# THE UNDERLYING CONCERN OF SECTION 181 OF THE COMPANIES ACT, 1965*

## 1. *APOLOGIA*

In recent years there have been two important decisions on the jurisdiction of the court under the relevant equivalent of section 181 of the Malaysian Companies Act, 1965. One case was decided in the New Zealand Court of Appeal[1] and the other in the High Court of Australia.[2] Section 181, popularly known as the "oppression" section, confers on the court the power to grant such orders as it thinks fit with the view of bringing to an end certain conduct. This conduct is defined as "oppressive" or "in disregard of ... interests as members" for the conduct of the affairs of the company or the exercise of the powers of the directors, and "unfairly discriminates against or is otherwise prejudicial" for an "act of the company" or "resolution of the members".

The purpose of this essay is to establish what was decided in the two cases and to explore their persuasiveness in Malaysia for the interpretation of section 181. Two matters call for particular attention:

1. Differences in the statutes. Whilst the three sections[3] share the same sources, concepts and terminology,[4] there are significant variations in their construction.
2. The existence or otherwise in Malaysian company law of doctrines which would make the cases irrelevant: The student

*The author gratefully acknowledges the help of Associate Professor P. Balan in the preparation of this essay. It nonetheless remains, in all respects, the author's own.

[1] *Thomas* v. *H.W. Thomas Ltd.* (1984) 2 A.C.L.C. 610.

[2] *Wayde* v. *New South Wales Rugby League Ltd* (1985) 61 A.L.R. 225.

[3] Section 209 Companies Act 1955 (New Zealand); section 320 Companies Act 1981 (Cth.)(Australia), this legislation being that adopted in each of the Australian states and hereafter in this essay collectively referred to as the "Companies Code"; section 181 Companies Act, 1965 (Malaysia).

[4] All reflect the influence of the Jenkins Committee (*Report of the Company Law Committee*, Cmnd. 1749) which recommended (para. 204) the terminology of "unfairly prejudicial" replace the old language of "oppression". For a discussion of the background to

should be wary of importing authorities without serious consideration. In particular, the Specific Relief Act, 1950 may be interpreted as allowing a degree of interference, unknown in Australia and New Zealand, in the internal management of companies. The resulting question is whether the Companies Act, 1965 contemplates or is even consistent with such interference.

The two cases are interesting in themselves but this, in the context of a reasonably efficient and learned legal profession, and the other writings on these cases,[5] is not sufficient reason for this essay. There are two cogent reasons for proceeding.[6] First, the rights of shareholders need as much publicity as possible now and in Malaysia. "Now" because the current recession is diverting the resources available for the protection of shareholders into the *ex post facto* world of liquidations and windings up. The shareholders of viable companies are being left more to their own devices. "Malaysia" because there appears to be a reluctance amongst shareholders, or, more precisely, stochastic residual cash flow recipients,[7] to protect their own interests. Publicity is one means of encouraging the pursuit of self-interest through court action. So also is clarification of exactly what protection is available.

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the British, Australian and New Zealand sections, see Ian Cameron, "Rugby League Footballers and 'Oppression or Injustice'", (1985) 8 *U.N.S.W. Law Journal* 236. The Malaysian section was provided when the Companies Act 1965 was enacted. This was drawn on the pattern of the Australian Uniform Companies Act 1961 of the various states of Australia, but with amendments as appropriate due to the lapse of time and local conditions. One of the former was the adoption of the Jenkins Committee recommendations.

[5] Ian Cameron, *op. cit.*; J.F.Corkery, "Oppression or Unfairness by Controllers — What Can a Shareholder Do About It? An Analysis of S.320 of the Companies Code", (1985) 9 *Adel. L.R.* 437. For an excellent article written prior to the cases, see G.Shapira, "Minority Shareholders' Protection — Recent Developments", (1982) *N.Z.U.L.R.* 134. See also David A. Wishart, "A Fresh Approach to Section 320", (1987) *U.W.A.L.R.* 94, where the cases are discussed in the context of a (much) more theoretical approach to solving the difficulties of the Australian equivalent of section 181 (section 320 of the Companies Code).

[6] In any event there have been no writings on the Malaysian section since the Privy Council decision in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1978] 2 M.L.J. 227.

[7] Section 181 refers to debentureholders as well as shareholders as being able to claim under the section. This curious provision is without precedent. To the writer's knowledge no such creditor has petitioned under the section. This is not surprising when the economics of the various relationships are understood. Shareholders are the stochastic

## 2. *THE CASES*

### 2.1. **New Zealand: *Thomas* v. *H.W.Thomas Ltd.***

The power of the Court under section 209 of the Companies Act 1955 (N.Z.) to grant relief to a member of a company is limited to situations where

> the affairs of the company have been are being or are likely to be conducted in a manner that is or any act or acts of the company have been or are or are likely to be oppressive, unfairly discriminatory or unfairly prejudicial to him [the member] (whether in his capacity as member or in any other capacity)[8]

and if

> the Court is of the opinion that it is just and equitable to do so, the Court may make such orders as it thinks fit.[9]

In contrast to the Malaysian provisions, the conduct of the affairs of the company and single acts of the company are treated together, there is no test referring to "disregard of his or their interests", and "prejudicial" is qualified by the word "unfairly".

Under section 209(2) of the New Zealand statute, quoted above, the Court may only make orders if it thinks it just and

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residual cash flow claimants, therefore bear the risk of a reduction of cash flow. Creditors, whilst the company is a going concern, receive a fixed cash flow, their interest. Thus shareholders are interested in decisions which affect the cash flow. Creditors are only interested in decisions which may cause the cash flow to terminate altogether. This is the situation of liquidation. But prior to liquidation a debentureholder will have been able to have a receiver appointed and will have, as a consequence, much more effective rights over management. Thus there is no incentive to use section 181. The provision for debentureholders to apply under the section was probably inserted because it was felt that in closed companies (small ones with no market for their shares where the status of the various people involved is usually confused) people suffer because of their status as debentureholder. But, again, the weapons of a party contracting with the company, which is the position of a debentureholder, are more powerful than even section 181. For a similar analysis of the relative position of different classes of shareholders, see the Singapore case of *Re S.Q.Wong Holdings (Pte.) Ltd.* [1987] 2 M.L.J. 299.

[8] Section 209(1).

[9] Section 209(2).

equitable to do so. This raises two questions unique to the New Zealand provision.[10] Is it an additional limitation on the power of the Court, so that the Court must first establish the character of the behaviour under section 209(1) and then decide whether or not to grant an order under section 209(2)? Secondly, are the words of subsection (2) to be interpreted in the light of the "just and equitable" ground for winding up?

In *Thomas* v. *H.W.Thomas Ltd.*,[11] a third generation family private company carried on a carting and building material supply business. The company was run conservatively so that its profits were much lower than they might have been. Power was effectively centralized in a managing director but members of the family employed by the company held few shares in their own right. A non-working member of the family, the plaintiff, succeeded to one third of the issued capital of the company. The plaintiff wanted to realize higher returns on the assets he had inherited. At a general meeting he tried to have the policies of the company changed, but failed. He gave notice, after one year, that he wished to sell his shares, but nothing formal ensued. A further eighteen months later, he issued a petition seeking that the court either order that his shares be purchased or the affairs of the company be otherwise regulated. In the New Zealand High Court, Ongley J. dismissed the application, but his judgement added little to what had been said in earlier cases.[12] The Court of Appeal, however, reviewed the section at length in upholding the opinion of Ongley J. Richardson J. gave the leading judgement. He first looked at the history of the oppression section and its interpretation, concluding, as would be expected, that Parliament intended the new wording to grant petitioners "a wider base on which to found a complaint".[13] He was of the opinion that each of the criteria, "oppressive", "unfairly discriminatory" and "unfairly prejudicial", was not meant to be a distinct alternative but that each formed a part of a "wider global expression". The "underlying concern" of all three was:

[10] Ian Cameron, *op.cit.*, p.241.

[11] (1984) 2 A.C.L.C. 610.

[12] In particular, *Re a Company* [1983] 2 All E.R. 36.

[13] *Thomas* v. *H.W. Thomas Ltd.* (1984) 2 A.C.L.C. 610, 616.

> that conduct of the company which is unjustly detrimental to any member of the company whatever form it takes and whether it adversely affects all members alike or discriminates against some only is a legitimate foundation for a complaint under sec. 209. The statutory concern is directed to instances or courses of conduct amounting to an unjust detriment to the interests of a member or members of a company. It follows that it is not necessary for a complainant to point to any actual irregularity or to an invasion of his legal rights or to a lack of probity or want of good faith towards him on the part of those in control of the company.[14]

This focuses the three criteria onto the justice and equity of the particular case and links subsection (1) of section 209 of the New Zealand act with subsection (2).[15] Richardson J. felt that subsection (2) called for an assessment of the position of the company according to the expectations analysis of Lord Wilberforce in *Ebrahimi* v. *Westbourne Galleries Ltd.*[16] to determine the parameters of what is unfair or unjust under subsection (1):

> Fairness cannot be assessed in a vacuum or simply from one member's point of view. It will often depend on weighing conflicting interests of different groups within the company. It is a matter of balancing all the interests involved in terms of the policies underlying the companies legislation in general and sec. 209 in particular: thus to have regard to the principles governing the duties of a director in the conduct of the affairs of a company and the rights and duties of a majority shareholder in relation to the minority; but to recognize that sec. 209 is a remedial provision designed to allow the court to intervene where there is a visible departure from the standards of fair dealing; and in the light of the history and structure of the particular company and the reasonable expectations of the members to determine whether the detriment occasioned to the complaining member's interests arising from the acts or conduct in that way is justifiable.[17]

[14] *Ibid.* 617.

[15] Ian Cameron suggests there is confusion in the judgement as to whether subsection (1) is assimilated to subsection (2) or *vice versa; op. cit.*, 242.

[16] [1973] A.C. 360, 379.

[17] *Thomas* v. *H.W. Thomas Ltd.* (1984) 2 A.C.L.C. 610, 618.

Applying his reasoning to the case at hand, Richardson J. felt that the plaintiff was entitled to apply commercial criteria in determining what was unfairly detrimental to himself. Although it was a family company to which equitable considerations should apply, it was not a company which employed all or even a substantial number of its members. On a balancing of interests, Richardson J. decided that the dividend return was not the only assessment of commercial return in the circumstances. Capital ownership and investment could well have been the motivation for the decision to carry on as before and this was not unreasonable. The decision not to realize assets to buy out the shares of the plaintiff also was a commercial judgement. The plaintiff could not be considered to be locked into the company because he had not tried to find alternative buyers or done anything other than notify the company of his desire to sell. Unfortunately, Richardson J. did not speculate as to the result had he been able to conclude that the plaintiff was locked into the company.

Somers J. and Sir Thaddeus McCarthy agreed with Richardson J. but emphasized the necessity for managerial discretion.[18] Their simplistic statements set a regrettable scene for the similarly simplistic reasoning of the Supreme Court of New South Wales and the evasions of the High Court of Australia in *Wayde* v. *New South Wales Rugby League Ltd.*[19]

## 2.2. Australia: *Wayde* v. *New South Wales Rugby League Ltd.*

Section 320 of the Australian Companies Code refers to the "affairs of the company"[20] or "an act or omission"[21] being "oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members" or "contrary to the interests of the members as a whole". A member who believes this is the case may bring an application to the court under section 320(1) and, under section 320(2), the Court may make such orders as it thinks fit if it is of the opinion that the same grounds

[18] *Ibid.* 619 & 620.

[19] (1985) 3 A.C.L.C. 158 (first instance), 177 (full court); (1985) 61 A.L.R. 225 (High Court).

[20] Section 320(1)(a)(i).

[21] A "proposed act or omission" is also included: section 320(1)(a)(ii).

(which are spelled out again in full) are made out. The structure of the provision is similar to that in the Malaysian Companies Act as it separates courses of conduct and single acts (or omissions), and in that the grounds for the application are the same as those of the power of the court to make orders.[22] However, the quadripartite test applies to both courses of conduct and single acts in Australia, whereas, in Malaysia, two tests apply to the one and two to the other.[23]

In *Wayde* v. *New South Wales Rugby League Ltd.*,[24] the section was interpreted by the High Court of Australia for the first time since its extensive 1981 amendments, although it had been the subject of a State Supreme Court decision.[25] The facts of the case were that a football club, Western District Rugby League Club (Wests), was excluded from a football competition. The management board of the League, which regulated the competition, had decided that too many games were being played. Wests' representatives on the League, a body incorporated under the Companies Code, sought redress under section 320. At first instance, Hodgson J., after dismissing the claim that the representative of the club could not sue in relation to harm done to the club itself, decided that the exclusion was oppressive and "also unfairly prejudicial within the same paragraph".[26] The duty of the league was to act for the benefit of the members and not football generally. Since exclusion would mean the destruction of a substantial source of goodwill for a multimillion dollar business (for that is what the football clubs are in New South Wales), it was contrary to the interests of a member and therefore not in the best interest of the company, being the members as a whole.

[22] Although in Malaysia the court is required to have in view "bringing to an end or remedying the matters complained of": section 181(2). This seems to be all encompassing and therefore of no significance.

[23] Section 181(1)(a) refers to courses of conduct and "oppressive" or "in disregard of his or their interest". Section 181(1)(b) refers to "some act of the company" and "unfairly discriminates or is otherwise prejudicial to".

[24] (1985) 61 A.L.R. 225.

[25] *Re G.Jeffery (Mens Store) Pty. Ltd.* (1984) 2 A.C.L.C. 421 (Supreme Court of Victoria). See also R.Baxt, "The New Remedy in Oppression — A Reworded Provision or a New Remedy?", (1985) 3 *Company and Securities Law Journal* 21.

[26] (1985) 3 A.C.L.C. 158, 176.

The Full Court of the Supreme Court of New South Wales founded its decision on appeal on the phrase, "contrary to the best interests of the members as a whole".[27] After a little trouble with the use of the word "members", it was decided that the phrase was a statutory recognition of the long established principle that the company should act "bona fide for the benefit of the company as a whole". Having so brought itself onto familiar ground, the Court found it easy to dispose of the case. In contrast to the opinion of Hodgson J., the interests of the company as revealed in the corporate constitution were held to include the proper management of the playing of football generally. Having regard to the alternatives available, the decision to exclude Wests was held to be properly made. The question of whether the benefit of the League outweighed the detriment to Wests was one for the management of the League itself:

> Courts may only interfere in the directors' decisions, relevantly, where oppression or unfair prejudice be shown. Whilst it is true that the Code should be given a beneficial construction and not unduly narrowed by judicial decisions, the terms of sec. 320 must not lead Courts into assuming the management of corporations, substituting their decisions and assessments for those of directors, who can be expected to have much greater knowledge and more time and expertise at their disposal to evaluate the best interests of the members of the corporation as a whole.[28]

By this means the Court reintroduced the traditional logic of freedom of management on one side and protection of minorities from ill-defined "frauds" on the other.[29] The tentative steps taken in *Thomas* v. *H.W.Thomas Ltd.*[30] towards a definition

[27] This phrase does not appear in section 209, Companies Act 1955 (N.Z.) or in section 181 Companies Act, 1965 (Malaysia).

[28] (1985) 3 A.C.L.C. 158,176.

[29] To revive Lord Lindley's test (*Allen* v. *Gold Reefs of West Africa Ltd.* [1900] 1 Ch. 656) harks back to the common law confusions as to what is fraud on the minority. The section was designed to overcome rather than enact them. One would have thought that the relationship between fraud on the minority and the section was perfectly clear but it seems that the courts here and in Australia, and the Privy Council have found that "unfair" confuses them: *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1976] 1 M.L.J. 59, [1978] 2 M.L.J. 227.

[30] (1984) 2 A.C.L.C. 610.

of fairness based on the nature of the particular company were entirely ignored. Further, the test "bona fide for the benefit of the company as a whole" is useless in cases of discrimination, as was demonstrated in *Peters American Delicacy Co.* v. *Heath.*[31]

In the High Court, the majority (Mason A.C.J., Wilson, Deane and Dawson JJ.) drew a distinction between the exercise of a general power of management and the instant case. In the former, a balancing of interests was required of the Court:

> It is not a case where the directors of a company, in the exercise of the general powers of management of the company, might bona fide adopt a policy or decide upon a course of action which is alleged to be unfairly prejudicial to a minority of the members of the company. In that kind of case it may well be appropriate for the court, on an application for relief under s 320, to examine the policy which has been pursued or the proposed course of action in order to determine the fairness or unfairness of the course which has been taken by those in control of the company. The court may be required in such circumstances to undertake a balancing exercise between the competing considerations disclosed by the evidence.[32]

The case at hand was one where a decision had to be made and, indeed, was expressly authorized:

> No amount of sympathy for Wests can obscure the fact that the League was expressly constituted to promote the best interests of the sport and empowered to determine which clubs should be entitled to participate in competitions conducted by it.[33]

Bearing in mind the special expertise and experience of the board, the admitted fact that the decision was made in good faith and that a decision would necessarily prejudice either Wests or the League through the effect of a prolonged season, the Court decided that "it has not been shown that those decisions of the Board were such that no Board acting reasonably could have made them."[34]

[31] (1939) 61 C.L.R. 457.
[32] (1985) 61 A.L.R. 225, 230.
[33] *Ibid.* 230-1.
[34] *Ibid.* 231.

In a minority, but assenting judgement, Brennan J. concentrated on the nature of unfairness. He expressly[35] adopted Richardson J.'s argument in *Thomas* v. *H.W.Thomas Ltd.*,[36] but noted that the just and equitable requirement of section 209(2) of the New Zealand legislation might make a material difference. At this point of divergence from Richardson J., Brennan J. formulated a test based on "ordinary standards of reasonableness and fair dealing":[37]

> The court must determine whether reasonable directors possessing any special skill, knowledge or acumen possessed by the directors and having in mind the importance of furthering the corporate object on the one hand and the disadvantage, disability or burden which the decision will impose on a member on the other, would have decided it was unfair to make that decision.[38]

According to Brennan J. this is an objective test and a question of fact and degree. In the case before him, on the basis of the same factors as influenced the majority, Brennan J. decided that reasonable directors would not have thought the decision of the Board unfair.

## 2.3. Analysis

The two cases present differing views of the respective sections. It is important to establish these differences and to compare the thrust of the cases with Malaysian law, in particular the Privy Council decision in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.*[39]

[35] *Ibid.* 233.
[36] (1984) 2 A.C.L.C. 610.
[37] (1985) 61 A.L.R. 225, 234.
[38] *Ibid.*
[39] [1978] 2 M.L.J. 227. It is not intended here to provide a complete guide to section 181, which is better provided in P.Pillai, "Enforcement of Directors' Duties and Oppression: In Re Kong Thai Sawmill (Miri) Sdn. Bhd.", [1976] *M.L.J.* lxxii, and P.J.Mooney, "Section 181 of the Companies Act, 1965", [1977] *M.L.J.* ms xxii. See also H.A.J. Ford and K.B. Rohatdi, *Singapore and Malaysian Supplement to H.A.J. Ford, Principles of Company Law*, 2nd ed., Singapore and Kuala Lumpur: M.L.J., 1981.

### 2.3.1. *"Global expression"* v. *individual tests*

Philip Pillai's response to the Federal Court decision in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.*[40] includes a strongly expressed argument that the Court was wrong to interpret section 181 as a unity. He asserts that it has at least two limbs, "oppressive" and "in disregard of the interests of the complainants", and goes on to list twelve "permutable grounds of action".[41] However, in *Thomas* v. *H.W. Thomas Ltd.*,[42] Richardson J., with whom the rest of the court agreed, was of the opinion that the tripartite test of "oppressive, unfairly discriminatory, or unfairly prejudicial" was one, a "wider, global expression" than the old single test of oppression. He came to this conclusion following a review of the British and New Zealand legislation and the cases that followed, and from a glance at the dictionary, which indicated that the words were to a large extent co-extensive. He then went on to seek the "underlying concern" of the expression.

In *Wayde* v. *New South Wales Rugby League Ltd.*,[43] the majority of the High Court of Australia referred to *Thomas* v. *H.W. Thomas Ltd.*[44] with approval but did not specifically advert to whether the expressions in the Companies Code were one or many. The reasoning of the majority is obscured by the distinction it made between general powers of management and powers to decide expressly conferred on the Board, it being held that the instant case was of the latter kind. However, there are two factors which could indicate that the Court viewed the expression in section 320 as unitary.[45] First is the simple point that the Court did not consider the facts with reference to each expression. There is a single strand to the argument, the conclusion being

[40] *Ibid.*
[41] P. Pillai, *op. cit.*, lxxiv-lxxv.
[42] (1984) 2 A.C.L.C. 610, 616-7.
[43] (1985) A.L.R. 225.
[44] (1984) 2 A.C.L.C. 610.
[45] Ian Cameron, *op. cit.*, 250-253, argues the contrary opinion. The writer feels that Cameron reads too much into words of marginal relevance to the argument of the Court. Cameron infers from the reproduction by the Court of the elements of the section that each would be considered separately. It is more likely the Court merely reproduced the terminology of the section for the purposes of its summary at the conclusion of the judgment.

that relief should not be granted. Second, the majority focused on the word "unfair" and concluded that, in the circumstances, "the appellants faced a difficult task in seeking to prove that the decisions in question were *unfairly* prejudicial to Wests and therefore not in the overall interests of the members as a whole".[46] The causal connection between unfairness and the overall interests of the members as a whole is clearly drawn. "Fairness" is the lynch-pin of the judgement: It is the rationale for the distinction between the types of power given to the Board and the source of the criteria by which decisions of the Board were to be assessed for both types of power. Brennan J., in his minority but assenting judgement, went further to assimilate the expressions into a single test. He dismissed the fourth limb of section 320, "the interests of the members as a whole", as not being of relevance to the case and, more generally, as being in the context a "cant expression".[47] Thus, the majority by implication and Brennan J. expressly repudiated the grounds on which the New South Wales Court of Appeal decided the case. That Court had decided that it was not necessary "if indeed it be possible, to mark with any precision what the meaning of the word 'unfairly' is in this context",[48] preferring to focus on "the interests of the members as a whole". The New South Wales Court of Appeal, therefore, seems to have thought that there were two limbs to section 320. Furthermore, in *Re G. Jeffrey (Men's Store) Pty. Ltd.,*[49] Crockett J. of the Supreme Court of Victoria treated each phrase separately but concluded that on the facts of the case not one was made out. His conclusion, however, focused on unfairness.

The form of the Malaysian provision, section 181, is very different from those considered in the cases under discussion. It separates the conduct of the affairs of the company or exercises of the power of directors from single acts or resolutions of the members or debenture holders. Whilst the Australian section is similar in this regard, the tests in that provision for each category are the same, whereas in the Malaysian version the

[46] (1985) 61 A.L.R. 225, 231.
[47] *Ibid.*, 233.
[48] (1985) 3 A.C.L.C. 177, 188.
[49] (1984) 2 A.C.L.C. 421.

tests differ. For the former category the tests are "oppressive" and "in disregard ... interests as members", and in the latter are "unfairly discriminates against" and "is otherwise prejudicial to". The problem to be faced is whether there are four or two limbs, or whether the section has a single underlying concern expressed in a variety of ways as appropriate for the particular events referred to in each paragraph. This problem has not been specifically adverted to in any local judgement. In three cases, *Re Chi Liung and Son Ltd.*,[50] *Re Coliseum Stand Car Service Ltd.*[51] and *Ng Chee Keong* v. *Ng Teong Kiat*,[52] the respective courts were in the fortunate position of being able to find that the events complained of amounted to oppression.[53] Given that para.(a) of section 181(1) refers directly to "oppressive" and para. (b) to "unfairly", which is universally accepted to be broader than "oppressive",[54] the courts did not feel constrained to speculate on the ambit of their discretion. Of the three cases, only the second adds anything more. There Abdul Hamid J. said, by way of explanation of his conclusion that an order should be granted:

> In the circumstances of this particular case I think the applicant has established to my satisfaction that the first respondent had conducted the affairs of the company without proper regard to his (applicant's) interests. To my mind it is not unreasonable to hold that it constituted an oppression on minority shareholders.[55]

Whilst the judge ostensibly subordinates the second limb of para. (a) to "oppressive", it is probably safer to assume that all he

[50] [1968] 1 M.L.J. 97.
[51] [1972] 1 M.L.J. 109.
[52] [1980] 1 M.L.J. 45.
[53] See also the Singapore case of *Re S.Q. Wong Holdings (pte.) Ltd.* [1987] 2 M.L.J. 299.
[54] This proposition is made in almost every case where "unfair" falls for discussion in whatever jurisdiction. See the three cases referred to immediately above, also *Re a Company* [1983] 2 All E.R. 36; *Re G. Jeffrey (Mens Store) Pty. Ltd.* (1984) 2 A.C.L.C. 421; *Thomas* v. *H.W. Thomas* (1984) 2 A.C.L.C. 610; *C.A.C.* v. *Orlit Holdings Ltd.* (1983) 1 A.C.L.R. 1038, 1052-3; *Wayde* v. *New South Wales Rugby League Ltd.* (1985) 61 A.L.R. 225, 232; *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1978] 2 M.L.J. 227,229.
[55] *Re Coliseum Stand Car Service Ltd.* [1972] 1 M.L.J. 109, 112.

meant was that the behaviour complained of lay within the underlying set of limits on the Court's discretion and that he did not consider whether it was a single set or not.

In *Re Kong Thai Sawmill (Miri) Sdn. Bhd.,*[56] the Federal Court seems to have viewed para.(a), if not the whole section, as having only a single limb:

> All that is required is that the conduct complained of should at least involve a visible departure from the standards of fair dealing and the violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.[57]

In the case of the exercise of the powers of directors, these principles of fair play refer to the fundamental principles of common law regulating the position of directors.[58]

The Privy Council confined itself to para.(a), referring specifically and separately to "oppression" and "disregard":

> As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made (*Elder* v. *Elder and Watson Ltd.*): their Lordships would place emphasis on "visible". And similarly "disregard" involves something more than a failure to take account of the minority's interest: there must be awareness of that interest and an evident decision to override it or brush it aside or to set at naught the proper company procedure (per Lord Clyde in *Thompson* v. *Drysdale*).[59]

Their Lordships went on to say that either may be established by reference to a single line defining acceptable conduct:

[56] [1976] 1 M.L.J. 59.
[57] *Ibid.* 74. The reference in the judgement is to "*Buckley* on Companies, 13 edition, page 423", but is the test enunciated for "oppression" by Cooper L.J. in *Elder* v. *Elder and Watson* 1952 S.C. 49, 55.
[58] Being that the directors are trustees of (1) the company's property and (2) the powers given to them: *ibid.* 74.
[59] *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1978] 2 M.L.J. 227, 229.

> Neither "oppression" nor "disregard" need be shown by a use of the majority's voting power to vote down the minority: either may be demonstrated by a course of conduct which in some identifiable respect, or at an identifiable point in time, can be held to have crossed the line.[60]

Whether the phrase "crossed the line" refers to the idea of standards of conduct or to a single underlying concern is unclear. Similarly, in its consideration of the evidence, the Privy Council referred expressly to "oppression" and "disregard", but did not deal with them as separate. The judgement, therefore, does not expressly preclude the idea of a single underlying concern. In any event, the explanation of "oppression" under para.(a) as a question of "standards of fair dealing" and "conditions of fair play" relies on the idea of fairness, the same concept as used in para.(b).

If the Privy Council were to be taken at face value, para.(b) of section 181(1) should be interpreted as containing a further two tests for remedial conduct: "unfairly discriminatory" and "otherwise prejudicial". However, when interpreted in this way, it is difficult to understand the latter phrase as having any coherent meaning. The word "prejudice" cannot stand on its own because, if the ordinary sense of the word is accepted, most decisions of the company will prejudice some shareholders. For example, even the decision to declare a dividend prejudices those who want capital increase. "Otherwise", therefore, restricts the scope of "prejudice". It does not do so by meaning "those prejudices which are not unfairly discriminatory" because "prejudice" in its usual sense includes unfair discriminations.

One way to make sense of the paragraph is to accept that its terms refer to or are conditioned by a single underlying concern of the whole section. The terms "unfairly discriminates" and "otherwise prejudicial" then become examples of the concern of the section. Alternatively, "prejudicial" might be imaginatively interpreted, perhaps by implying in the same connotations as the Privy Council saw in "disregard". But "disregard" in its ordinary sense includes these connotations, whereas "prejudi-

[60] *Ibid.*

cial" does not. If they are to be found, they derive from some overall idea of the section itself, which is, of course, the underlying concern.

The further the terms of the section are explored the more it appears that they cannot be separately assessed. This is not to deny that each term highlights a possible means of assessing the extent of the concern of the section, which is probably what the Privy Council in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.*[61] can be taken to have been trying to do.

2.3.2. *Assessment of the Behaviour*

No matter which interpretation is adopted, a Court is forced by the section to assess the behaviour complained of to see whether a remedy ought to be ordered. The processes involved and factors taken into consideration in the two subject cases are relevant for Malaysian Courts in their assessment of behaviour.

2.3.2.1.The Balancing Process..

In *Thomas* v. *H.W. Thomas Ltd.*,[62] Richardson J. said that to assess "unfairness" under section 209(1) of the New Zealand statute or "injustice" under section 209(2), the Court must look to the overall position of the company:

> Fairness cannot be assessed in a vacuum or simply from one member's point of view. It will often depend on weighing conflicting interests of different groups within the company. It is a matter of balancing all the interests involved in terms of the policies underlying the companies legislation in general and sec. 209 in particular: thus to have regard to the principles governing the duties of a director in the conduct of the affairs of a company and the rights and duties of a majority shareholder in relation to the minority; but to recognize that sec. 209 is a remedial provision designed to allow the court to intervene where there is a visible departure from the standards of fair dealing; and in the light of the history and structure of the particular company and

[61] [1978] 2 M.L.J. 227.
[62] (1984) 2 A.C.L.C. 610.

> the reasonable expectations of the members to determine whether the detriment occasioned to the complaining member's interests arising from the acts or conduct in that way is justifiable.[63]

The majority in *Wayde* v. *New South Wales Rugby League Ltd.*[64] cited this passage with approval when speculating on the process to be adopted when considering an exercise of a general power of management.[65] It hinted that the same process is involved when powers expressly conferred are at issue by stating that it would have been difficult for the appellants to have shown that the decision of the Board was unfairly prejudicial to them and therefore not in the overall interests of the members as a whole. As in *Peters American Delicacy Co.* v. *Heath,*[66] a decision had to be made favouring all clubs except Wests or one favouring Wests; in these circumstances the test was that no Board acting reasonably could have decided as the Board did. The Court balanced the detriment to Wests against the interests of the League. The latter were not the interests as expressed by a reasonable, expert and experienced Board but included the interest of being governed by such a Board without interference:

> No amount of sympathy for Wests can obscure the fact that the League was expressly constituted to promote the best interests of the sport and empowered to determine which clubs should be entitled to participate in competitions conducted by it.[67]

Brennan J. also adopted the passage from *Thomas* v. *H.W. Thomas Ltd.* quoted above. He advocated a balancing process with an extra feature:

> The court must determine whether reasonable directors, possessing any special skill, knowledge or acumen possessed by the directors and having in mind the importance of furthering the corporate object on the one hand and the disadvantage, disability or

[63] *Ibid.* 618.
[64] (1985) 61 A.L.R. 225.
[65] *Ibid.* 230.
[66] (1939) 61 C.L.R. 457.
[67] (1985) 61 A.L.R. 225, 230-231.

burden which the decision will impose on a member on the other, would have decided that it was unfair to make that decision.[68]

However, weighing interests with the standards of reasonable directors in mind is rather like setting a tiger to guard goats: Management is an interested party. There can be no "reasonable director" who defines the scope of internal management. The detriment of a member may be assessed only by reference to some definition of the rights of members. In *Wayde* v. *New South Wales Rugby League Ltd.*,[69] management was in the peculiar position of not being overtly interested in the outcome, but in most cases management will have a preference, presumably based on self-advantage.

The High Court of Australia added little, beyond general approval, to the description of the balancing process given in *Thomas* v. *H.W.Thomas Ltd.*[70] Writers also tend to support the concept.[71] Yet the process itself is only vaguely defined. Richardson J. made reference to two matters of policy: the principles governing the duties of directors in the conduct of the affairs of the company, and the rights and duties of a majority shareholder in relation to the minority. Presumably he was saying that the balancing process should look to the nature of the interests of the parties as defined in the pre-existing case law in the areas known as directors' duties, fraud on the minority and shareholders' rights. The balancing process, therefore, does not involve any new perception of the relationship between the parties.

Richardson J. proceeded to elaborate on the concept of "balancing" by indicating three means of assessing when the court may intervene: when there is a "visible departure from the standards of fair dealing", "in the light of the history and structure of the particular company" or "the reasonable expectations of the member", the latter two being measures to determine when the detriment is "justifiable". There is no originality in

[68] *Ibid.* 234.
[69] (1985) 61 A.L.R. 225
[70] (1984) 2 A.C.L.C. 610.
[71] Ian Cameron, *op. cit.*; R.Baxt, *op. cit.*; J.F.Corkery, *op. cit.*; even G. Shapira, *op. cit.*

any of these, except perhaps the second. The first is the standard formula for oppression deriving from Cooper L.J.'s judgement in *Elder* v. *Elder and Watson.*[72] The last is a reference to Lord Wilberforce's "equitable considerations" in *Ebrahimi* v. *Westbourne Galleries Ltd.*[73] and therefore liable to be discounted in jurisdictions which do not have the "just and equitable" requirement of section 209(2) of the New Zealand legislation. Brennan J. noted as much in *Wayde* v. *New South Wales Rugby League Ltd.*[74] In addition, the connection between the just and equitable ground for winding up under section 218(1)(i) and section 181 is severed in the Malaysian version of the provision. The link between the two has had a torturous history[75] and a Court would not want to reopen that old wound by a careless reference to Lord Wilberforce's comments.

"In the light of the history and structure of the particular company" is the only phrase without an identifiable source. Remembering that judgments are not to be read like statutes, one hesitates to place too much meaning on it. In its context it looks suspiciously like a passing reference to the obvious fact that a Court should refer occasionally to the facts in its discussion of unfairness. At this point, the writer must confess to finding in the phrase a faint hope that "unfairness" will not repeat the history of "oppression" by retreating back to reformulations of the internal management rule. This essay is concerned with a subject confined to the bounds of probable judicial reasoning, thus has a narrower scope than speculations as to what a Court

[72] 1952 S.C. 49, 55.
[73] [1973] A.C. 360, 370.
[74] (1985) 61 A.L.R. 225, 233.
[75] This history starts from the earliest beginnings of the section. The Cohen Committee recommended the insertion of the predecessor of section 181 to enable a court to settle matters in cases of oppression under the equivalent of section 218(1)(i) in any way it thought fit (*Report of the Committee on Company Law Amendment*, (Lionel H. Cohen, Chairman) Cmd. 6659, June 1945, p.60, at p.95). The connection was maintained in subsequent "oppression" sections by requiring the court to be of the opinion that the company could be wound up under the "just and equitable" ground but that it would be unfair to do so; see, for example, section 186 of the (now repealed) Uniform Companies Act 1961 of many of the Australian states or section 210 of the Companies Act 1948 (U.K.)(now replaced).

might make of a detailed and profound perception of the function of the structure of a particular company. Suffice it for now to state that a test, based on the limits to acquiescence, on joining the particular company, of a reasonable shareholder to decisions made by the various means set forth in the constitution of the company, is the writer's suggestion.[76]

In summary, "balancing" is the process of determining whether the detriment to the complainant is justifiable within the current understanding, based on the established principles of company law, of the nature of the interests of the parties. "Justifiable" is measured by reference to "fair dealing", the facts of the case and the expectations analysis. As such, "balancing" suffers a grievous defect. It is self contradictory.

One contradiction lies in the absence of definition of what the interest of a member in a share is. The *Borland's Trustee* v. *Steel Bros. & Co. Ltd.*[77] description of a share clearly reveals this:

> A share is the interest of a shareholder in a company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with s. 16 of the *Companies Act* 1862 [sec.33(1) Companies Act, 1965 (Malaysia)]. The contract contained in the articles of association is one of the original incidents of the share. A share is not a sum of money settled in the way suggested, but is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount.[78]

The sole measure of the interest in the matters referred to is a sum of money. The alternative definition is a list of all the rights of a shareholder, with the assertion that they comprise the interest of a member. Yet the rights of a member are far from certain.

[76] See David A. Wishart, "A Fresh Approach to Section 320", (1987) 17 *U.W.A.L.R.* 94.
[77] [1901] 1 Ch. 279.
[78] *Ibid.* 288.

Only an undefined number of the articles of association may be enforced against a majority[79] and the member has only a degree of vaguely defined common law protection against fraud by the majority.[80] The established principles of company law, which determine the limits of the rights of a member, firmly maintain that centralized control promotes efficient management, and that democracy, or majority rule, provides for the accountability of management to the shareholders. Only when majority rule fails are wrongs or frauds done because majority rule is a part of the definition of the interest of a member. "Unfairness" was designed to overcome the rigours of this philosophy. "Balancing" reintroduces the common law concept of the interest of a member, hence also the concept of majority rule. The "interest of a member" therefore includes subservience to that against which it is measured, namely the interest of all the members in centralized management or, more generally, the maintenance of the existing (flexible) constitution.

Secondly, "balancing" should not be taken to measure detriment to the individual against the benefit of the company.[81] The definition of the latter is in the hands of the shareholders, by their decisions, which can be effected only under the constitution of the company. Majority rule and centralized management, together with the internal management rule, are the foundation of the corporate constitution, therefore are also included in this side of the equation.

The tautology at the foundation of "balancing" implies that it is inevitable that some form of the internal management rule will be applied in cases to come. Managerial discretion is a funda-

[79] This is the internal management rule, for which *Mozley* v. *Alston* (1847) 1 Ph. 790 is the paradigm case, and the start of a long chain of authority. Comp. *Pang Ten Fatt* v. *Tawau Transport Co. Sdn. Bhd.* [1986] 1 M.L.J. 179.

[80] This is the rule in *Foss* v. *Harbottle*, the paradigm case for which and the start of another long chain of authority is, of course, *Foss* v. *Harbottle* (1843) 2 Hare 461, 67 E.R.189. For a discussion, see *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1976] 1 M.L.J.59 (F.C.), [1978] 2 M.L.J. 227 (P.C.).

[81] Each member, in common law, votes in their own interest and, if directors benefit, directors' fiduciary duties come into play. If the breach of these duties is not pursued, the constitution of the company is at issue, not the interests of the directors. In other words, the benefit of an individual director is irrelevant to individual suffering because the company itself might be gaining from the decision.

mental principle in law because the corporate form depends on strong central control for its efficiency and effectiveness. It is, therefore, seen as an argument against court interference in the management of companies. But asserting that management has a role or discretion does not draw the line between those situations where the court should balance interests and those where this is the task of management. Where, then, is this line? Recourse to prior accepted principles finds a single framework for all companies: the majority in general meeting, directors' duties and personal rights or fraud on the power. If these are initially rejected and a new set of limits applied to one company, for the next they may be hopelessly restrictive. A corporate yacht provided for by resolution of the board for the comfort of directors may be acceptable in one company but not in the next.[82] For the general meeting to remove rights of occupation of flats is wrongful in one company and not in another.[83] Since the courts feel the need to make the ambit of managerial freedom predictable, although a court decides matters on the facts, the principles applied in the exercise of the discretion tend to include its definition. As cases where management requires greater freedom influence the definition, less and less behaviour falls outside it.[84]

"Balancing" has not been overtly accepted in any Malaysian case to date. In *Re Kong Thai Sawmill (Miri) Sdn. Bhd.*[85] the Privy Council merely stated that there is a line between acceptable

[82] In *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1976] 1 M.L.J. 59 (F.C.), [1978] 2 M.L.J. 227 (P.C.), the Federal Court and the Privy Council came to differing conclusions on this situation.

[83] In *Crumpton* v. *Morrine Hall Pty. Ltd.* [1965] N.S.W.R. 240 and *Fischer* v. *Easthaven Ltd.* [1965] N.S.W.R. 261 the same court (the Supreme Court of New South Wales) came to differing conclusions on very similar facts within a few months.

[84] This process is the explanation why the "oppression" section was steadily confined in scope, necessitating the enactment of the present form of the provision. For academic condemnation of the trend, see: B.H.McPherson, "Oppression of Minority Shareholders", (1963) 36 *A.L.J.* 427; K.W.Wedderburn, "Oppression of Minority Shareholders", (1966) 20 *M.L.R.* 321; R.Baxt, "Oppression of Shareholders — The Australian Remedy", (1971) 8 *M.U.L.R.* 91; D.Prentice, "Protection of Minority Shareholders", (1972) 25 *Current Legal Problems* 124, 145-8; A.Boyle, "Power of the Court to Grant Relief on a Petition Alleging Unfair Practice", (1980) 1 *Company Lawyer,* 280.

[85] [1976] 1 M.L.J. 59, [1978] 2 M.L.J. 227.

and remedial behaviour, and gave some indications of where it might be. It then proceeded to discuss each individual matter complained of to decide whether the line had been crossed.[86] Malaysian courts should continue to steer well clear of "balancing". It is a superficially attractive process but one leading only to confusion, not only because the process itself is flawed but also because it involves accepting the false proposition that the interests being balanced are discrete and comprehensible.

2.3.2.2. Types of Power.

The majority of the High Court of Australia in *Wayde v. New South Wales Rugby League Ltd.*[87] made the distinction between powers specifically conferred on an organ and general powers of management. The case was of the former kind and it was, as a result, more difficult for the appellant to show unfair prejudice. The question for Malaysian courts is whether they should follow suit. It would appear, again, to be a false lead to follow. Categories, each distinguishable by fine distinctions rewarding only to practitioners, have a habit of proliferating.[88] Furthermore, each class of cases would need an entirely new definition of the relevant tests. Since the distinction is unnecessary,[89] courts should save themselves the effort and the public the cost.

In one respect the distinction does make a point of substance. By accepting that there are varying types of power, the Court acknowledged that members may acquiesce to some prejudice or discrimination. The Court implied that the more specific the power, the greater the degree of acquiescence in the results of

[86] The Privy Council was inconsistent in laying stress on the "course of conduct" requirement in its general discussion, yet proceeding to deal with each item separately when discussing the facts.

[87] (1985) 61 A.L.R. 225.

[88] The majority itself appeared to be unsure whether the category was of powers specifically conferred or of powers the exercise of which must necessarily prejudice one side or the other: "[The Board is] obliged to face up to the decision ..." or "the League was expressly constituted to promote the best interests of the sport and empowered to determine which clubs should be entitled to participate in competitions conducted by it" (*ibid.* 230-231).

[89] Brennan J. did not feel compelled to use it, *ibid.* 231-4.

its exercise. The constitution was seen as an agreement, expressing the desires of the parties, including the complainant.[90] The problem with this train of thought is that in many cases the remedy was granted to overcome provisions in the constitution of the company. Thus, in *Re Caratti Holding Co. Pty. Ltd.*, the Privy Council, in an appeal from the Supreme Court of Western Australia, said: "[The relevant article] was neither understood nor accepted by Mr. Caratti and Mr. Zampatti as having any reference to the business between them: and the use of its provisions against Mr. Zampatti is inconsistent with the agreement."[91] The Court enforced an oral understanding of the parties rather than the agreement as represented by the constitution of the company.[92] An argument that the parties have or have not agreed to a provision of the constitution of the company is a mere assertion, which should be supported with evidence of its acceptance. Alternatively, courts could take the stand that the constitution of the company represents the agreement of the parties in the absence of contrary evidence. It is inconsistent to accept, as the High Court of Australia has done, that both propositions can coexist.[93]

2.3.2.3. Expectations.

Richardson J. referred to three factors as bearing on the question of when the Court may intervene to "balance" the interests of the respective parties. The reasonable expectations of shareholders is one. This idea is often said to derive from oppression under the "just and equitable" ground

[90] See also *Re Warrick Howard (Aust.) Pty. Ltd.* (1983) 1 A.C.L.C. 634, 636.
[91] [1979] A.C.L.C. 32,002, 32,008.
[92] This idea is at the foundation of the expectations analysis referred to by Richardson J. in *Thomas* v. *H.W.Thomas Ltd.* (1984) 2 A.C.L.C. 610 and discussed below.
[93] This is a related but distinct point from that which proved persuasive to the Privy Council in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.* [1978] 2 M.L.J. 227. There the complainant was taken by his conduct to have acquiesced in each of the acts complained of. He had either approved the act in general meeting or did not complain for a long period of time. The argument of the Privy Council is not strong at this point because the complaint was about a *course* of conduct and not each individual act.

for winding up because it received its most comprehensive discussion in *Ebrahimi* v. *Westbourne Galleries Ltd.*,[94] a case concerning the equivalent of section 218(1)(i). However, it has its true source in comments made quite early in the history of the oppression section.[95] The notion is that shareholders have expectations as to how the affairs of a company should be conducted. In small companies, which could be partnerships, the expectations may relate to a number of matters; for example, participation in management, method of and participation in remuneration, and extrication of investment. Thus it refers to arrangements not reflected in the constitution of the company even when this is almost entirely at the discretion of the parties. The court looks to alternative definitions of their interests.

The notion of an overriding, perhaps merely implicit, but agreed structure or standards of behaviour is simple, yet it raises the difficult problem of when the court should decide that the hidden arrangements, which exist in most situations, should be enforced. Lord Wilberforce gave his idea of the expectations, but did not explain when they should be acknowledged. A similar, but more useful, test has been developed by O'Neal[96] when distinguishing between the "closed" and "open" corporation, to use the North American terminology:

1. Few shareholders (often only one or two).
2. The shareholders usually live in the same geographical area, knowing each other and acquainted with each other's business skills.

[94] [1973] A.C. 360, 378-80. The principles there enunciated were accepted for Malaysia in *Re Tahansan Sdn. Bhd.* [1984] 1 M.L.J. 264; reversed [1985] 1 M.L.J. 58 when the Federal Court only implicitly accepted the point; decision at first instance affirmed in *Tay Bok Choon* v. *Tahansan Sdn. Bhd.* [1987] 1 M.L.J. 433 by the Privy Council which baldly asserted that the Courts of Malaysia agreed that the expectations analysis applied. Lord Wilberforce drew his ideas from *Re Wondoflex Textiles Pty. Ltd.* (1951) V.L.R. 458, 467.

[95] In *Elder* v. *Elder and Watson Limited* 1952 S.C. 49, 55: "... violation of the conditions of fair play ..."(per Lord Cooper); 60: "... in the matter of his proprietary rights as a shareholder ..." (per Lord Keith). In *Re H.R.Harmer Ltd.* [1959] 1 W.L.R. 62, 87: "Shareholders are entitled to have the affairs of a company conducted in the way laid down by the company's constitution" (per Romer J.). The expectations of shareholders are that to which these quotations refer.

[96] F. Hodge O'Neal, *Close Corporations*, Chicago: Callaghan, 1958, 13-17.

3. Shareholders who participate in management.
4. No established market in corporate stock, not listed, not dealt with by brokers; rarely traded.

In contrast to Lord Wilberforce's criteria, these are ascertainable from the facts of a case and relate to the actual structure of the business rather than implicit agreements.

No matter how they are distinguished, the fundamental dichotomy between those companies where the agreement lies behind the articles and those where it is the articles remains. One application of the latter is the distinction between types of powers. The former is the expectations argument. Again, if two such inconsistent positions as to the status of the articles are taken without a full appreciation of why a particular company is in one situation or the other, only arbitrary justice will result.

2.3.2.4. "Fair Play".

Richardson J. referred to "standards of fair play" in his description of the factors involved is assessing what is justifiable.[97] The Privy Council in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.*[98] used the same test[99] to explain "oppression", although it emphasized the word "visible". There are two ways of looking at "fair play". One is to accept that it is a reference to the English idea of gentlemanly games. Thus the mores of cricket (probably not those of football) are to be applied to the business world as commonly held standards of behaviour whose infringement is easily recognised. This version of the test is of little use in the world at large. Its standards cannot be the common language of business here, nor, if recent reports of events in the City of London are to be believed, there.[100]

[97] *Thomas* v. *H.W.Thomas Ltd.* (1984) 2 A.C.L.C. 610, 618.

[98] [1978] 2 M.L.J. 227.

[99] The test is derived from that of Lord Cooper in *Elder* v. *Elder and Watson Limited* 1952 S.C. 49, 55. It is probably taking those comments out of context to create of them a test; they seem more directed at the expectations of the shareholder, see note 95 above.

[100] Nor, indeed of the writer, coming as he does from the land of the under-arm bowler. The recent Guiness scandal is an example of the standards of conduct prevailing in the City of London.

Arguably, it represents an idealized vision of the business world held by a cocooned judiciary. The second way of viewing "fair play" and "fair dealing" is to accept that the emphasis lies on fairness. It is, therefore, tied into "unfairly" as used in para. (b) of section 181(1) and is a reference to the underlying concern of the whole section. As such, it adds nothing to our comprehension of the limits to that concern. Fairness, like "disregard of interests", cannot be assessed in the abstract. There has to be a standard of behaviour or a definition of "interest" against which to measure behaviour. Both the code of conduct and the interests to be disregarded are aspects of the same thing. The interests of a shareholder include the definition of behaviour which is remedial under the section. Apart from gamesmanship, the word "fair" does not define this behaviour.

### 2.4. Conclusions.

To this point, this essay has been critical, even destructive, of the approaches adopted in the two cases under consideration. "Balancing interests" is a flawed process, despite its superficial attractiveness. The expectations test and the process of categorizing powers to decide are inconsistent concepts if they are taken to be measures of the extent of the jurisdiction of the Court under the section; as conclusions from a process of evaluation of the structure of a particular company they are unexceptionable, but there is no current understanding of the nature of a company sufficient to support that process. The idea of fair play is either an Englishman's ideal or a mere restatement of the problem.

In only one respect can the two cases be said to have advanced understanding of the section and that is attributable only to the New Zealand Court of Appeal. This is the perception that the section may have a single underlying concern rather than consist of a series of related, but essentially separate tests. Whether or not the Malaysian section is to be interpreted "globally" is still an open question, despite the Privy Council in *Re Kong Thai Sawmill (Miri) Sdn. Bhd.*[101] The clear question remaining is this: What should the Courts do in Malaysia?

[101] [1978] 2 M.L.J. 227.

## 3. *MALAYSIA: SECTION 181 AND OTHER DISCRETIONS*

As has been indicated, if the global avenue to interpretation is not taken, substantial difficulties for the interpretation of section 181 follow. "Oppression" is an expression of notorious difficulty. There are cases to support almost any claimant and cases to deny them. The term "disregard of the interests" is fraught with the similar problems of defining "interests" without either falling into the trap of the internal management rule or requiring an entirely new theory of legal personality.[102] Similarly, "unfairly discriminatory" and "otherwise prejudicial" as separate tests are almost incomprehensible, but taken together refer to the particular sufferings of claimants when the conduct complained of consists of individual acts of the company or resolutions of the members.

The "global" approach to interpreting section 181 is recommended. The courts should look to the underlying concern of the legislation. However, they should be wary of appealing processes like "balancing" and sets of assumptions masquerading as arguments. Examples of the latter are the expectations analysis, that the constitution of a company is an agreement or acquiescence, that management has a definable discretion or even that commercial viability excuses unfair conduct.[103]

One question remains: Is it sensible for a Malaysian court to look for the underlying concern of the section? Since the section gives a discretion, should not the courts merely exercise

[102] See David A. Wishart, "A Conceptual Analysis of the Control of Companies", (1984) 14 *M.U.L.R.* 601, and "A Fresh Approach to Section 320" (1987) 17 *U.W.A.L.R.* 94, if this is desired. The theory there espoused has its origins in S.J.Stoljar, *Groups and Entities*, Canberra: A.N.U. Press, 1973, especially at pp. 175-189; F.Hallis, *Corporate Personality*, London: O.U.P., 1930, p260ff; and James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States 1790-1970*, Charlottesville: University Press of Virginia, 1970.

[103] There are vague hints at this last argument in many cases. The most obvious is *Ng Eng Hiam* v. *Ng Kee Wei* (1965) 31 M.L.J. 238, but this case was a petition to wind up a company on the grounds of oppression under the just and equitable ground. It is difficult to understand the relevance of the commercial viability of the company to section 181, particularly as "buy-outs" and "hive-downs" are as feasible in cases under section 181 as they are when the company is being liquidated.

it, deciding on the basis of the facts whether there is remedial behaviour? An affirmative answer could be a reasoned conclusion from the conception, held in Malaysia, of the judicial function in relation to the Companies Act.

The evidence for this conception lies in the readiness with which permanent injunctions and declarations are sued for and granted in corporate matters.[104] Usually, the cases are not reported. They encompass many and varied situations, including claims for the avoidance of decisions of the general meeting, the control of management's activities and the civil enforcement of various Acts relating to company law. One reported example of the last is *M.B.F. Holdings Bhd.* v. *Emtex Corporation Bhd.*[105] where the Court's power to issue injunctions was used to defeat a takeover offer. The case concerned section 6 of the Securities Industry Act, 1983, which requires that the Capital Issues Committee approve a proposal for a take-over offer. M.B.F.Holdings Bhd. had issued to Emtex Corporation Bhd. a notice of a take-over scheme under the old section 179 of the Companies Act, 1965.[106] The notice was expressed to be conditional on the approval of the Capital Issues Committee. Emtex Corporation Bhd. sought a declaration that approval was required before notice under section 179 was sent. M.B.F.Holdings Bhd. argued that Emtex Corporation Bhd. had no *locus standi* to apply for a declaration. The Supreme Court, on appeal, held that *locus standi* did exist, the majority on the grounds that, if the offer was bad in law, Emtex Corporation Bhd. would be affected because it would be being taken over illegally. Seah S.C.J.'s analysis was tighter; he felt *locus standi* existed because Emtex Corporation Bhd. was required by statute to reply to the offer, creating sufficient interest in the subject matter of the application. Furthermore, Seah S.C.J. expressly stated that he had no opinion as to whether *locus standi* would exist if the offer was to be sent to the shareholders without any action being required of

[104] Interlocutory or temporary injunctions are a separate matter based on different principles. Therefore they are not dealt with here.

[105] [1986] 1 M.L.J. 477.

[106] Replaced, by the Companies Amendment Act, 1985, with the new provision which empowers a Panel to make a Code on Take-overs and Mergers.

the company. His reluctance is warranted because the identity of shareholders should not be of concern to a company permitted to solicit funds from the public.[107]

Another example of the sort of situation where relief is granted can be found in *Federal Transport Service Co. Ltd.* v. *Abdul Malik.*[108] Chan Min Tat J. held, in an action by a minority against management,[109] that it is within the rule of the court to interfere if the governing body or membership of a partnership or company is so divided that it cannot act together. The case was a claim that management was "thoroughly irresponsible and unsatisfactory" and evidence revealed confusion as to the events surrounding the acts complained of. In this situation, Chan Min Tat J. ordered that a receiver and manager be appointed until such time as the affairs of the company were sorted out.[110] A similar robust approach was taken by Wan Mohamed J. in *Pang Ten Fatt* v. *Tawau Transport Co. Sdn. Bhd.*[111] In this case articles providing for the employment of the plaintiffs were held enforceable in whatever capacity the plaintiffs might

[107] Comp. *Colortone Holdings Ltd.* v. *Calsil Ltd.* [1965] V.R. 129. The facts are very similar and the Acts virtually identical. The breach in both did not affect the validity of contracts for the sale of shares. The result in *Colortone Holdings Ltd.* v. *Calsil Ltd.* [1965] V.R. 129 was that there was no right in the company or even a shareholder to insist on compliance with the law. See also *Conway* v. *Petronius Clothing Co. Ltd.* [1978] 1 All E.R. 185 where a right to inspect company documents was held to exist, but it was not a right that arose from statute, despite penal provisions in the Companies Act 1948 (U.K.). It arose either as an incident of the office as director or from the contract of employment with the company (*ibid.* 201).

[108] [1973] 1 M.L.J. 216.

[109] It is curious that the company was the plaintiff. Chang Min Tat J. noted this, *ibid.* 217, but did not strike out the action. He should have, on the well established ground that the internal management rule gives rise to the presumption that whatever the majority can do to prevent court action will be presumed to have been done, including resolving that the company name not be used in litigation: *Great Western Railway Co.* v. *Rushout* (1852) 5 De.G.&Sm. 290, 64 E.R. 1121; *East Pant Du United Lead Mining Co. (Ltd.)* v. *Merryweather* (1864) 2 H.&M. 254, 71 E.R. 460; *Atwool* v. *Merryweather* (1867) L.R. 5 Eq. 464; *MacDougall* v. *Gardiner* (1875-6) Ch.D. 13; *Russell* v. *Wakefield Waterworks Co.* (1875) L.R. 20 Eq. 474; *Pender* v. *Lushington* (1877) 6 Ch.D. 70; *Duckett* v. *Gover* (1877) 6 Ch.D. 82; *In Re The Transvaal Gold Exploration and Land Co. (Ltd.)* (1854-5) T.L.R. 604.

[110] The cases of *Featherstone* v. *Cook; Trade Auxiliary Company* v. *Vickers* (1873) 16 L.R.Eq.Cas. 298 were cited.

[111] [1986] 1 M.L.J. 179.

sue. In an approach reminiscent of the expectations analysis, Wan Mohamed J. held that the rights and privileges given by the relevant article were:

> something given by the company to someone and they are absolute. They cannot be taken away without the consent of all persons who are beneficiaries of those rights and privileges.[112]

Similarly:

> Section 31 of the Companies Act provides the manner and circumstances under which articles of association can be amended, but it cannot withdraw the rights and privileges given by the company to anyone who is a shareholder or an outsider.[113]

Both propositions, that the articles can be enforced by any person given rights under them and that they cannot be removed by the due processes of constitutional change, appear contrary to authority.[114] No exception to the established principles of common law was cited in the judgement.[115]

In these cases, as in most where injunctions are granted or denied, the court assumed a jurisdiction to interfere in the running of the company. In few of them is the order made justified by any provision in the Companies Act, 1965. In only the second mentioned case was any authority for the assumption of jurisdiction given, but this was two decisions of Sir R. Malins V.C. in

[112] *Ibid.* 181.

[113] *Ibid.* 182.

[114] For the first, *Eley* v. *Positive Security Life Assurance Co.* (1875) 1 Ex.D. 20, (1876) 1 Ex.D. 85 (also *Malayan Banking Limited* v. *Raffles Hotel Ltd.* [1966] 1 M.L.J. 206). For the second, *Andrews* v. *Gas Meter Co.* [1897] 1 Ch. 361, but subject to fraud on the minority (see *Padiah Genganaidu* v. *The Lower Perak Syndicate Sdn. Bhd.* [1974] 1 M.L.J. 220). Both cases are the paradigm for a long chain of authority.

[115] Similarly, the Singapore case of *Re Petrotech Logistics Pte Ltd.* [1982] 2 M.L.J. 212 was a petition to wind up a company, but Abdul Wahab Ghows J. confirmed an interim injunction cancelling a resolution enabling the expropriation of the petitioner's shares and also gave the petitioner the option to purchase as many shares as he wished at par. There was no discussion of the basis of the order, even though section 218(1) does not provide for any order other than a winding up. Furthermore, the express reason for the insertion of the oppression section was to permit such orders to be made: Cohen Committee, 95.

1873 which concerned the right of a debenture holder to seek the appointment of a receiver and manager.[116]

The jurisdiction assumed by the Malaysian courts in the cases mentioned above does not appear to be justified by any of the categories permitting such interference in common law. There is no general right to enforce company law as such. The inherent jurisdiction of courts of equity to protect rights in the nature of or analagous with proprietary rights either created by or existing independently of statute[117] does not seem to have been exercised because there is no discussion of whether such a right has arisen. The established "exceptions" to the rule in *Foss* v. *Harbottle* do not apply.[118] No fraud is established in the second case and it does not appear that the Court even adverted to whether the petitioners were members in the third.[119] This is not to say that in the cases it was not possible for the plaintiffs to fulfil the requirements of such rights as were available, but it is asserted that, according to the judgments as reported, it does not appear that they did so.

This suggests that the Specific Relief Act, 1950 is the source of the power to grant relief.[120] The cause of action is established

[116]See note 110, above. This right is now well established but conceptually distinct from that of any other petitioner because it arises out of equitable protection of the security given by the company under a contract. See also section 43 of the Specific Relief Act, 1950. Further, the idea of company was itself in a state of flux. The separate legal entity doctrine had not been confirmed in *Salomon's Case* and the broad language of Sir R. Malins V.C. reflects this, rather than any wider application of the principles on which he decided the cases before him.

[117]*Colortone Holdings Ltd.* v. *Calsil Ltd.* [1965] V.R. 129, 138; *Conway* v. *Petronius Clothing Co. Ltd.* [1978] 1 All E.R. 185, 201.

[118]The rule in *Foss* v. *Harbottle* specifies the circumstances when a shareholder may, in common law (strictly, equity), bring an action against the company. The last, "when justice requires it" exception is much cited but little used. It would need extraordinary circumstances: *Edwards* v. *Halliwell* [1950] 2 All E.R. 1064; *Prudential Assurance Co. Ltd.* v. *Newman Industries Ltd.* [1982] 1 All E.R. 354; *Hodgson* v. *N.A.L.G.O.* [1972] 1 W.L.R. 130.

[119]In *Re Petrotech Logistics Pte. Ltd.* [1982] 2 M.L.J. 212 the powers of the court were assumed to derive from the fact of a winding up petition.

[120]See *Nicholas* v. *Gan Realty Sdn. Bhd.* [1970] 2 M.L.J. 89, 91: "Our law on injunctions is given in section 50 *et seq.* of the Specific Relief (Malay States) Ordinance 1950". In other words, the Specific Relief Act, 1950 codifies the inherent jurisdiction of the courts. If it merely codifies, the preceeding comments on the inherent jurisdiction of the courts would apply to their powers under the Specific Relief Act, 1950. However, it appears,

in each case[121] and the Specific Relief Act, 1950 confers the power to effect a remedy. Section 52 of that Act grants the court the power to issue injunctions when a person's right to or enjoyment of property is invaded or an invasion is threatened. Illustration (c) appended to the section gives the example of a dividend being paid by the directors of a public company otherwise than out of profit, asserting that any shareholder may sue for an injunction to restrain the directors. Illustration (d) is equally specific:

> The directors of a fire and life insurance company are about to engage in marine insurances. Any of the shareholders may sue for an injunction to restrain them.

Other remedies made available to applicants under the Specific Relief Act, 1950 are declaratory relief under sections 41 and 42, the appointment of receivers under section 43 and orders compelling performance of public duties under sections 44 to 49. The second and third of these are relatively self-explanatory for present purposes. The first requires that the persons seeking relief be "entitled to any legal character, or to any right as to any property",[122] but that relief granted be binding only on the parties to the suit and any persons claiming through them.[123] Both injunctions and declarations are only to be made if no other relief is available.[124] Although the Act appears to merely provide a means to relief and not the cause of action, there are problems in the way it is, in fact, used.

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and this is the crux of the matter, that the Specific Relief Act, 1950 is being used to justify a wider jurisdiction. It is against the extension of jurisdiction that the argument of this part of this essay is directed.

121 *M.B.F.Holdings Bhd.* v. *Emtex Corporation Bhd.* [1986] 1 M.L.J. 477: breach of the provisions of the Securities Industry Act, 1983; *Federal Transport Service Co. Ltd.* v. *Abdul Malik* [1973] 1 M.L.J. 216: divisions in the governing body or membership of a company; *Pang Ten Fatt* v. *Tawau Transport Co. Sdn. Bhd.* [1986] 1 M.L.J. 179: breach of the articles.

122 Section 42.

123 Section 42, which goes on to deal with the situation of beneficiaries of trustees who are parties.

124 See the proviso to section 41 and section 54(i).

To take a minor, but obvious point first: Both of the relevant illustrations are now covered by sections in the Companies Act, 1965. Remedies are provided in section 365 for those who would suffer, and not for others, when dividends are paid otherwise than out of profits. Those most affected are creditors, because the priority of repayment in the event of a winding up is changed. Shareholders are getting the cash of the dividend ahead of payments to creditors. A shareholder is not interested because in as much as the capital value of their investment is affected, so they are paid money now. The situation in illustration (d) is covered because a member is granted a power to restrain *ultra vires* activities in section 20(2)(b). Thus specific remedies are granted in the later Act and should overcome the general Act.

These minor issues are indicative of a more profound general point. It is the nature of company law to grant freedom to management. The corporate form enables capital to be pooled and used in the most efficient ways possible in the particular circumstances. Thus the act of contributing capital is one whereby a capacity to use funds is given in return for the benefits that such use may bring. If there is no freedom to use those funds, there is no point to the corporate form. This principle is the basis of the internal management rule, the rule in *Foss* v. *Harbottle* and the division of power between the organs of the company. The first two establish the primacy of the majority over the individual shareholder and assert that it does not matter if the rules are broken, so long as the majority accept the situation.[125] The division of power demonstrates that if power is given to a body in the corporate structure, it is not to be controlled by other bodies, that each has its own purposes.[126] The structure is accepted, with all defects, on acquisition of membership because the purpose of the acquisition is the use of the capital contribution in the way specified by that structure.

[125] See *Foss* v. *Harbottle* (1843) 2 Hare 461, 67 E.R. 189 and *Mozley* v. *Alston* (1847) 1 Ph. 790, 41 E.R. 833 for the paradigm cases of long chains of authority. They are best investigated by referring to K.W.Wedderburn, "Shareholders' Rights and the Rule in *Foss* v. *Harbottle*", [1957] *C.L.J.* 194 and [1958] *C.L.J.* 93.

[126] *Automatic Self-Cleansing Filter Syndicate* v. *Cuninghame* [1906] 2 Ch. 34.

If the legal principles seem confusing, so they are, but underlying all is the notion that at the foundation of company law lies the fact that money is paid to managers to be used by them. Further, its use involves freedom and hence risk but the money is freely paid in the hope of return.[127] The acceptance of risk of loss in the hope of return through the free use by managers of capital contributed by uninvolved contributors is one of the engines of capitalism and, arguably, hence economic growth. The powers assumed by the Court under the Specific Relief Act, 1950 could cut right across this principle of freedom of management. To that extent their exercise would derogate from the efficient use of capital.

In order to confine most narrowly the jurisdiction of the court, an argument might lie that the Companies Act, 1965, as a specific enactment, excludes the operation of the Specific Relief Act, 1950 from the whole field of company law. Support for this argument might be found in the provision by the legislature of relief in particular circumstances, with the corollary that no relief is intended to be granted in others. There are few such situations provided for because there is no point to compliance without interests being served. Where abuses of the corporate form are possible in the sense that individuals suffer in ways not attributable to the risk freely undertaken, remedies have been inserted. The relevant example is section 181. Another, more subtle, remedy is section 162 which grants the court the power to rectify the register of shareholders.[128] On the other hand, some common law remedies are restricted by the Companies Act; for example, under section 19, the member's right to prevent and avoid *ultra vires* acts of the company. This view ignores the fact that the Companies Act, 1965 is not a code. Much of company law is common law, generated in the courts of equity. Thus the statute can create proprietary rights, or rights analagous with them,

[127] This point is well made in a slightly different context in the recent Singapore case of *Re S.Q.Wong Holdings (Pte.) Ltd.* [1987] 2 M.L.J. 299.

[128] This is an enormously powerful, yet underutilized remedy. See *Kathleen Investments (Australia) Ltd. v. Australian Atomic Energy Commission* (1977) 139 C.L.R. 117 for an example of its use to control public authorities.

and those rights will be enforced by the courts without specific provisions for their enforcement.[129] Excluding the equitable jurisdiction of the courts from the whole of company law would eradicate these well established rights of enforcement. It would also leave the accepted common law remedies, enumerated in the exceptions to the rule in *Foss* v. *Harbottle*, without rationale.

A less extreme position,[130] more consistent with authority, might be that injunctions and declarations may be granted when the cause of action originates from the breach of a statute.[131] In Australia, similar relief is available under section 574 of the Companies Code.[132] It ensures that the legislature's wishes are carried out, but with those most concerned bearing the costs and risks of enforcement. If those most concerned are not of the opinion that compliance is worth those risks and costs, then there is no point to compliance. It is an unnecessary community cost. If this position were to be adopted, the standing of an applicant to sue should be established. Section 574 of the Companies Code refers to "any person whose interests have been, are or would be affected by the conduct", words which echo the more general terminology of the Specific Relief Act, 1950: "right to, or enjoyment of, property".[133]

A broader view of the power to grant injunctions and declarations would not limit the power of the court at all. Breaches of the statute, of the memorandum and articles of a company and even of normal procedures might give rise to remedial circumstances. Any person, whatever their relationship with the company, might be able to sue. Referring to the words of the Specific Relief Act, 1950, these matters would constitute "rights

[129] *Wyld* v. *Silver* [1963] Ch. 243; *Colortone Holdings Ltd.* v. *Calsil Ltd.* [1965] V.R. 129; *Conway* v. *Petronius Clothing Co. Ltd.* [1978] 1 All E.R. 185.

[130] Assuming, of course, that the Specific Relief Act, 1950 does more than merely (and inexactly) codify the inherent equitable jurisdiction as referred to previously. See note 120 above.

[131] For example, *M.B.F.Holdings Bhd.* v. *Emtex Corporation Bhd.* [1986] 1 M.L.J. 477.

[132] See also section 409A Companies Act (Cap. 50) (Singapore).

[133] *BHP Co. Ltd.* v. *Bell Resources Ltd* (1984) 8 A.C.L.R. 609 interpreted section 574 of the Companies Code to give similar standing to that held to exist in *M.B.F.Holdings Bhd.* v. *Emtex Corporation Bhd.* [1986] 1 M.L.J. 477.

to, or enjoyment of, property". It is in this context that *Pang Ten Fatt* v. *Tawau Transport Co. Sdn. Bhd.*[134] may be understood. The Court assumed a discretionary, and therefore uncontrolled, power to decide what is "property" or its "enjoyment".

The broad view leaves section 181 without rationale or purpose, other than to increase the remedies available,[135] because the power purportedly granted by it is already possessed by the court. But the limits of the court's discretion described in section 181 are there because the nature of "property", or even "interest", in a company is extraordinarily difficult to define. The section was inserted to cut through the Gordian knot of the common law. Its words are calculated to give the court some indication of the sorts of situation which ought to be remedial in the vast range of possible claims of damage to interests. To fall back on the simple language of the Specific Relief Act, 1950 to solve the same problem of the fluid nature of competing interests in a company would leave the law in confusion, increasing the costs of resolution of disputes and, generally, community transaction costs. For example, the law regulating meetings of shareholders is a sophisticated adaptation to the idea that, when people meet in accordance with rules, it is often to their advantage that those rules not be precisely complied with. Thus it is provided in section 33(3) as modified by the common law[136] that the

[134] [1986] 1 M.L.J. 179.

[135] See section 181(2).

[136] The common law developed the idea of a contractual basis to the company long before it was adopted in statute. The terms of the section have been ignored in favour of the common law conception. See: *Sparks* v. *Liverpool Water Works* (1807) 13 Ves. Jun. 428, 33 E.R.354; *In re Norwich Yarn Company, ex parte Bignold* (1856) 22 Beav. 143, 52 E.R. 1062; *In re Tavarone Mining Company: Pritchard's Case* (1873) 5 App. Cas. 317; *Houldsworth* v. *City of Glasgow Bank* (1880) 5 App. Cas. 317; *Imperial Hydropathic Hotel Company, Blackpool* v. *Hampson* (1882) 23 Ch.D. 1. See also the paradigm post-section cases: *Automatic Self Cleansing Filter Syndicate Co. Ltd.* v. *Cuninghame* [1906] 2 Ch. 34; *Salmon* v. *Quin and Axtens Limited* [1909] 1 Ch. 311; *Hickman* v. *Kent or Romney Marsh Sheep-breeders' Association* [1915] 1 Ch. 881; *Rayfield* v. *Hands* [1958] 2 All E.R. 194; *Winthrop Investments Ltd.* v. *Winns Ltd.* [1975] 2 N.S.W.L.R. 666.

articles are a contract between the members and between the members and the company,[137] but that the enforceability of the rights therein contained is severely restricted; for example, the provision of the articles are binding only in respect of rights as members[138] and even if a right is granted and breached, if a normal majority can remedy the contravention it cannot be enforced.[139] The law so accomodates the perennial problems of benefit to the group at the expense of the individual. Certainly, the law proved inadequate in some situations and section 181 was enacted to rectify them. But the notions of property inherent in the Specific Relief Act, 1950 are as a bull in the china shop of the common law.

The broad view should at least be limited by the ideas of managerial discretion and group governance. A company is freely joined by individuals. What appears to be law, the memorandum and articles, is not the whole constitution of the company, but are part of a sophisticated aparatus for ensuring that return to all members is maximized, bearing in mind the costs of monitoring and control, of deviations from a particular shareholder's desires,[140] and that the corporate form benefits society. The word "property" in the Specific Relief Act, 1950 should be understood to incorporate these concepts and, by them, the jurisdiction of the court narrowed. The shareholder thus has no property interest in compliance with all the articles, just as they do not have in the property of the company. The nature of a shareholder's property is defined by the whole of company law and threats

[137] Comp. section 33(1).

[138] *Eley* v. *Positive Government Security Life Assurance Co. Ltd.* (1876) 1 Ex.D. 88; *Re Dale and Plant Ltd* (1889) 61 L.T.(N.S.) 206; *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate* [1899] 2 Ch. 80; *Hickman* v. *Kent or Romney Marsh Sheep-breeders' Association* [1915] 1 Ch. 881; *Shuttleworth* v. *Cox Bros. (Maidenhead) Ltd.* [1927] 2 K.B. 9; *Beattie* v. *E.&F. Beattie Ltd.* [1938] Ch. 708.

[139] *Mozley* v. *Alston* (1847) 1 Ph. 790, 41 E.R. 833; *Great Western Railway Co.* v. *Rushout* (1852) 5 De.G.&Sm. 290, 64 E.R. 1121; *Lord* v. *Copper Mines Co.* (1848) 2 Ph. 740, 41 E.R. 1129; *MacDougall* v. *Gardiner* (1875) 1 Ch.D. 13; *Brown* v. *La Trinidad* (1887) 37 Ch.D. 1; *Beattie* v. *E. & F. Beattie Ltd.* [1938] Ch. 708. Comp. *Cannon* v. *Trask* (1875) 20 Eq. 669; *Pender* v. *Lushington* (1877) 6 Ch.D. 70.

[140] There is no objective means of ascertaining what is of benefit to the members as a whole. Indeed, there is no such thing. All that exists is what each shareholder wants. Members join companies because, after deducting the costs mentioned in the text, they still gain more than they lose from participation.

to it are preventable to no more or less extent than provided by that law.

On this, middle, view and the first, narrow, view of the Specific Relief Act, 1950, section 181 of the Companies Act, 1950 retains its function of adding a remedy to the armoury of shareholders (and creditors).[141] The wide view implies that section 181 should be interpreted simply as a broadening of the remedies available to the court: Subsection (1) does not limit the power of the court, but justifies wide-ranging powers to regulate the running of companies; subsection (2) becomes the crux of the section. This is antithetical to the traditional concept of the function of the judiciary in company law. The existence of the narrow and middle views show that it is not necessary to take such a radical step, even accepting all Malaysian authority.

The preceding assumes, *arguendo*, that the Specific Relief Act, 1950 modifies the powers of the court to issue injunctions and declarations. However, the Specific Relief Act, 1950 should revert to its original intent of being merely a means by which causes of action otherwise defined are remedied. If so interpreted, company law in Malaysia would be consistent with that of the United Kingdom, Australia and New Zealand. Much uncertainty in the law would be resolved. And the judiciary would be able to retreat from deciding the best policies for companies, that is, interfering in their internal management other than in situations where real interests are in danger.

## 4. *CONCLUSIONS*

The terms of section 181 clearly limit the judicial role to remedying the problems of a particular plaintiff in certain limited situations. The legislature has specified that the discretion to grant orders is to be exercised only in those situations, no matter how difficult their definition. There is a clear implication that no wider discretion is granted and that defendants are entitled to win the case if it is apparent that the plaintiff's complaints fall outside those situations. At this point, the approach to such

[141] See note 7, above.

sections taken world-wide should be taken in Malaysia, despite the terms of the Specific Relief Act, 1950. There seems no peculiarity of this country which would necessitate a different approach. Indeed, the form of capitalism adopted in Malaysia is the same as that in other common law countries: The corporate form is its essential feature. The company is a means of aggregation of capital whereby powers of direction are given to various organs. Section 181 is designed to regulate relations within the capitalist ideology, in which self-interest is paramount. The corporate form, therefore, would not seem to be at issue even in the problems of economic development, given that capitalist means are used to the extent of the adoption of that form of business.[142]

When exercising the discretion under section 181, a court should bring itself within the terms of the section. In other words, the discretion is as to what orders should be made, not whether the conduct is remedial. Courts should seek the single underlying concern of the definition of their jurisdiction rather than referring to a multiplicity of tests. However, it is a pointless task to endeavour to articulate a formula for that concern, although it might be possible in the far future. Such formulae as have been adopted in Malaysia and elsewhere prove, on analysis, to add nothing to understanding of the underlying concern and even to distort the development of the law in relation to the section.

The words and phrases of the section are not mere surplusage or paraphrases of the underlying concern. In the context of a section which divides up events in the running of the affairs of a company into courses of conduct of management or the directors, and acts of the company or resolutions of the members, each phrase indicates the impact of the underlying concern on the events complained of. Thus when members are deciding mat-

[142] The economics of section 181, or even of the company, is an exceedingly difficult topic. See R.H.Coase, "The Nature of the Firm", (1937) 4 *Economica* 386, for an explanation of why classical economics fails to explain the company. For a neoclassical explanation of the company, see: C.Jensen and W.H.Meckling, "Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure", (1976) *Jo. Financial Economics* 305. See generally: J.H.Farrer, *Company Law*, Butterworths: London, 1985.

ters, the main concern is that majority rule might work to an unacceptable disadvantage of those in the minority. The word "discriminate" refers directly to the differential treatment a majority might mete out. "Unfair" indicates some discrimination is acceptable, but only to a certain point. "Otherwise prejudicial" is an indication that in the event that the term "discrimination" is narrowly interpreted or, for some semantic reason, is inapplicable, a wider spectrum of events should be remedial.[143] Similarly, in disputes between management and membership, "oppressive" and "disregard" highlight the nature of the company as a grant to management by the members of the power to decide as to the use of the pool of capital, at the same time as respecting the fact that a member contributes a portion of the capital, therefore has partial ownership of it, is taking the risks associated with the use of their contribution and ought to receive the benefits from its use, subject to the rewards due to management. A balancing process should not be adopted because the interests of the management are not involved. What is at issue is the extent of management's powers in the particular company. The degree of discretion granted in the particular circumstances is and should be established on the evidence. The interest of a member includes the fact that management has a particular degree of freedom from that member's and other members' personal interests. The member receives a reward for abandoning this degree of self-interest, the reward being the extra profit to be derived from enterprises demanding large amounts of capital and strong central control. The cost a member suffers for this reward is the difference between their best interest and what they get.[144]

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[143] For example, in *Scottish Co-operative Wholesale Society Ltd.* v. *Meyer* [1959] A.C. 324, the company was run down to the detriment of all the shareholders as shareholders but to the benefit of a holding company as a separate business.

[144] Extra costs, technically speaking, are the costs of monitoring the acts of management and of insuring the risk of default.