13. According to Lord Wilberforce in Ebrahimi v Westbourne Galleries Ltd [1972] 2 All E.R. 492 at 500, a company may be considered an incorporated partnership if it possesses one or more of these elements, that is: (i) an association formed or continued on the basis of a personal relationship involving mutual confidence; (ii) an agreement or understanding that all or some of the shareholders shall participate in the conduct of the business; (iii) restrictions on the transfer of the members' interest in the company--so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere. See also Leadenhill General Stores Ltd, Re (1971) 115 Sol. J. 202; D. D. Prentice, “Winding Up on the Just and Equitable Ground: The Partnership Analogy” (1973) 89 L.Q.R. 107.

14. Ripin v United States Woven Label Co (1912) 205 N.Y. 442; 98 N.E 855; See also Hornstein, “Stockholders' Agreements in the Closely Held Corporation” (1950) 59 Yale L.J. 1040; Hornstein, “Judicial Tolerance of the Incorporated Partnership” (1953) 18 Law & Contemp. Prob. 435 at p.436.

15. See Surchin v Approved Bus. Mach. Co Inc (1967) 155 Misc., 2d 888; 286 N.Y.S.2d 580 (Sup. Ct).

16. Kruger v Gerth, above fn.11, (1965) 16 N.Y.2d 802 at 805; 263 N.Y.S.2d 1 at 3; 210 N.E.2d 355 at 356.

17. The same approach is referred as the Business Judgment Rule by the American courts. See Note, “Minority Shareholders' Power to Compel Declaration of Dividends in Close Corporations--A New Approach” (1956) 10 Rutgers L. Rev. 723 at p.724.

18. (1912) 35 E.R. 61. See Cooper L.J. in Scottish Insurance Corp Ltd v Wilsons & Clyde Coal Co Ltd [1948] S.C. 360.

19. (1843) 2 Hare 461; 67 E.R. 189; See Mozley v Alston [1847] 1 Ph. 790; 41 E.R. 833; MacDougall v Gardiner (1875-76) L.R. 1 Ch. D. 13 at 25; Lord Jenkins in Edwards v Halliwell [1950] 2 All E.R. 1064 at 1066.

20. See A. J. Boyle, “Corporate Litigation in the US and UK: Minority Shareholders' Remedies” (Cambridge University Press, Cambridge, 2002). Chs 1 and 2 of this work explore the development of the rule and its exceptions.

21. In his researches into the rule in Foss v Harbottle, above fn.19, Professor Wedderburn made an incisive in-depth analysis of the modern law on the right of minorities to institute action against the majority without necessarily seeking the winding up of the company. See “Shareholders Rights and the Rule in Foss v Harbottle ” [1957] C.L.J. 194, continued in [1958] C.L.J. 93.

22. See ss.66 and 369 of the Companies Act 1985.

23. See Pender v Lushington, above fn.3.

24. See Edwards v Halliwell, above fn.19.

25. See Ashbury Railway Carriage & Iron Co Ltd v Riche (1874-75) L.R. 7 H.L. 653; see also ss.263 and 264 of the Companies Act 1985.

26. See Foss v Harbottle, above fn.19.

27. See s.14 of the Companies Act 1985.

28. North-West Transportation Co Ltd v Beatty, above fn.3. Hence a majority in controlmay constitute an unruly horse if not checked and gagged.

29. Austin conceived positive law as simply a command emanating from a sovereign authority under the pain of sanction for disobedience. See J. Austin, “The Province of Jurisprudence Determined (H. L. A. Hart, ed., George Weidenfeld & Nicholson Ltd, 1954); cf. H. L. A. Hart, “The Concept of Law” (Oxford University Press, 1961) and L. L. Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart” (1958) 71 Harv. L. Rev. 630; L. L. Fuller, The Morality of Law (Yale University Press, 1964).

30. See Dworkins, Taking Rights Seriously (Gerald Duckworth & Co, 1978); Dworkins, “Is Law A System of Rules?” in The Philosophy of Law, (R. M. Dworkin ed., Oxford University Press, 1977).

31. The existence of a ready market for the shares of public companies facilitate easy trades and transference of risk if a shareholder is not contented with corporate administration or market performance.

32. Edwards v Halliwell, above fn.19.

33. See Daniels v Daniels [1978] Ch. 406; Estmanco (Kilner House) Ltd v Greater London Council [1982] 1 All E.R. 437.

34. See Cotter v National Union of Seamen [1929] 2 Ch. 58.

35. [1956] 2 All E.R. 518.

36. According to Vinelott J. in Prudential Assurance Co Ltd v Newman Industries Ltd (No.2) [1980] 2 All E.R. 841 it would be wrong to attempt to draw the boundaries limiting the category of cases which permit a minority shareholders action.

37. Hodgson v NALGO [1972] 1 All E.R. 15.

38. Daniels v Daniels, above fn.33; Alexander v Automatic Telephone Co [1900] 2 Ch. 56.

39. Where awrong has been done which affects personal rights qua member of the company. See Pender v Lushington, above fn.3, 80-81.

40. A common action by a group to redress breaches of personal rights common to members of the group.

41. Derivative actions are representative actions by shareholders to enforce corporate rights. The object of such action is to recover damages or property for the company.

42. See the Court of Appeal decision in Wallersteiner v Moir (No.2) [1975] Q.B. 373.

43. These basic features of the distinction between a derivative or representative action and a direct personal shareholder action are part of the American common law on the subject. See Litwin v Allen (1940) 25 N.Y.S.2d 667 (N.Y. Sup. Ct); Cohen v Beneficial Indus. Loan Corp (1949) 337 U.S. 541; Aronson v Lewis (1984) 473 A.2d 805 (Del.); Baker v Pratt (1986) 222 Cal. Rptr 253 (Cal. Ct. App.). Also see generally, American Law Institute, Principles of Corporate Governance: Analysis and Recommendations (Proposed Final Draft, 1992), s.7.01; See also D. A. DeMott, “Shareholder Derivative Actions: Law and Practice” (1986) 1992 Supplement.

44. See Alexander v Automatic Telephone Co, above fn.38; Menier v Hooper's Telegraph Works (1873-74) L.R. 9 Ch. App. 350; See also Wedderburn, above fn.21.

45. See Prudential Assurance Co Ltd v Newman Industries Ltd (No.2) [1982] Ch. 204; [1982] 1 All E.R. 354.

46. ibid.

47. Where it is proved that the company cannot practically call a meeting to redress a wrong done or being done to it, the court will generally grant leave to a minority to bring a derivative action; above fn.37.

48. Above fn.42; the Court of Appeal considered this constraint and held that in appropriate cases, the shareholder should be indemnified by the company against the costs of bringing the action on the company's behalf. See para.19.9(7) of the English Civil Procedure Rules 1998.

49. See A. J. Boyle, “The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American Legal History” (1965) 28 M.L.R. 317; D. D. Prentice, “The Protection of Minority Shareholders” (1972) 25 C.L.P. 124; K. Rajak, “The Oppression of Minority Shareholders” (1972) 35 M.L.R. 156.

50. See Jenkins Report of the Company Law Committee, Cmnd.1749 (1962); See also the Interim Report of the Select Committee on Company Law, Ontario Legislative Assembly 1967, 5th session 27th Legislature, (15 & 16 Eliz. 2, c.VII) s.4.1-3.

51. Jenkins Report, above fn.50, para.206.

52. In Allied Ready Mix Co ex rel. Mattingly v Allen 994 S.W.2d 4 at 8 (Ky. Ct. App. 1998), the business judgment rule was defined by the court as:“a presumption that in making a business decision [not involving self interest], the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” (quoting Aronson v Lewis 473 A.2d 805 at 812 (Del. 1984)).

53. Wheeler v Pullman Iron & Steel Co (1892) N.E. 420.

54. (1855) 59 U.S. (18 How.) 331.

55. W. M. Fletcher et al. , Fletcher's Cyclopedia of the Law of private Corporations, (perm ed. rev. vol. 1995) s.5940. The first fear was that corporations disputing with shareholders in the state of incorporation might collude with foreign shareholders to litigate in the federal courts via diversity jurisdiction--thus removing the litigation from “their natural, their lawful, and their appropriate forum.” Hawes v City of Oakland 104 U.S. 450 at 452 (1881). Second was the fear that unconstrained minority shareholders could undermine the principle that the board of directors and majority shareholders should be the corporation's decision-makers--including making the decision of whether or not to initiate any litigation. Daily Income Fund Inc v Fox 464 U.S. 523 at 530 (1984).

56. W. M. Fletcher et al. , Fletcher Cyclopedia of the Law of Private Corporations (perm. edn, rev. vol., 1995), ss.5940-5941.10.

57. See B. T. Ferrell, Note, “A Hybrid Approach: Integrating the Delaware and the ALI Approaches to Shareholder Derivative Litigation”, (1999) 60 Ohio St. L.J. 241 at p.265 (citing Aronson v Lewis, above fn.43; B. Stanfield, “For Better Or For Worse?: Marriage Of The Texas And Model Business Corporation Acts' Derivative Action Statutes And What It Means For Corporations” (2004) 35 Tex. Tech L. Rev. 347; See also the Investment Company Act 1940.

58. Model Business Corporation Act Ann. ss.7.40-7.47 (1999).

59. In Richardson v Arizona Fuels Corp. 614 P.2d 636 (Utah 1980), the Utah Supreme Court outlined the legal differences between derivative actions and those brought by shareholders suing directly in their individual capacities. Richardson has been repeatedly cited in Utah cases to delineate the difference between direct and derivative claims; See also J. W. Welch, “Shareholder Individual and Derivative Actions: Underlying Rationales and the Closely Held Corporation” (1984) 9 J. Corp. L. 147 at p.154.

60. (1980) 486 F.Supp.1; 788 D.C.Conn.

61. See also Halsted Video Inc v Guttillo 115 F.R.D. 177 (N.D. Ill. 1987).

62. Federal r.23.1 states that: In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have.

63. See federal courts hearing derivative claims based on state law must apply state demand requirements: see Kamen v Kemper Fin. Services 111 S. Ct. 1711 at 1716 (1991). The extent of the right therefore varies from state to state. See Del. Code Ann. tit. 8, 327 (1991) (providing standing requirement); Del. Ch. Ct. C.P.R. 23.1 (providing demand requirement).

64. See Lewis v Anderson 477 A.2d 1040, 1046 (Del. 1984)

65. See Del. Code Ann. tit. 8, 327 (1991), s.327; Helfand v Gambee 136 A.2d 558, 559-60 (Del. Ch. 1957).

66. Kamen v Kemper Fin. Services Inc, above fn.53, 1716-1717.

67. Maki v Estate of Ziehm 391 N.Y.S.2d 705, 707 (App. Div. 1977) (holding that the claim of misappropriation of corporate funds may not be addressed in a direct action by a stockholder, but must be brought in the name of the corporation, since the damages, if any, belong to the corporation).

68. See W. M. Fletcher et al. , Fletcher Cyclopedia of the Law of Private Corporations 59.11.50 (perm. edn, rev. vol., 2000). See also Crosby v Beam 47 Ohio St. 3d 105, 548 N.E.2d 217 (1989); Aurora Credit Servs. Inc v Liberty W. Dev. Inc 970 P.2d 1273, 1275 (Utah 1998); Donahue v Rodd Electrotype Co of New Eng 328 N.E.2d 505, 512 (Mass. 1975); Wilkes v Springside Nursing Home Inc 370 Mass. 842, 353 N.E.2d 657 (1976).

69. American Law Institute, Principles of Corporate Governance: Analysis and Recommendations 7.01 cmte. (1994).

70. Adopted by the Pennsylvania Supreme Court in Cuker v Mikalauskas 547 Pa. 600, 692 A.2d 1042 (1997).

71. The English approach of entertaining minority actions and treating the private company as a quasi partnership is further discussed below.

72. 110 Idaho 510, 716 P.2d 1282 (1986).

73. Gower's Principles of Modern Company Law (5th edn, 1992), p.670.

74. The concept was introduced by s.75 of the English Companies Act 1980 as a way of providing the oppressed minority easy access to the courts.

75. This clause was introduced into the section by the Companies Act 1989, thereby bringing corporate wrongs within the acts that may ground an action under the section.

76. It is not an entirely new remedy. In s.210 of the Companies Act 1948, any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) may seek remedial relief from the courts.

77. The line between “oppressive” and “unfairly prejudicial” conduct is thin. Every oppressive act would certainly be “unfairly prejudicial” but “unfairly prejudicial conduct” may not necessarily be oppressive. The former is thus a more liberal term. For efficacy of application, both concepts are usually taken into consideration when courts examine the right of a petitioning minority to judicial relief.

78. Above fn.35.

79. [1958] 3 All E.R. 66; [1959] A.C. 324.

80. See Gower and Davies, Principles of Modern Company Law (17th edn, Sweet &Maxwell, 2003), p.512. Hoffman L.J. in Saul D Harrison & Sons Plc, Re [1995] 1 B.C.L.C. 14 affirmed that:“enabling the court in an appropriate case to outflank the rule in Foss v Harbottle was one of the purposes of the section”.

81. Above fn.36; reversed [1982] 1 All E.R. 354.

82. See Estmanco, above fn.33; Brown v British Abrasive Wheel Co Ltd [1919] 1 Ch. 290; Omisade v Akande [1987] 2 NWLR Pt 55, 158.

83. For example, acts of gross and self serving negligence: See S. Griffin, “Negligent Mismanagement as Unfairly Prejudicial Conduct” (1992) 108 L.Q.R 389; in Elgindata (No.1), Re [1991] B.C.L.C. 959, it was held that negligent or incompetent management of a company's business by directors constituted conduct which is unfairly prejudicial to the interest of the members.

84. See R.A. Noble & Sons (Clothing) Ltd, Re [1983] B.C.L.C. 273; Cumna Ltd, Re [1986] B.C.L.C. 430.

85. See recent English decisions on similar provisions in the cases of A Company (No.003160 of 1986), Re [1986] B.C.L.C. 4391 and Cumna Ltd, Re, above fn.84, both of which held that the exclusion of a minority member from management will ground an action alleging unfair prejudice.

86. See A Company (No.00477 of 1986), Re [1986] B.C.L.C. 376; and Hoffman J. in A Company (No.8699 of 1985), Re [1986] B.C.L.C. 382 at 387; A Company Ex p. Glossop, Re [1988] 1 W.L.R. 1068. See also, Jenkins Report, above fn.50, para.206.

87. Gower and Davies, above fn.80, pp.512, 516.

88. s.461(1).

89. Above fn.54.

90. See Wheeler v Pullman Iron & Steel Co 143 Ill. 197; 32 N.E. 420.

91. Ill.Rev. Stat.1955, Ch.32, para.157.86; s.86(a)(3) of the 1933 Act was the basis for s.90(a)(2), later s.97(a)(2), and finally s.14.30(2)(ii) of the various versions of the Model Act, and introduced the concept of oppression as a basis for liquidation.

92. S. K. Miller, “How should U.K. and U.S. Minority Shareholder Remedies for Unfairly Prejudicial or Oppressive Conduct be Reformed?” (1999) 36 Am. Bus. L.J. 579.

93. 10 Ill.2d 566; 141 N.E.2d 45 (1957).

94. 20 Ill.2d 208; 170 N.E.2d 131.

95. See also, Compton v Paul K. Harding Realty Co 285 N.E.2d 574, 581 (Ill. App. Ct. 1972) where the defendant was charged with managing the corporation to the exclusion of the plaintiff and with withdrawing an excessive salary, the court stated that “an arbitrary, overbearing and heavy-handed course of conduct … justif[ied] the finding of oppression…”. In examining the record, the court stated:“Specific instances of such evidence include testimony regarding the failure of defendant Harding to call meetings of the board of directors or to consult with plaintiff Compton regarding management of corporate affairs, his imperious attitude when questioned about his salary and his dilatory reaction to the plaintiffs' requests.”

96. Ross v 311 North Central Ave Bldg Corp (1970) 264 N.E.2d 406; Nortzke v Art Gallery Inc (1980) 84 Ill. App.3d 294; 405 N.E.2d 839.

97. Gray v Hall (1973) 10 Ill. App.3d 1030; 295 N.E.2d 506.

98. See Conn. Gen. Stat. Ann. s.33-382(b) (West Supp. 1970); D.C. Code s.29-931b(a) (1973); Fla. Stat. Ann. s.607.274 (West 1977); Ill. Ann. Stat. Ch. 32, s.157.86 (Smith-Hurd, 1979 Supplement); Ind. Code. Ann. s.23-1-7-2 (Burns 1972); Me. Rev. Stat. Ann. tit.13-A, s.1115 (1974); Minn. Stat. Ann. s.301.50 (West 1969); N.H. Rev. Stat.Ann. s.294.97 (1978);N.C. Gen. Stat. s.55-125 (1975); Pa. Stat. Ann. tit.15 s.2107; R.I. Gen. Laws s.7-1.1-90 (1970); Tenn. Code Ann. s.48-1008 (1979); W.Va. Code s.31-1-134 (1975). Note however that till date a few states remain without a statutory prescription of oppression but have analogous concepts which have been developed to encompass oppression.

99. (1972) 213 Va. 129 at 134; 189 S.E.2d 315 at 319.

100. Above fn.79, 86.

101. The following year, the Oregon Supreme Court, in Baker v Commercial Body Builders Inc, relied on similar authority and adopted the same rhetoric in defining oppression.

102. See s.825(2)(c) of the Michigan Corporation Code, Mich. Comp. Laws Ann. s.450.1825(2)(c) (West, 1973, 1988 Supplement) which gives a circuit court the power to grant relief other than dissolution when the acts of those in control are oppressive. See also statutes in Alabama (Ala. Code (1987), Georgia (Ga. Code Ann. 1977, 1988 Supplement), Hawaii (Haw. Rev. Stat. 1985, 1988 Supplement), Mississippi (Miss. Code Ann., 1988 Supplement), Tennessee (Tenn. Code Ann. 1988), and Virginia (Va. Code Ann. 1985).

103. See Ala. Code, ss.10-2A-309; Georgia (Ga. Code Ann. ss. 22-703), Hawaii (Haw. Rev. Stat. s.415-96); Mississippi (Miss. Code Ann. s.70-4-14.32); Tennessee (Tenn. Code Ann. s.48-24-303); and Virginia (Va. Code Ann. s.13.1-748).

104. ss.1104-a, 1111(b)(3) and 1118.

105. Except a corporation registered as an investment company under the Investment Company Act 1940, the shares of which are not listed on a national securities exchange or regularly quoted in an over-the-counter market.

106. Insolvency Act 1986, s.122(1)(g) empowers a shareholder to apply to court for an order that his company be wound upon the ground that it is just and equitable to do so.

107. See B. H. McPherson, “Winding Up On the Just and Equitable Ground” [1964] 27 M.L.R. 282; See also Huberman, “Compulsory Winding Up--The Just and Equitable Rule” (1967) 5 Albert. L. Rev. 135.

108. See Lord Wilberforce exposition of the principle in Ebrahimi, above fn.13, [1973] A.C. 360 at 500.

109. [1916] 2 Ch. 426.

110. ibid. , 431-433.

111. See Loch v John Blackwood Ltd [1924] A.C. 783.

112. [1973] A.C. 360 at 500.

113. See per Lord Wilberforce in Ebrahimi, above fn.13, [1973] A.C. 360 at 500.

114. In Davis and Collett Ltd, Re [1935] Ch. 693 at 698, the court held that conduct as would justify a winding up order should not be construed ejusdem generis those listed in s.408 but that the words “just and equitable” be construed in the widest possible terms as to what justice and equity would require. See also Straw Products, Re [1941] V.L.R. 222 at 223.

115. Yenidje Tobacco Co Ltd, Re [1916] 2 Ch. 426 at 430; Davis and Collett Ltd, Re, above fn.114.

116. Above fn.11.

117. German Date Coffee Co, Re (1881-82) L.R. 20 Ch. D. 169.

118. See Lundie Bros, Re [1965] 1 W.L.R. 1051; Ebrahimi, above fn.13, [1973] A.C. 360.

119. See Thomas Edward Brinsmead & Sons, Re [1897] 1 Ch. 406.

120. See per contra : Hogg v Cramphorn [1966] 3 All E.R. 420; See also K. W. Wedderburn, “Shareholders' Control of Directors' Powers: A Judicial Innovation” (1967) 30 M.L.R. 77.

121. A Company, Re, above fn.86.

122. A Company, Re, above fn.86, 379; see also Vinelott J. in A Company, Re [1983] 2 All E.R. 854 at 859; R.A. Noble & Sons (Clothing) Ltd, Re, above fn.84; OC (Transport) Services Ltd, Re [1984] B.C.L.C. 251; A Company Ex p. Glossop, Re, above fn.86.

123. [1999] 1 W.L.R. 1092.

124. Ebrahimi, above fn.13, [1973] A.C. 360 at 379.

125. [1997] 2 B.C.L.C. 739 at 767.

126. ibid.

127. Above fn.123.

128. Above fn.123.

129. Above fn.123, 1098.

130. Above fn.123, 1099.

131. Ebrahimi, above fn.13, [1973] A.C. 360 at 379

132. See Bamber v Eaton [2004] EWHC 2437; [2005] 1 All E.R. 820 following the bargain principle. In Larvin v Phoenix Office Supplies Ltd [2002] EWCA Civ 1740; [2003] 1 B.C.L.C. 76, it was held inter alia that the purpose of s.459 of the 1985 Act was to protect shareholders against the breach of the terms on which they agreed that the affairs of the company should be conducted, either through the articles of association or some collateral agreement.

133. Cm.3769 (1997), para.4.11. The Commission reasoned that such an outline of the concept of unfairness might unduly limit its conduct and that “conduct which would appear to be deserving of a remedy may be left unremedied…” (p.43, para.411).

134. See B. R. Cheffins, Company Law (Clarendon Press, Oxford, 1997), pp.463-466.

135. See L. E. Mitchell, “The Death of Fiduciary Duty in Close Corporations” (1990) 138 U. Pa. L. Rev. 1675.

136. Per Justice Cardoso explaining the basis of fiduciary duty between partners in Meinhard v Salmon 164 N.E 545, 546 (N.Y.1928).

137. (1975) 328 N.E.2d., 505 at 592-593; See also Cardullo v Landau 329 Mass. 5, 8, 105 N.E.2d 843 (1952); DeCotis v D'Antona 350 Mass. 165, 168, 214 N.E.2d 21 (1966).

138. See Hagshenas v Gaylord 557 N.E.2d 316 (Ill. App. Ct. 1994); Rexford Rand Corp v Ancel 58 F.3d 1215 (7th Cir. 1995); Illinois Rockford Corp v Kulp 242 N.E.2d 228 (Ill. 1968).

139. Baker v Commercial Body Builders Inc 507 P.2d 387 (Ore. 1973).

140. Gidwitz v Lanzit Corrugated Box Co 170 N.E. 2d 131 (Ill. 1960).

141. See Rambusch, Re 533 N.Y.S.2d 423 (N.Y.App. Div. 1988) (New Jersey); Donahue v Rodd Electrotype Co of New England Inc 328 N.E.2d 505 (Mass. 1975); Broccoli v Broccoli 710 A.2d 669 (R.I.1998).

142. See Bakalis v Bressler 115 N.E.2d 323 (Ill. 1953); Mandell v Centrum Frontier Corp 407 N.E.2d 821 (Ill. App. Ct. 1980); See also W. R. Quinlan and J. F. Kennedy, above fn.5; T. M. Madden, “Oppression of Minority Shareholder Rights in Closely Held Corporations” (2002) 50 Apr. R.I. Bar. Jor. 19.

143. The Minnesota statute refers to acting:“fraudulently, illegally, or in a manner unfairly prejudicial toward one or more shareholders in their capacities as shareholders, directors, or officers or as employees of a closely held corporation”.See Minn. Stat. Ann. s.302A.751 (West, 1992, Supplement). See also Mo. Ann. Stat. s.351.850 (Vernon, 1991).

144. The rule set out in many jurisdictions is:“The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors.”See Southern Pac. Co v Bogert (1919) 250 U.S. 483; 39 S.Ct. 533; 64 L.Ed. 1099. Accord, e.g., Jones v H.F. Ahmanson & Co (1969) 1 Cal.3d 93; 81 Cal. Rptr. 592; 460 P.2d. 464; Allied Chem. & Dye Corp v Steel & Tube Co of America (1923) 14 Del. Ch. 1; 120 A. 486; Kavanaugh v Kavanaugh Knitting Co (1919) 226 N.Y. 185; 123 N.E. 148; Zahn v Transamerica Corp (1947) 162 F.2d 36 (3rd Cir.). See generally Berle, “ ‘Control’ in Corporate Law” (1958) 58 Col. L. Rev. 1212 at p.1222.

145. See Jesser v Mayfair Hotel 316 S.W.2d 465 (Mo. 1958); Central Standard Life Ins. Co v David 141N.E. 2d 45 (Ill. 1957).

146. See C. S. Grandfield, “The Reasonable Expectations of Minority Shareholders in Closely Held Corporations: TheMorality of Small Businesses” (2002) 14 DePaul Bus. L. J. 381; D. K. Moll, “Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective” (2000) 53 Vand. L. Rev. 749.

147. In Compton v Paul K. Harding Realty Co 285 N.E.2d 574 (Ill. App. Ct. 1972), it was the dominance of corporate management evidenced by a failure to call board meetings and to consult with the minority; In Wilkes v Springside Nursing Home Inc 353 N.E.2d 657 (Mass. 1976), it was a freeze-out technique whereby a 50% shareholder denies the other access to corporate books and records and unilaterally amends byelaws to admit a long time friend to the board of directors; See also Notzke v Art Gallery Inc 405 N.E.2d 839 (Ill. App. Ct. 1980); Gidwitz v Lanzit Corrugated Box Co 170 N.E.2d 131 (Ill. 1960); Kalabogias v Georgou 627 N.E.2d 51 (Ill. App. Ct. 1993); Michelson v Duncan 407 A.2d 211 (Del. 1979).

148. (1980) 433 N.Y.S.2d 359.

149. See also Pedro v Pedro 489 N.W.2d 798 (Minn. App. Ct. 1992).

150. See Minn Stat. Ss.302A.751, subd. 3a (2000); N.D. Cent. Code ss.10-19.1-115.4 (2000); 805 ILL. Comp. Stat. Ann. 5/12.56(4)(d) (West 2000).

151. Above fn.6, pp.715-724.

152. See MO. Rev. Stat. s.351.494 (1994).

153. See Schirmer v Bear 672 N.E.2d. 1171 (Ill. 1996).

154. See the following American cases where similar reliefs have been granted applying the Business Corporation Statutes of the States: Steelman v Mallory, above fn.72; Schumacher v Schumacher 469 N.W.2d 793 (N.D. 1991); Horizon House-Microwave Inc v Bazzy 486 N.E.2d. 70 (Mass. App.Ct. 1985). See also W. H. Wade and L. Betram, “The Development of the Shareholder's Direct Action Damage Remedy” (1992) 29 GA. St. Bar J. 195.

155. See Brenda Hannigan, Company Law (LexisNexis, 2003), p.429.

156. cf. the dicta of Lord Wilberforce in Wbrahimi, above fn.122, with Norman Ryp C.J. in Topper & Keystone Trade & Development Corp. (1980) 433 N.Y.S. 2d, 359, above fn.148

157. See R.A. Noble & Sons (Clothing) Ltd, Re ; and Cumna Ltd, Re, both above fn.84.

158. For example, acts of gross and self serving negligence: See S. Griffin, above fn.83.

159. See Elgindata Ltd, Re, above fn.83.

160. [1995] 2 B.C.L.C. 280 at 292-294. The decision fully considered the cases of A Company (No.00477 of 1986), Re, above fn.86, (Hoffmann J.), Tay Bok Choon v Tahansan Sdn Bhd [1987] 1W.L.R. 413 (PC) and JE Cade & Son Ltd, Re [1992] B.C.L.C. 213 (Warner J.).

161. See recent English decisions on similar provisions in the cases of A Company (No.003160 of 1986), Re, above fn.85, and Cumna Ltd, Re, above fn.84, both of which held that the exclusion of a minority member from management will ground an action alleging unfair prejudice; while in Elgingata Ltd, Re, above fn.83, negligent or incompetent management of a company's business by directors constituted conduct which is unfairly prejudicial to the interest of the members.

162. Above fnn.103 and 104.

163. Above fn.123, 1098.

164. Above fn.136; Donahue v Rodd Electrotype Co, above fn.68.

165. Above fn.123.