



# The Oppression Remedy and the Demise of Classical Company Law Theory

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Judge of the Caribbean Court of Justice

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## **REMARKS**

**By**

**The Honourable Mr Justice Andrew Burgess, Judge of the Caribbean Court of Justice,**

**on the occasion of**

**The Mona Law Master Class Series**

**Corporate Governance**

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### **Introduction**

I have chosen as the topic of this presentation what I have titled: “The Oppression Remedy and the Demise of Classical Company Law Theory”. I have chosen this topic for two reasons.

The first reason is doctrinal. Let me explain what I mean by this.

Recent regional companies’ legislation has broken away from the age-old tradition of copying English companies’ statutes and is now rooted in Canadian legislative provisions. Many of these provisions are new and distinct both in character and purpose and represent a rejection of the classical company law theory that yielded the organizing principles which were at the foundation of English companies’ legislation. That theory asserts that company law rights and obligations derive from the classification of corporate constitutional documents, the memorandum and articles, as contracts. Thus classified, remedies for corporate wrong doing affecting shareholders

and other stakeholders are limited by the principles governing the remedies available for breach of contract.

The “Oppression Remedy” provision is a provision which rejects the contractarian theory of company law rights and obligations. The implications of that, especially in light of section 19 (1) of the Jamaican Companies Act, are fascinating to me as a student of Commonwealth Caribbean company Law.

My second reason for choosing this topic is pragmatic. It relates to the prevalence of the remedy in regional company law litigation.

In the last twenty-five years or so, the “Oppression Remedy” provision has been the most litigated provision in regional company law litigation. Indeed, “Oppression Remedy” cases account for almost 50% of such litigation! It has been litigated in regional High Courts and Courts of Appeal and in the CCJ and the Privy Council.

For these two reasons, then, I think that you will readily grant me leave to have this conversation with you on my chosen topic this afternoon.

Let me begin by providing an introduction to the “Oppression Remedy” provision.

### **Basic Oppression Remedy Provision**

The typical Oppression Remedy Provision in regional Companies Acts reads as follows:

*“(1) A complainant may apply to the court for an order under this section.*

*(2) If, upon an application under section (1), the court is satisfied that in respect of a company or any of its affiliates*

*(a) any act or omission of the company or any of its affiliates effects a result, (b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner, or*

*(c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,*

*that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any shareholder or debenture holder, creditor, director or officer of the company, the court may make an order to rectify the matters complained of.”*

I would suggest that it is crucial that we pay attention to the wording of this provision because, as we will see, that is key to unlocking the secrets of the oppression remedy. Also, to me, two other important interrelated aspects of the Oppression Remedy Provision in regional Companies Acts lends to a better understanding of that provision.

The first relates to the provenance of the provision and the second the theoretical foundation of the provision.

*First the historical roots of the provisions.*

The Oppression Remedy Provisions trace their roots back to section 210 of the English 1948 Companies Act. Under that section any member who complained that the affairs of the company were being conducted in a manner oppressive to some part of the members could petition the

court. If the court was satisfied that the facts supported a winding up order under section 222 (f) on just and equitable grounds, then the court was empowered to make any order it thought fit.

*Second, the theoretical foundation of the provisions*

The Oppression Remedy Provisions are not a codification of the common law.<sup>1</sup> Rather, as I have already intimated, they represent a shattering of the traditional company law theory that the company's constating documents constitute a contract. This theory was captured in a provision in the Acts creating what we called a statutory contract.

And I am certain that all of you will remember that flowing from that contractarian model of company law were such rules as (i) the *Rayfield v Hands* rule that rights in the memo and articles were enforceable among members *inter se*; (ii) the *Hickman v Romney Marsh Sheepbreeders Assoc* rule that, as the memo and articles constitute a contract between the company and each member, the company could enforce the articles against each member; and (iii) the *Pender v Lushington*<sup>2</sup> rule that a member could enforce the articles against the company. You will also remember that the rule was that the articles do not constitute a contract in respect of what is termed "outsiderrights", that is, rights pertaining to persons in some capacity other than that of member. Your classical company law analogue of the classical contract privity of contract principle!

The "Oppression Remedy" provisions have completely upended this common law approach to remedying of wrongs done to shareholders and other stakeholders. In the Canadian case of *Westfair Foods Ltd v Watt*,<sup>3</sup> Kerrans JA expressed the opinion that the oppression remedy

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<sup>1</sup> *Ferguson v Imax Systems Corp* (1983)150 DLR (3d) 718 Ont CA.

<sup>2</sup> (1877) 6 Ch D 70 Eng Ch D.

<sup>3</sup> (1991) 5 BLR (2d) 160 Alta CA.

provisions are nothing more than a compendious way for Parliament saying to the courts that the classes protected by the Act are to be fairly and justly treated. This is important because, in traditional company law theory, fairness and justice are to be judged by what is expressed in the articles which are indeed stated to be contracts. Put differently, in classical company law fairness and justice reside in the legal rights which accrue under the statutory contract.

As we will see, a review of the case authority on the operation of the oppression remedy supports the conclusion that that remedy is available, not to vindicate legal rights, but to vindicate equity and justice and as such is to be viewed as an equitable remedy. Indeed, one commentator called it, “a broad and flexible tool, designed to protect the interests of corporate stakeholders in a variety of corporate circumstances”.<sup>4</sup> And Professor Stanley Beck deemed it “the broadest, most comprehensive and most open-ended shareholder remedy in the common law world”.<sup>5</sup>

Very interestingly, it is arguable that the foregoing theoretical analysis of the “Oppression Remedy” provisions does not sit comfortably with the Jamaican Act. This is because section 19 (1) of that Act retains the traditional notion that the articles of incorporation in Jamaica constitute a statutory contract. It provides that:

Subject to the provisions of this Act, the articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the articles.

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<sup>4</sup> Peterson Shareholders Remedies in Canada (Toronto: 1989) at para 18.21

<sup>5</sup> “Minority Shareholders’ Rights in the 1980s” in Law Society of Upper Canada Lectures (1982), Corporate Law in the 80s, 311 at 312.

Perhaps, the presence of this provision is the reason why the Jamaica “Oppression Remedy” provisions are contained in a section 213A, a section which appears to have been added to the Act as an afterthought! We will have a little more to say on this presently.

### **Analysis of the Oppression Remedy Provisions**

Let us turn now to an analysis of the Oppression Remedy.

The first question that arises here is this:

#### **To Whom is the Remedy Available?**

If we go back to the Oppression Remedy Provisions, we will see that on the express language of those provisions, the oppression remedy is available to “a complainant”.

#### **So, who is a “Complainant”?**

The expression “Complainant” constitutes a novel legal category in regional company law. It appears to be intended to protect the interests of not only shareholders, but also of other stakeholders such as creditors, management, and the public in general.

This is evident from the statutory definition provision on “complainant”. Section 225 (b) of the Barbados Act is typical and defines “complainant” as follows:

*“complainant” means:*

- (i) a shareholder or debenture holder, or a former holder of a share or debenture of a company or any of its affiliates;*

- (ii) a director or an officer or former director or officer of a company or any of its affiliates;*
- (iii) the Registrar; or*
- (iv) any other person who, in the discretion of the court, is a proper person to make an application under this part.*

As is evident from this provision, the expression “Complainant” represents a fundamental move away from classical company law theory that only shareholders can assert company law remedies against a company. The expression embraces the idea that company law remedies may also be available to other stakeholders of a company. Stated differently, the expression signals a movement away from a shareholder theory to a stakeholder theory of company law remedies.

Observe, however, the definition in section 212 (3) of the Jamaican Act. You will notice that the definition of complainant in that subsection does not include “any other person who, in the discretion of the court, is a proper person to make an application” as in section 225 (b) of the Barbados Act. It may very well be that the Jamaican Act in pursuit of coherence between section 19 (i), the statutory contract provision.

Let us turn next to the question:

### **When is the Remedy Available?**



The kernel of the oppression remedy provisions is that the conduct complained of must be actionable conduct in the sense that is “oppressive or unfairly prejudicial, or that unfairly disregards the interests of a shareholder or debenture holder, creditor, director or officer of the company”.

There are therefore two central focus points in determining entitlement to the oppression remedy. These are (i) the “interests” of the protected category and (ii) the conduct that is “oppressive”, “unfairly prejudicial” or “unfairly disregards” to these “interests”.<sup>6</sup>In this regard, it was stated by the Court in the leading Supreme Court of Canada case of *BCE Inc v 1976 Debentureholders*,<sup>7</sup> as follows at [56]:

[T]he best approach to the interpretation of s. 241 is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to “oppression”, “unfair prejudice” or “unfair disregard” as set out in s.241 (2) of the CBCA.

To summarise, in a claim for the oppression remedy, two questions must be considered. The first is whether the evidence supports the complainant’s assertion of “actionable interests”. The second is whether the evidence establishes that those interests were violated by conduct falling within the

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<sup>6</sup> *Mcateer v Devoncraft Developments Ltd* (2001) 24 BLR (3d) 1 Alta QB.

<sup>7</sup> [2008] SCR 560.

terms, “oppression”, “unfair prejudice” or “unfair disregard” of a relevant interest?<sup>8</sup> In other words, whether there was “actionable conduct?”

### **First, “Actionable Interests”**

*BCE Inc v 1976 Debentureholders* makes it plain that the “interests” referred to in the oppression remedy provisions must be interpreted in light of the purpose of the oppression remedy itself.<sup>9</sup> It is clear from the legislative history that that remedy was chosen to free the court from technical considerations of legal right and to confer a wide power to do what appears to the court to be just and equitable. The purpose of the oppression remedy, therefore, is to provide a “just and equitable” remedy for “interests” of persons in the protected category not already enforceable at law without recourse to special remedies. Indeed, it is now firmly established in Canadian case law that the “interests” not already enforceable at law which are left for the oppression remedy to deal with and those “interests” are the “reasonable expectations” of affected stakeholders.<sup>10</sup>

Judicial recognition of the importance of stakeholders’ expectations as a principle underlying the “just and equitable” oppression remedy is largely attributable to the English House of Lords case of *Ebrahimi v Westbourne Galleries Ltd.*<sup>11</sup> In this case, Lord Wilberforce said of the “just and equitable” winding up remedy in section 222 (f) of the English Companies Act, 1948:

The words [“just and equitable”] are a recognition of the fact that a limited company is more than a mere judicial entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or

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<sup>8</sup> *BCE v 1976 Debentureholders* [2008] SCR 506 at [68].

<sup>9</sup> *BCE v 1976 Debentureholders* [2008] SCR 506 at [58]-[62].

<sup>10</sup> See the cases cited by Hamilton JA in *Cohen v Jonco et al* 2005 MBCA 45 at [31].

<sup>11</sup> [1973] AC 360 at 379 Eng HL.

amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure....

In *BCE Inc v 1976 Debentureholders*,<sup>12</sup> the Supreme Court of Canada noted that Lord Wilberforce's analysis of the just and equitable remedy was in terms of the "rights, expectations and obligations" of individuals in the protected category. The Court opined that, since "rights" and "obligations" connote interests enforceable at law without recourse to special remedies, what is left for the oppression remedy to deal with are the "reasonable expectations" of affected individuals in the protected category. Thus, according to *BCE* the "reasonable expectations" of the protected category constitute the actionable interests of the protected category for purposes of the oppression remedy.

In my view, those interests are better regarded as the "equitable expectations" of this class. Let me explain.

The judgment of Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd*<sup>13</sup> is universally relied as the starting point in explaining the concept of expectations in the context of the Oppression Remedy. There, Lord Wilberforce pointed out that in most cases what are the interests of shareholders will be adequately and exhaustively defined in the constituent documents of the company and the Companies Acts, but that in some cases, what he called, "equitable considerations" might intrude.

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<sup>12</sup> [2008] SCR 560 at [61].

<sup>13</sup> [1973] AC 360 Eng HL.

He observed that such cases typically may include one, or probably more, of the following elements:<sup>14</sup>

*“(i) an association formed or continued on the basis of a personal relationship, involving mutual confidence--this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be ‘sleeping members’), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members’ in the company--so that if confidence is lost, or a member is removed from management, he cannot take out his stake and go elsewhere...”*

These elements are typically present in small closely held companies whose shareholders tend to be associated by more than purely commercial interests, to be actively involved in many instances in the day-to-day management of the company and to be personally committed to the company.

However, as Lord Wilberforce explained, it would be impossible, and wholly undesirable, to exhaustively define the circumstances in which equitable considerations may be allowed to intrude in determining the interests of a shareholder. He said:<sup>15</sup>

*“Certainly, the fact that the company is a small one, or a private company, is not enough. There are many of these where the association is a purely commercial one, of which it can safely be said that the basis of the association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more.”*

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<sup>14</sup> [1973] AC 360, 379 Eng HL.

<sup>15</sup> [1973] AC 360, 380.

It is plain from Lord Wilberforce's adumbration that the concept of expectations rests on "the superimposition of equitable consideration" in a particular case. Thus, in determining whether an expectation is actionable in an oppression remedy case, regard must be had to the facts of the specific case, the relationships at issue, and the entire context, including the fact that there may be conflicting claims and expectations.

The reasonable or equitable expectations of the protected category have been held to include the expectations expressly embedded in their strict legal rights,<sup>16</sup> as well as the underlying expectations springing from these rights.<sup>17</sup>

Some of you may be asking whether the concept of reasonable or equitable expectations in company law includes the wider public law concept of "legitimate expectations".

In the English Court of Appeal case of *Re Saul D Harrison & Sons plc*,<sup>18</sup> Hoffmann LJ (as he then was) suggested that it did. However, in the English House of Lords case of *O'Neil v Phillips*,<sup>18</sup> by then Lord Hoffmann admitted that such a suggestion was "probably a mistake". Instead, he suggested a shift from the public law language of "legitimate expectations" to the more traditional private law terminology of constraining the exercise of legal rights by reference to "equitable considerations".

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<sup>16</sup> *Wonsch (Litigation Guardian of) v Wonsch* (2007) CarswellOnt 3914 Ont CA.

<sup>17</sup> See, *Constitution Ins Co v Kosmopoulos* [1978] 1 SCR 2 SCC where it was held that the interests of a creditor included the expectation that the controlling shareholder would cause the company to take out insurance on its assets.

<sup>18</sup> [1995] 1 BCLC 14 Eng CA.

<sup>18</sup> [1999] 2 BCLC 1 Eng HL

Despite citing *O'Neil v Phillips*,<sup>19</sup> the Grenadian Court of Appeal in *Grenada General Insurance Co. Ltd, Jonas Browne & Hubbard (Grenada) Ltd et al v Grenada Insurance Services Ltd*,<sup>20</sup> based its decision on “legitimate expectation”. The facts of this case are that GGIC Ltd was formed in 1990 pursuant to discussions between GIS Ltd and JBH Ltd and a memorandum of intent was made and signed by two representatives of each company. The relevant part of the memorandum stated as follows:

*“It is proposed that Grenada Insurance Services (G.I.S) and the insurance department of Jonas Browne and Hubbard (J.B.H) merge their respective portfolios to form a new national insurance company. The new company will rapidly accelerate the localization of the insurance industry in Grenada.*

*The objective is to create a partnership in which each party, G.I.S and J.B.H., contributes equally to the decision making process. However, it is understood that, in order for the results of the new company to be incorporated into the consolidated accounts of J.B.H., it is preferred that J.B.H. owns 51 percent of the shares.”*

J.H.B. used its majority shareholding to force through a change in the composition of the board, and following this up, used its resultant majority position on the Board to remove the chairman, who was G.I.S.’s nominee, and to replace him by its own nominee.

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<sup>19</sup> [1999] 2 BCLC 1 Eng HL

<sup>20</sup> (Unreported) (Civ App No 12 of 1999 Gren CA).

The Grenada Court of Appeal held that the provisions of the memorandum created in G.I.S. “a legitimate expectation to contribute equally with the Appellant [J.B.H.] in the decision-making process as it related to the affairs of the first Appellant [GGIC Ltd].” The Court of Appeal concluded that this conduct was unfairly prejudicial to and unfairly disregarded the interests of G.I.S.

**Second:**

**Actionable Conduct**

The Oppression Remedy Provisions expressly stipulate that the oppression remedy is available where there is conduct that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of shareholders or debenture holders, creditors, directors or officers of the company. There are therefore three categories of conduct that can give rise to the oppression remedy and which therefore constitute actionable conduct. These are “oppressive” conduct, “unfairly prejudicial” conduct and conduct which “unfairly disregards” the interests of shareholders or debenture holders, creditors, directors or officers of the company. Each of these categories introduces a separate category of conduct, which may overlap in any case, but each of which, if proven, can constitute oppression as encoded in the provisions of these Acts.<sup>21</sup>

On the face of it, the statutory juxtaposition of the words “oppressive”, “unfairly prejudicial” and “unfairly disregards” appears to introduce, in descending order, the stringency of the proof required to invoke the oppression remedy. Put differently, the wording of the provisions seems to suggest that oppressive conduct requires stricter proof than unfairly prejudicial conduct which, in turn, requires stricter proof than unfair disregard.

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<sup>21</sup> See *Lalla v Trinidad Cement Ltd et al* (Unreported) (HCA No. Cv. S -852/98 T’dad HC) per Jamadar J.

<sup>23</sup> (1993) 11 BLR (2d) 122 Alta QB.

That appears to be the interpretation to be given to these words by the case authorities. Thus, in *Such v RW-LB Holdings Ltd*<sup>23</sup> it was held that the burden of proof required for unfair prejudice or unfair disregard is less rigorous than the burden of proof required for oppression because what is at issue is the unfair result of the conduct, not the state of the mind of the wrongdoer.

Similarly, in *Re Mason and Intercity Properties Ltd*,<sup>22</sup> Blair JA opined that “oppressive” conduct involves a more rigorous standard than that of “unfairly prejudicial” or conduct which “unfairly disregards”.

Again, in *Dancey v 229281 Alta Ltd*,<sup>23</sup> it was held that the words “unfairly prejudicial” had an effect different from and going beyond that ascribed to “oppressive”, and in *Re Abrahams and Inter Wide Investments Ltd*,<sup>24</sup> Griffiths J expressed a similar view.

Let us therefore explore separately the meaning of each of the standards contained in the three categories mentioned in the provisions.

### **Oppressive conduct**

Oppressive conduct is a concept borrowed from section 210 of the United Kingdom Companies Act 1948 and involves the most stringent requirements of the three categories of conduct specified in regional Acts.<sup>25</sup> Lord Simonds in *Scottish Cooperative Wholesale society Ltd v*

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<sup>22</sup> (1987), 59 OR (2d) 631 Ont CA.

<sup>23</sup> (1988), 40 BLR 180 Alta QB.

<sup>24</sup> (1985), 51 OR (2d) 460 HC.

<sup>25</sup> *Such v RW-LB Holdings Ltd* (1993) 11 BLR (2d) 122 Alta QB; *Cohen v Jonco Holdings Ltd* (2005) 4 BLR (4th) 232 Man CA.



Meyer<sup>26</sup> interpreted the concept as used in section 210 of the United Kingdom 1948 Act as connoting “burdensome, harsh and wrongful” conduct to some part of the members of the company. It was held also to necessitate a course of conduct, not mere isolated acts, continuing up to time of the petition involving an invasion of legal rights, displaying lack of probity on the part of those conducting the company’s affairs, and affecting the petitioner in his capacity of a member.

Lord Simonds interpretation of oppressive conduct as burdensome, harsh and wrongful conduct involving an invasion of a legal right was adopted in the Manitoba Court Appeal case of *Cohen v Jonco Holdings Ltd.*<sup>27</sup> This case which was cited with approval in the St. Lucian High Court case of *Devaux v Duboulay Holdings Ltd*<sup>28</sup> and, it is submitted, is to be viewed as a correct interpretation of that expression as used in regional Companies Acts.

It is to be noted however that Lord Simonds requirement that oppressive conduct necessitates a course of conduct, not mere isolated acts, is, on the express language of the oppressive remedy provisions in regional Acts, inapposite. The express language is “any act or omission”. This means that an isolated burdensome or harsh or wrongful act can constitute oppressive conduct and that it is not necessary to prove a continuing course to establish oppressive conduct under regional Acts.

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<sup>26</sup> [1959] AC 324 Eng HL.

<sup>27</sup> (2005) 4 BLR (4 th) 232 at [23] Man CA. See also *Brant Investments Ltd v Keeprite Inc* (1991) 3 OR (3d) 289 Ont CA.

<sup>28</sup> (Unreported) SLUHCV 0424 of 2003 St L HC.

*Turning next to*

### **Unfairly prejudicial conduct**

The sole type of conduct that was covered by the section 210 of the United Kingdom Companies Act, 1948 oppression remedy was conduct that was “oppressive”. The Jenkins Committee thought that this was too narrow a basis for protection and so recommended that the basis should be expanded to include conduct that was “unfairly prejudicial” to the interests of members. This recommendation has been incorporated in the oppression remedy provisions in regional Companies Acts. which include “unfairly prejudicial” conduct as a basis for invoking the oppression remedy. In fact, it may be noted that unfairly prejudicial conduct is the sole basis of the oppression remedy under the St. Christopher/Nevis Act.<sup>29</sup>

Unfair prejudice is a less stringent concept than oppression. Thus, in the Canadian case of *Miller v F Mendel Holdings Ltd*<sup>30</sup>, it was held that conduct complained of which may not be burdensome, harsh and wrongful and therefore oppressive may nevertheless be unfairly prejudicial.

On the other hand, in approaching unfair prejudice, the courts have held that the conduct complained of must be prejudicial in the sense of causing prejudice or harm to the relevant interests of the shareholder or other complainant and that as such both unfairness and prejudice must be proved.<sup>31</sup>

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<sup>29</sup> St C/N s 241.

<sup>30</sup> (1984) 26 BLR 85 Sask QB. See also *Such v RW-LB Holdings Ltd* (1993) 11 BLR (2d) 122 Alta QB; *Cohen v Jonco Holdings Ltd* (2005) 4 BLR (4 th) 232 Man CA.

<sup>31</sup> *Re Saul D Harrison and Sons plc* [1995] 1 BCLC 14 Eng CA; *Re RA Noble & Sons (clothing) Ltd* [1983] BCLC 273.

It also appears from case law that it is not necessary to show that the conduct complained of is improper or illegal<sup>32</sup> and that an exercise of a legal right may have an unfairly prejudicial consequence.<sup>33</sup>

The approach of the courts is to look at any alleged prejudicial conduct from an objective point of view, to take into account any relevant circumstances, and to give the expression its natural meaning without any technical gloss.<sup>34</sup>

In deciding whether conduct is unfairly prejudicial, the court may take a number of factors into consideration. For instance, although there is no requirement that the complainant should come with clean hands,<sup>35</sup> the conduct of the complainant may be a factor taken into account.<sup>36</sup> The court may also look at such things as whether any offer was made to buy out the complainant, the motive of the wrongdoer, any delay in bringing the complaint, and any other relevant factors.

It is clear from the cases that there are no set categories of what constitutes unfairly prejudicial conduct. Be that as it may, the cases in which conduct is held to be unfairly prejudicial tend to fall into certain well-defined categories.

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<sup>32</sup> Re RA Noble & Sons (clothing) Ltd [1983]BCLC 273; Re Little Olympian Each-Ways Ltd (No.3) [1995] 1 BCLC 636 Eng Ch D.

<sup>33</sup> Pente Investment Management Ltd v Schneider Corp (1998) (Sub nom Maple Leaf Foods Inc v Schneider Corp) (1998) 44 BLR (2d) 115 Ont CA; Grenada General Insurance Co. Ltd, Jonas Browne & Hubbard (Grenada) Ltd et al v Grenada Insurance Services Ltd (Unreported) (Civ App No 12 of 1999 Gren CA).

<sup>34</sup> Re Saul D Harrison and Sons plc [1995] 1 BCLC 14 Eng CA.

<sup>35</sup> See, *Journet v Superchef Food Industries Ltd* (1984) 29 BLR 206 Que SC where it was explained that to require perfect probity from a complainant would imply that dishonesty or improper management is to be sanctioned if no spotless complainant may be found. See also, *Standal's Patents Ltd v 160088 Canada Inc* [1991] 1 RJQ 1996 Que SC; *Krynen v Bugg* (2003) 32 BLR (3d) 61 Ont SCJ.

<sup>36</sup> *Grace v Biagioli* [2006] 2 BCLC 70 CA.

1. Where a shareholder is excluded from management or removed from the board.<sup>37</sup>
2. Where controlling shareholders make adverse changes to an existing shareholder's rights.
3. Where there is the diversion of business to another company in which the majority shareholder has a greater interest.
4. Where there is failure to hold annual general meetings and to have financial statements prepared in accordance with the Acts thus depriving shareholders of their right to information on the state of the company's affairs.
5. A failure to call a special general meeting of shareholders to fill a vacancy on the board of directors resulting from the bankruptcy of the second director has been held to amount to unfairly prejudicial conduct.
6. Where there has been a serious departure from normal and business-like practices. In *Re Abraham and Inter Wide Investments Ltd*,<sup>38</sup> the Ontario High Court held that conduct was

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<sup>37</sup> *Diligenti v RWMD Operations Kelowna Ltd* (1976) 1 BCLR 36 SC; *Grenada General Insurance Co. Ltd, Jonas Browne & Hubbard (Grenada) Ltd et al v Grenada Insurance Services Ltd* (Unreported) Civ App No 12 of 1999 Gren CA.

<sup>38</sup> (1985) 51 OR (2d) 460 Ont HC.

unfairly prejudicial where payments which were characterized as directors fees had not been legally authorized, did not have the character of directors fees, were not associated with the duties and responsibilities of directors and had been paid to companies related to the directors and where financial statements were inadequate, inaccurate and not prepared in accordance with accepted accounting principles.

*Finally*

### **Unfair disregard**

Even less stringent conduct that may constitute oppression than unfairly prejudicial conduct is conduct that “unfairly disregards” the interests of shareholders, and others with interests, in the company. In *Stech v Davies*<sup>39</sup> “unfairly disregards” was interpreted to mean “unjustly or without cause pay no attention to ignore or treat as of no importance the interests of the security holders, creditors, directors or officers”.

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*Stech v Davies*<sup>40</sup> was also recently applied by the Supreme Court of *British Columbia in Canex Investment Inc v 0799701 Ltd.*<sup>42</sup>In that case, the defendants, in their various capacities, simply paid no attention to the plaintiff’s interests in the company and its business but chose to ignore or treat their interests as of no importance.

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<sup>39</sup> (1987), 53 Alta LR (2d) 373 at [17] Alta QB.

<sup>40</sup> BCSC 1414.

## **Court Orders Power to make Orders**

In classical company law, the range of orders which a court can make in actions between members inter se or between members and the company is limited to damages, injunctions, and declarations. This has been dramatically changed in respect of the oppression remedy. Courts are granted wide power under regional Companies Acts to make interim or final orders to remedy oppression.<sup>41</sup> This power is not limited to the specific list of remedies set out in the oppression remedy provisions; that list is illustrative and not exhaustive.<sup>42</sup>

The orders expressly mentioned in the Acts include orders:

- restraining the conduct complained of,
- appointing a receiver or receiver manager,
- amending the articles or by-laws or creating or amending a unanimous shareholder agreement,
- directing an issue or exchange of shares or debentures,
- appointing directors in place of, or in addition to, all or any of the directors then in office,
- directing a company or any other person to purchase shares or debentures of a holder thereof,
- directing a company or other person to pay a shareholder or debenture holder any part of the moneys paid by him for his shares or debentures,

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<sup>41</sup> Galantis v Alexiou [2019] UKPC 1 at [16]; Algonquin Mercantile Corp v Enfield corp (1990) 74 OR (2d) 457 Ont HC; Millar V McNally (1991) 3 BLR (2d) 102 Ont Gen Div; Watkin v Open Window Bakery Ltd (1996) 28 OR (3d) 441 Ont Div Ct; Waxman v Waxman (2004) 44 BLR (3d) 165 Ont CA.

<sup>42</sup> Cairney v Golden Key Holdings (No 2) (1988) 40 BLR 289 BC SC.

- varying or setting aside a transaction or contract to which a company is a party, and compensating the company or any other party to the transaction or contract,
- requiring a company, within the specified by the court, to produce to the court or an interested party financial statements in the form required under the Acts or an accounting in such other form as the court may determine,
- compensating an aggrieved person,
- directing rectification of the registers or other records of the company,
- liquidating and dissolving the company,
- directing an investigation under the Acts to be made,
- requiring the trial of any issue.

### **Object of Orders**

The object of an oppression order is expressly stated in the Acts to be to rectify the oppressive conduct complained of but should go no further than is necessary to rectify existing oppression. This principle was affirmed by the Supreme Court of Canada in the recent decision of *Wilson v Alharayeri*<sup>43</sup> where the Court observed of section 241 (the oppression provision) of the CBCA, that:<sup>44</sup>

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<sup>43</sup> [2019] 1SCR 1037.

<sup>44</sup> [2019] 1SCR 1037at [27].

Any order under s 241 (3) exists solely to ‘rectify the matters complain of’ as provided by s 241 (2). The purpose of the oppression remedy is therefore corrective: ‘...in seeking to redress inequities between private parties’, the oppression remedy seeks to ‘apply a measure of corrective justice’ (JG MacKintosh, ‘The Retrospectivity of the Oppression Remedy’ (1987) Can Bus LJ 219, at p225)...In other words, an order under s 241 (3) should go no further than necessary to correct the injustice or unfairness between the parties.

From the foregoing, a question which naturally arises is whether orders may be sought in respect of past oppressive conduct.

### **The Order Must be to Remedy a Current Oppressive State-of-Affairs**

This question was at issue in relation to section 280 of the Bahamian Companies Act<sup>45</sup> in the Privy Council decision of *Glantis v Alexiou*.<sup>46</sup> There, Lord Lloyd-Jones, delivering the decision of the Board, opined that the conduct which gives rise to oppression under section 280 need not be continuing at the time of the application to the court. According to Lord Lloyd-Jones this conclusion is evident from the fact that the relevant provisions of section 280, in describing that conduct, use both the present and perfect tenses. On the other hand, the wording of section 280 strongly suggests that it is directed at remedying a current oppressive or unfair state-of-affairs.

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<sup>45</sup> The corresponding provisions are Ang s 266; Ant s 241; B’dos s 228; Dom s 241; Gren ss 241; Guy s 224; J’ca s 213A; Mont s 241; St L s 241; St V s 241; T’dad s 242.

<sup>46</sup> [2019] UKPC 1.



Accordingly, even though the oppressive conduct may have ceased at the time of the application, there must be existing oppression or unfairness at that time which is susceptible of remedy by the court interceding in the affairs of the company. In such an event, the court may make an order to rectify the matter to which the complaint relates.

### **Orders After a Finding of no Oppression**

If the court is satisfied that a case of oppression is established, it has an open-ended power to make any interim or final order it thinks fit.<sup>47</sup> The Barbadian High Court decision in *Cox v Roberts*<sup>50</sup> makes it necessary to stress that such orders may only be made where the court has found oppression. In this case, Blackman J, having reached the conclusion that the complainant had not made out a case of oppression, rather curiously went on to rule:

*“Section 228 (3) of the Act provides that in connection with an application under this section, the Court may make any interim or final order it thinks fit. I am of the view that in the circumstances of the prevailing relationship between Cox and the first and third defendants, so long as the shares in the WOW Group are distributed between them, disputes will persist. As a consequence, I am of the view that it is in the best interests of the company that the above relationship should come to an end.*

*Accordingly, there will be an order pursuant to s. 228 (3) directing the first, and fourth defendants to sell their shares to any of the first, third or fourth defendants.”*

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<sup>47</sup> Ang s 266 (3); Ant s 241 (3); Bah s 280 (3); B’dos s 228 (3); Dom s 241 (3); Gren ss 241 (3); Guy s 224 (3); J’ca s 213A (3); Mont s 241 (3); St L s 241 (3); St V s 241 (3); T’dad s 242 (3). <sup>50</sup> (Unreported) Civil Suit No 1948 of 2003 B’dos HC.

It is respectfully submitted that this ruling of the learned judge was not consistent with a proper interpretation of the power of the court to make orders under section 228 (3). Section 228 (3) is inextricably tied to subsections (1) and (2) of section 228. Subsection (1) states “that a complainant may apply to the court for an order under this section”. Subsection (2) continues “if upon an application under subsection (1) the court is satisfied [that there is oppression]” and subsection (3) allows that “in connection with an application under this section, the court may make any interim or final order it thinks fit”. Clearly, the making of an order under subsection (3) is conditional upon the prior satisfaction of subsections (1) and (2). For this reason, it is only where there is a finding of oppression that a court may make an order under section 228 (3). Put simply, the court only has power to make an order to remedy oppression.<sup>48</sup>

## **Some Special Rules Relating to the Oppression Remedy**

### **(1) Shareholder Ratification in Oppression Actions Rule**

Provisions in some regional Acts (NB not Jamaica) set out rules relating to shareholder ratification of an alleged breach that gives rise to an application for either the oppression remedy. Section 229

(1) reads:

*“An application made or an action brought or intervened in [respect of a derivative or oppression remedy] may not be stayed or dismissed by reason only that it is shown that an alleged breach of a right or duty owed to the company or its subsidiary has been or might*

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<sup>48</sup> Galantis v Alexiou [2019] UKPC 1 at [16]; McAteer v Devoncraft Developments Ltd (2001) 24 BLR (3d) 1 Alta QB.

*be approved by the shareholders of the company or its subsidiary; but evidence of approval by the shareholders may be taken into account by the court in making an order [in respect of a derivative or oppression remedy].”*

Prior to this enactment, the rule in *Foss v Harbottle*, absolutely barred an action by a minority shareholder to remedy any breach which has or might be ratified by the majority shareholders in general meeting. In the Canadian case of *Pappas v Acan Windows Inc.*,<sup>49</sup> it was held that a provision *in pari materia* with section 229 (1) abolishes this rule. Be that as it may, that subsection leaves shareholder ratification as an evidentiary matter which the court can consider in determining whether judicial intervention, either through approval of a derivative action or through the granting of an order in respect of oppression, is appropriate.

## **(2) Settlement of Oppression Actions Rule**

To discourage strike suits to extort financial settlements from corporate management, provisions in regional Acts (NB Not Jamaica) provide for court supervision of the settlement of oppression actions before trial. That subsection provides that such actions may not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the court given upon such terms as the court thinks fit.

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<sup>49</sup> (1991) 2 BLR (2d) 180 Nfld SC.

### **(3) Interim Costs in Oppression Actions Rule**

To ensure that a complainant may institute an oppression action, provisions in the Acts in regional Acts (NB not Jamaica) empower the court to compel a company to provide interim financing to the complainant in an oppression application. That section provides that, in an oppression application made or a derivative or oppression action brought or intervened in, the court may at any time order the company or its subsidiary to pay to the complainant interim costs, including legal fees and disbursements. However, the complainant may be held accountable for those interim costs upon the final disposition of the application or action.

The criteria which are appropriate in determining whether the court may order a company or its subsidiary to pay interim costs in an oppression application appear to be now settled.

In *Organ v Barnett*,<sup>50</sup> MacDonald J., agreeing with Blair J., held that, to obtain interim costs, an applicant must first establish that there is a case of sufficient merit to warrant pursuit and then establish that the applicant is genuinely in financial need which, but for an interim costs order would preclude the claim from being pursued. Subsequent cases have accepted this statement of the law as the settled law.<sup>51</sup>

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<sup>50</sup> (1992) 11 OR (3d) 210 Ont Gen Div.

<sup>51</sup> See, eg, *M v H* (1993) 15 OR (3d) 721 Ont Gen Div; *Hess v Proudfoot Motels Ltd* (1993) 42 ACWS (3d) 645 Ont Gen Div; *West v Edson Packaging Machinery Ltd* (1994) ACWS (3d) 1262 Ont Gen Div.

## **Conclusion**

The provisions in the Companies Acts in the Commonwealth Caribbean on the oppression remedy follow the trend in modern company legislation to provide increasing protection to minority shareholders and other stakeholders against abuse of majority rule by the granting of new rights and new remedies to the minority and other stakeholders. The oppression provisions have achieved this by significantly undermining traditional company law theory that company law rights are to be determined on contract principles even if the Jamaican Act appears to be a bit reticent in this regard.

I thank you and expect that I will be thoroughly interrogated on the views I have expressed.

**The Honourable Mr. Justice Andrew Burgess**

