

SPECIFIC PROBLEMS WITH THE OPPRESSION SECTION

by

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There is no doubt that the oppression remedy contained in s.260 of the *Corporations Law* is a crucial weapon in the shareholder's armoury to correct perceived injustices carried out by the controllers of the company.¹ Applications under this section may be made by a member² on either of two broad grounds:

1. that the affairs of the company are being conducted in a manner that is oppressive, unfairly prejudicial, unfairly discriminatory or in a manner that is contrary to the interests of members as a whole;

2. that an act or omission, or a proposed act or omission, by or on behalf of the company, or a resolution, or a proposed resolution, of a class of members of the company, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or would be contrary to the interests of the members as a whole.

The oppression section was introduced and amended to overcome the problems associated with the common law rule of *Foss v. Harbottle*,³ and in particular, to provide the minority shareholder an avenue to recover on behalf of the company.⁴ However, the section has created some difficulties of its own and it is the intention of this article to examine these. First, the definition of "affairs of the company" may not include the acts of nominee directors appointed to a subsidiary. This would be unusual considering the widespread use of corporate groups. The second problem that may occur is that it may be argued that a resolution of the general meeting is not an act by or on behalf of the company. If this is the case then the problems associated with the fraud on the minority exception to the rule in *Foss v. Harbottle* may not have been overcome.⁵ The third problem to be considered is whether conduct can be said to be unfairly prejudicial or unfairly discriminatory if it affects all members the same. Furthermore it is necessary to address the term "contrary to the interests of members as a whole", and consider whether this requires the conduct in question to be contrary to each and every member of the corporation. Discussion will also be made as to whether s.260 can be used where there is a specific statutory provision governing the conduct in question, or where members could have their claims in contract in tort. Further, a number of issues arise in respect of the interaction of s.260 with the general law

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1 It has not always been such a crucial weapon. "In England, the country from which we derived section 260, during the period 1948 to 1980, only two applications for relief from oppressive acts were successful", I Ramsay 'Shareholder Litigation: Recent Developments in the Oppression Remedy' (1992) 3 No. 4 *Business Law Section Newsletter* 6.

2 This does not include a person who has purchased shares but is not yet a registered member: *Niord Pty Ltd v. Adelaide Petroleum* (1990) 2 ACSR 347.

3 [1843] 2 Ha 461; 67 ER 189.

4 Many law reform committees recognised these problems and advocated a statutory remedy for the minority shareholder; eg, Cohen Report, Cmd. 6659, United Kingdom 1945; Jenkins Report, Cmd 1749, United Kingdom 1962; Lawrence Report, Interim Report of the Select Committee on Company Law, Ontario 1967; Dickerson Report, Proposals for a New Business Corporations Law for Canada, Ottawa, 1971.

5 For a discussion of some of these problems see MA Maloney 'Whither the Statutory Derivative Action' (1986) 64 *Can BR* 309; AJ Boyle 'The Prudential, the Court of Appeal and *Foss v. Harbottle*' (1981) 2 *Co Law* 264; M Stamp 'Minority Shareholders: Another Nail in the Coffin' (1988) 9 *Co Law* 134, HH Mason 'Fraud on the Minority: The Problem of a Single Formulation of the Principle' (1972) 46 *ALJ* 67 and LS Sealy 'The Rule in *Foss v. Harbottle*: The Australian Experience' (1989) 10 *Company Lawyer* 52. For a discussion of the approach to shareholder litigation in Australia see I Ramsay 'Corporate Governance, Shareholder Litigation and the Prospects for a Statutory Derivative Action' (1992) 15 *UNSWLJ* 149 at 159-162.

remedies available to the minority shareholder. Finally, the question of whether the courts should interfere in matters of business judgment, will be examined.

The Definition of "Affairs of the Company"

Section 53 defines the affairs of a body corporate:⁶

"53 For the purposes of ... section 260 ... the affairs of a body corporate include:

(a) the promotion, formation, membership, control, business, trading, transactions and dealings ... of the body ...;

(c) the internal management and proceedings of the corporation ...;

(g) matters concerned with the ascertainment of the persons who are to have been financially interested in the success or failure, or apparent success or failure, of the body or are or have been able to control or materially to influence the policy of the body ...;

(k) matters relating to or arising out of the audit of, or working papers or reports of an auditor concerning, any matters referred to in any of the preceding paragraphs."

As can be seen from the extract of this section, the definition is widely drafted. However, a number of problems still arise in respect of the definition. The first problem is that of nominee directors. In *Morgan v. 45 Fleurs Avenue Pty Ltd*⁷ Company A held 45% of the equity of Company B. Company A appointed a nominee director to the board of Company B. The plaintiff, a shareholder in Company A, claimed that conduct of the nominee director was oppressive and unfair to him. The Supreme Court of New South Wales dismissed the suit on the basis that the complaint referred to the affairs of Company B, and not to Company A. The plaintiff had no shareholding in Company B; thus he did not have standing to pursue the matter.

"It is of course true that a person who is what might be called a nominee director, may legitimately exercise his votes on a board in the interests of the person who appointed him without being in breach of a fiduciary duty to the company on whose board he sits. However, I do not consider that this state of affairs is sufficient for one to conclude that when so taking part in a board meeting of a company one is acting in the affairs of the appointor company."⁸

As Redmond comments: "The outcome is anomalous in view of the widespread adoption of the group of companies as a model of business organisation. The Morgan decision effectively denies shareholders in the parent company a right of complaint concerning the conduct of nominees appointed to the board of a subsidiary company."⁹

The solution to this may be in expanding the definition of the affairs of the company to include that of a nominee director appointed to the board of another company. This would have the advantage of allowing judicial intervention where appropriate, but if there was no legitimate shareholder interest the court could still deny a remedy, as it did in *Morgan*.

Prentice states that:

"... where activities are carried out in group form, the economic reality of group activity should be recognised and the manner in which the affairs of one member of the group are conducted should, in most circumstances, be treated as part of the affairs of other group members."¹⁰

6 It should be noted that s.260 refers to a company whereas 53 refers to a body corporate. This is probably of no consequence, but such looseness of terminology should have been avoided.

7 (1987) 5 ACLC 222.

8 *Ibid* at 234.

9 P Redmond 'Nominee Directors' [1987] 10 UNSWLJ 194.

10 DD Prentice 'The Theory of the Firm: Minority Shareholders Oppression: Sections 459-461 of the Companies Act 1985' [1988] 8 *Oxford J of Legal Stud* 55.

What Constitutes an Act/Omission by or on behalf of the Company?

Section 260 requires that the unfairly prejudicial, unfairly discriminatory, oppressive conduct be related to the affairs of the company, or alternatively that the act or omission or resolution etc. be by or on behalf of the company. "This description can hardly cover acts of sheer misfeasance, such as the misapplication of the company's funds, where the company is the victim and not the agent".¹¹

If an act such as the misappropriation of company funds does not come within the terms of the section the minority shareholder may still have to rely on an exception to the rule in *Foss v. Harbottle*¹² or seek a winding up order on the just and equitable ground.¹³ In this writer's view it would be unusual if s.260 was interpreted in such a legalistic manner. Section 260 was introduced and then amended to amplify the remedies available to the minority shareholder, and it would be inconsistent with the philosophy of the section if it did not provide a remedy where there was a misapplication of company funds by a director.¹⁴

In addition to the preceding problems there is doubt that the passing of a resolution by the general meeting can be considered an act by or on behalf of the company. Burrige submits that "there are many acts or omissions which may very well unfairly prejudice the interests of members but which are not acts or omissions of the company or acts or omissions performed or omitted to be performed on its behalf".¹⁵ Authority for this proposition is *Northern Counties Securities Ltd v. Jackson and Steeple Ltd*.¹⁶ In this case, the directors of the defendant company summoned a meeting of shareholders to obtain approval for certain matters which would allow the company to comply with an order for specific performance made in favour of the plaintiff. One of the issues before Walton J was whether the specific performance order made against the company was binding on the shareholders. His Honour held that it was not:

"... although it is perfectly true that the acts of the members, in passing certain special types of resolutions, binds the company, their acts are not the acts of the company. There would ... be no real doubt about this, were it not for the use of the curious expression 'the company in general meeting' which in a sense drags in the name of the company unnecessarily, what the phrase really means [counsel submitted] is 'the members (or corporators) of the company assembled in general meeting', and that if the phrase is written out full in this manner, it becomes quite clear that the decisions taken at such a meeting, and the resolutions passed there at, are decisions taken by, and resolutions passed by, the members of the company, and not by the company itself."¹⁷

The view of Burrige, that a resolution of the general meeting may not be an act by or on behalf of the company has been criticised by Prentice,¹⁸ and Shapira.¹⁹ Shapira considers that the decision of *Northern Counties* is an isolated, first instance decision decided in an exceptional context and that it is a thin base,²⁰ from which to argue that the legislation has failed in its objective to overcome the problems associated with the fraud on the minority exception to the rule in *Foss v. Harbottle*.

11 R Instone 'Unfair Prejudice to Shareholders' [1981] *NLJ* 1316.

12 *Supra* n.3.

13 See 460-461 of the *Corporations Law*.

14 Similar questions could arise with a director passing on corporate information. This could hardly be considered an act by or on behalf of the company.

15 S Burrige 'Wrongful Rights Issues' [1981] 44 *MLR* 40.

16 [1974] 1 *WLR* 1133.

17 *Ibid* at 1144.

18 Prentice, *supra* n.10 at 71-72.

19 G Shapira 'Minority Shareholders Protection - Recent Developments' [1982] 10 *NZULR* 134.

20 *Ibid* at 140.

Prentice comments that:

“Although the decisions of shareholders may not necessarily be those of the company so as to affect the company’s relationships with a third party, they will be binding on the shareholders *inter se* and affect the shareholders’ interest and it is this dimension to their operation that brings them within the ambit of section [260].”²¹

The submissions of Prentice and Shapira are preferable, especially when one considers the remedial nature of the legislation, and as the intention of the legislature was to overcome the problems associated with the common law, the judiciary is unlikely to follow *Northern Counties*.

In any event, a small amendment to out legislation would overcome any problems. Section 260 already refers to a resolution or proposed resolution of a class of members. This can be compared to the equivalent section of the *Malaysia Companies Act* s.181(1)(b) which refers to a resolution of the members, holders of debentures or any class of them. Therefore to remove any doubt about the effectiveness of s.260, the section could be amended to read “... a resolution, or a proposed resolution, *of the members or* of a class of members ...”.

Is the Conduct Unfairly Prejudicial or Unfairly Discriminatory if it affects all Members the same?

One issue that arises in respect of the terms “unfairly prejudicial” and “unfairly discriminatory” is whether the conduct in question can be said to be unfairly prejudicial or unfairly discriminatory if it affects all members equally. Corkery comments that:

“... while an action - the non-payment of dividends, for instance - may apply to all shareholders equally, it may still unfairly prejudice some of them and not others. For example, some shareholders may rely entirely on income from their investments; others who are well paid executives of the company may not. In *Re Overton Holdings Pty Ltd* the defendants unsuccessfully argued that s.[260](a)(i) and (ii) did not apply because the actions complained of affected all members the same. Rowland J, without conceding that the words ‘prejudicial’ and ‘discriminatory’ call for evidence of unequal treatment of members, focussed on the word ‘oppression’. Oppression was made out:

‘The fact that a loss if suffered by Overton [Pty. Ltd.] will eventually also be borne equally by the other shareholders does not make the conduct any less oppressive to the petitioner.’ Similar things cannot be said of “prejudice” and “discrimination”. Unequal treatment of members is at the heart of those words.”²²

This view of Corkery that unequal treatment is at the heart of these terms is supported by a decision emanating from England. In *Re Carrington Vijella*²³ a minority shareholder complained that the board of directors had entered into a disadvantageous service contract with its chief executive. Justice Vinelott held that this was a breach which would affect all shareholders equally, and to succeed the complainant had to show the conduct was unfairly prejudicial to part of the members. Support for Vinelott J’s view can be found in the particular wording of the English legislation which existed at that time. At the time of the decision s.459 of the *Companies Act 1985* U.K. required conduct which is “unfairly prejudicial to the interests of *some part of the members*” (emphasis added).²⁴ There is no such wording in s.260. Austin questions the Vinelott J reasoning that unfairly prejudicial and unfairly discriminatory are restricted to situations involving

21 Prentice, *supra* n.10 at 72.

22 JF Corkery ‘Oppression or Unfairness by Controllers - What can a shareholder do about it? An Analysis of s.320 of the Companies Code’ (1988) 9 *Adel Law Review* 437 at 447.

23 (1983) 1 BCC 98, 951; noted (1983) 4 *Co Lawyer* 164 (L Sealy).

24 The legislation was altered by the *Companies Act 1989*, paragraph 11 of schedule 19. This inserted the phrase “unfairly prejudicial to the interests of its members generally or of some part of its members”; replacing “unfairly prejudicial to the interests of some part of the members”.

inequality of treatment between shareholders.²⁵ The term “oppressive” did not require inequality of treatment between shareholders²⁶ and it would be unusual if the new terms were interpreted in a more restrictive manner than the old legislation.

If the legislation is interpreted to mean inequality of treatment, the term “contrary to the interests of members as a whole” will assume particular importance.²⁷

Contrary to the Interests of Members as a Whole

This ground for relief contained in s.260 will generally cover those breaches of fiduciary duty which directors owe to the company:

“Negligence and breaches of fiduciary duty by directors, even though those duties are owed to the company and not the shareholders, are indirectly contrary to the interests of members as a whole. If the company suffers then the members’ investment is hurt.”²⁸

One concern in respect of this term is what interpretation the judiciary will give to members as a whole. This ground for relief will be of little use if the conduct or act in question must be contrary to each and every individual member:

“The controllers’ interests as members may well be served by their selfish manner of acting. Thus not all members would be disadvantaged. More likely those words mean that, where controllers act in their own interests only, they will be seen to be acting contrary to the interests of members as a whole. Even if the controllers act in the majority’s interests they will not, under this interpretation, be acting in the interests of members as a whole.”²⁹

It is submitted given the remedial nature of legislation that the court should accept this view.

Can Section 260 be used where there is a specific statutory provision concerning the conduct in question or where the claim could be based in contract or tort?

Section 260 has the potential to be utilised where the conduct in question is governed by a specific statutory provision. Does the existence of a specific statutory provision bar a remedy pursuant to s.260? Austin suggests not. He comments that:

“The mere fact that there is another more specific statutory provision is surely no automatic bar to relief under the oppression section. Nevertheless, it is inconceivable that s.260 will be allowed to replace the more specific regimes. The key to a partial reconciliation, I suggest, is to remember that the cardinal utility of s.260 is that it makes available a much more extensive range of remedies than the more specific areas of law.”³⁰

One area of possible conflict that could occur is between s.260 and s.1002 of the *Corporations Law*. Section 1002 provides for a “Prohibition of Dealings in Securities by Insiders.” In particular s.1002(G) provides for possible prosecution if a person with information not generally available, (and that person knows, or ought to know, that that information might have a material effect on the value of securities) utilises that information to buy or sell securities.

If one of the elements of s.1002(G) is not made out should the court still provide relief under s.260? Austin argues that s.260 should not be used where the section in question, such as the insider trading provisions, create a criminal offence. “There is a major issue of maintaining certainty and predicability.”³¹ The issue of the interaction of s.260 will also arise with respect to

25 RP Austin ‘Protection of Minority Shareholders: Changes to Section 320’ *Committee for Postgraduate Studies in the Department of Law University of Sydney* 102 at p.122.

26 *Scottish Co-operative Wholesale Society Ltd. v. Meyer* [1959] AC 324.

27 It should be noted that the Court of Appeal in New Zealand in *Re HW Thomas Ltd* (1983) 1 ACLC 1256 at 1262 indicated in *obiter* comments that conduct could be unfairly prejudicial or unfairly discriminatory even if it does affect all the members equally.

28 Corkery, *supra* n.22 at 447-8.

29 *Ibid* at 448.

30 Austin, *supra* n.25 at 114-5.

31 *Ibid* at 115.

the rights of holders of classes of shares,³² together with questions concerning acquisition of shares.³³ The court when approaching these issues should proceed on a case by case basis without adopting general principles that cannot be justified for particular sections. I would agree with Austin,³⁴ that if the specific statutory provision provides for criminal penalties then s.260 should not be invoked. Other than that each case should depend on its own circumstances.³⁵

Questions will also arise concerning the interaction of the law of contract and tort with the oppression section. Shapira provides the following example:

“Assume that A and B own and manage a manufacturing company. X is prepared to invest in the company, provided he is awarded exclusive rights to market a range of the company’s products. The agreement may be embodied in the company’s articles, in a separate contract, or in both. X takes a minority share and operates as the company’s marketing agent. Eventually A and B vote resolutions cancelling X’s agency, leading to its ruin. X, whom we may further assume has invested all his savings in the company and in his franchise, brings proceedings under [s.260], alleging that he had been unfairly prejudiced in his capacity as the company’s marketing agent.”³⁶

X in this hypothetical case has a possible remedy for breach of contract or wrongful dismissal. Should X also be able to invoke s.260? I would submit that X, in this case, should be able to invoke s.260. His “rights, expectations and obligations are not necessarily submerged in the company structure”.³⁷ “The test should be whether the particular capacity in which the member has been prejudiced was, in part or in whole, the *raison d’être* for his subscribing to, or remaining a member of, the company.”³⁸ If, however, the obligation sought to be enforced is only incidental to the incorporation relationship and not the principal reason for incorporation, then remedies pursuant to the *Corporations Law* should not be utilised.

The Nature of Relief Available to a Minority Shareholder - Section 260(2)(g)

Section 260(2) provides a number of orders that the court can make if it is satisfied that injustice has been made out. The remedy that has attracted the most attention is s.260(2)(g). This provides for an order:

“... directing the company to institute, prosecute, defend or discontinue specified proceedings, or authorising a member or members of the company to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company.”

This order derives from the recommendations of the Jenkins Committee³⁹ and is designed to overcome the “legendary” problems associated with the rule in *Foss v. Harbottle*.⁴⁰

Some writers, however, see some difficulties with this subsection. Section 260 was originally designed to protect shareholders’ interests, but this order introduces a wider sphere of complaints - that of complaints about wrongs done to the company. Shapira comments that this “indicates the legislature’s disregard for the fundamental distinction between the corporate cause of action and the member’s personal rights”.⁴¹ He further comments that [s.260(2)(g)] is ill-conceived. “It makes s.[260] blow hot and cold on the distinction between corporate rights and shareholders’ interests.”⁴²

32 See ss.197-199 of the *Corporations Law*.

33 See ss.732-736 of the *Corporations Law*.

34 *Supra* n.25.

35 In *Re Zephyr Holdings* [1988] 14 ACLR 30, the precursor to s.260 was argued as was a breach of the Stock Exchange Listing Rules - there was however no question of criminal sanctions.

36 Shapira, *supra* n.19 at 155.

37 See *Ebrahimi v. Westbourne Galleries Ltd.* [1973] AC 360 at 379.

38 *Ibid.*

39 Cmnd 1749 at paras. 206-207 and 212(e).

40 See the comments made by Corkery, *supra* n.22 at 458.

41 Shapira, *supra* n.19 at 159.

42 *Ibid.*

Corkery however, considers that "any confusion would probably only be of academic concern".⁴³ The distinction:

"... should not be a problem if the courts accept that actions that hurt the company also prejudice or hurt the members' interests in the company. Injury to the company - through misappropriation of assets, improper use of powers and negligence, for example - depreciates the value of its shares and thereby hurts members. Indirectly the company's property is the shareholders' property ... It is almost too much to hope that paragraph (g) will sweep away the troubles of *Foss v. Harbottle*. But applied liberally it could do just that."⁴⁴

I would accept Corkery's comment that s.260(2)(g) has the potential to sweep away the troubles of *Foss v. Harbottle* but I would submit that Shapira is right when criticising the introduction of a corporate remedy for a provision designed primarily for the remedy of personal injuries. This remedy does bring into question the issue of ratification and it is submitted that the preferable approach would be to introduce the statutory derivative action which would allow s.260 to be used for the remedy of personal wrongs and the statutory derivative action for the remedy of corporate wrongs.⁴⁵

Section 260(2)(g) was used by Rowlands J in *Re Overton Holdings Pty Ltd*⁴⁶ His Honour was satisfied by establishment of a prima facie case of oppression, the defendant having "chosen to remain silent". The applicant supported his allegations by affidavit, the company then failed to provide answering affidavits. This case offers some hope that applications to bring derivative proceedings can be brought expeditiously.

Hannigan suggests that this remedy, "calls into question the whole issue of ratification. If ratification of a ratifiable wrong is 'unfairly prejudicial' ... entitling the minority shareholder to a litigation order, does the rule in *Foss v. Harbottle* still exist?"⁴⁷ It is submitted that if the court is not likely to award a litigation order if the conduct in question is ratifiable, particularly in light of their desire not to interfere in the decisions of the business community.

"It would appear that the court faces three options. Firstly, ratification by an independent majority, reaching a bona fide decision can never come within "unfairly prejudicial". Secondly, they could decide that ratification, regardless of *bona fides*, amounts to unfairly prejudicial conduct and grant a litigation order. Finally, the court could decide that ratification may, in certain circumstances, amount to unfairly prejudicial conduct, but the proper remedy is compensation rather than a litigation order. The chances of getting a litigation order then seem slim, nor is it indeed clear that minority shareholders will resort to [s.260] in an attempt to circumvent the rule in *Foss v. Harbottle*."⁴⁸

Hannigan further considers, that it is "most unsatisfactory" that the problems surrounding the rule in *Foss v. Harbottle* have been imported into the new statutory regime, and that the s.260(2)(g) order is a convoluted way to deal with the problems of *Foss v. Harbottle*.⁴⁹

43 Corkery, *supra* n.22 at 461.

44 *Ibid* at 460.

45 In Australia the Companies and Securities Law Review committee have released (July 1990), discussion paper No. 11 which is titled 'Enforcement of the Duties of Directors and Officers of a Company by means of a Statutory Derivative Action'. This recommendation has been endorsed by the Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs, *Corporate Practices and the Rights of Shareholders* (1991) Recommendation 26. See the discussion of the statutory derivative action by I Ramsey 'Corporate Governance, Shareholder Litigation and the Prospects for a Statutory Derivative Action' (1992) 15 *UNSWLJ* 149.

46 (1984) 2 *ACLC* 777.

47 BM Hannigan, 'Statutory Protection for Minority Shareholders - Section 75 of the Companies Act 1980' (1982) 11 *Anglo-Am L Rev* 20 at 32.

48 *Ibid* at 33.

49 *Ibid*. It should be noted that in *Jenkins v. Enterprise Gold Mines* (1992) 6 *ACSR* 539 the court found that ratification of a preference share issue by the shareholders itself constituted an act of oppression.

In conclusion, I would agree with Corkery that the litigation order does have the potential to sweep away the problems surrounding the rule in *Foss v. Harbottle*. "[T]he complexities of proving fraud, dealing with the potential absurdities of ratification, and showing control by the wrongdoers - the problems that have dogged derivative suit proceedings in the past"⁵⁰ could all be of historical interest if the judiciary apply s.260(2)(g) liberally. However, my argument would be that a more acceptable way to overcome the problems associated with the rule in *Foss v. Harbottle* and to maintain a clear distinction between personal and corporate rights, would be to retain s.260 as the remedial provision for personal injuries, and to introduce a statutory derivative action for the remedy of corporate wrongs. This would have the advantage of resolving the issue of ratification and maintaining the separation between corporate and personal rights.⁵¹

Should the Courts interfere in matters of Business Judgment?

The courts have recently reiterated that they should not interfere in matters of business judgment. His Honour Martin J in *Re Terri Co. Ltd*⁵² considered that matters of business judgment cannot constitute grounds for relief under s.260. In a similar fashion, Brooking J in the Supreme Court of Victoria in *Zephyr Holdings v. Jack Chia*⁵³ commented that:

"Whereas in the present case, bad faith is not established and where, as in the present case, the allegation is that the proposed course of action is detrimental to the members as a whole, the court must take care that it does not too readily intervene in the affairs of a company under s.[260] ... It is only stating the obvious to say that, under s.[260], the court does not sit as an appellate tribunal to review the decisions of the organs of a company, or of a class of its members on the footing that the court will, as it were, automatically reverse the decision if it disagrees with it."⁵⁴

The difficulty with this approach is that the judiciary have never adequately explained why they refuse to intervene in the internal management of corporations. It has generally been explained by academics on the grounds of economic efficiency. The firm is generally seen as more efficient "for the simple reason that it could in certain circumstances reduce the costs of contracting."⁵⁵ This reduction in the cost of contracting occurs because of a number of reasons including:

- 1.the firm is able to reduce the possibility of default;
- 2.the firm is more able to adjust to unforeseen circumstances;
- 3.the firm provides a mechanism for regulating the terms and conditions on which labour is supplied and rewarded.⁵⁶

50 JF Corkery *Directors' Powers and Duties* Longman Professional 1987 at 259.

51 Another provision which would allow the minority shareholder to overcome the rule in *Foss v. Harbottle* is s.1324. This section provides:

"1324(1) [Court may grant injunction restraining] Where a person has engaged, is engaging or is proposing to engage in any conduct that constituted, constitutes or would constitute:

(a) a contravention of this Law;

the court may grant an injunction restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing."

In certain circumstances an injunction obtained pursuant to s.1324 will provide a quicker and less complex remedy for the minority shareholder. The main limitation on the section, however, is that it only applies to breaches of the *Corporations Law*. Examples of the types of applications that come within the ambit of s.1324 are breaches of statutory duty under s.232, breach of a duty to disclose interests in contracts under s.231 or a breach of duty to convene a general meeting pursuant to s.246. Section 1324 has substantial potential and it may well serve as a useful adjunct to s.260. Indeed Baxt comments that s.1324 on its own "may well overcome the strictness of the rule in *Foss v. Harbottle*". (R Baxt 'Intervention by Members and N.C.S.C. in Statutory Breaches' (1980) 8 *A Bus L Rev* 406 at 412; see also R Baxt 'Will s.1324 of the Companies Code Please Stand Up' (1989) 7 *Company and Sec L J* 388).

52 (1988) 6 *ACLC* 402.

53 (1988) 14 *ACLR* 30.

54 *Ibid* at 37.

55 Prentice, *supra* n.10 at 56.

56 See the discussion by Prentice *supra* n.10 at 56-58.

Nevertheless, this efficiency will be largely eroded should the courts intervene in the internal management of companies. The efficient use of the capital of the company requires that the courts do not interfere. It is obviously not practicable to have the unanimous agreement of all the shareholders before a decision is made by the company. "The motivating rationale for the internal management rule is just as valid now as it was in the nineteenth century. Economic efficiency requires freedom to make rational decisions and the courts should not derogate from this freedom."⁵⁷

This theory fails to consider that a clear distinction has to be drawn between a publicly listed company and an incorporated partnership. With a company listed on the Stock Exchange the opportunity for oppression is substantially reduced. The minority shareholder being able to freely transfer his shareholding can, "therefore expeditiously liquidate his investment."⁵⁸ This opportunity is not available to the minority shareholder in the incorporated or quasi-partnership as there is no market for such shares. Accordingly, it is submitted that the courts should not adopt an inflexible approach as to when they should interfere. In particular the court should adopt a positive role in the regulation of the incorporated partnership. As Prentice comments:

"The interests of a member in an incorporated partnership will be broadly as follows: (i) the right to participate in the affairs of the company so as to guarantee some return on his investment; (ii) the right to protect his investment in the company which will often take the form of the investment of skills and labour; (iii) the ability to monitor the conduct of his co-venturers. The response of the law should be to protect these interests as the law will then be doing for the parties what they would have done for themselves."⁵⁹

Another reason for the courts refusing to intervene in intra-corporate disputes is the problem of escalating costs:

"As with all civil actions, the costs of derivative suits have skyrocketed. In fact, the legal expenses incurred by a corporation are often especially onerous, not only because many of these actions are complex but because the corporation typically is called upon to pay for several separate teams of lawyers in the same action ... Expense is not the only burden imposed upon the corporation by the derivative suit. Typically these cases seriously disrupt corporate business, as top management personnel are divested from their normal pursuits and assume the role of witness; and the corporation may also be damaged by bad publicity generated by the suit... Moreover, even where the derivative suit does have some merit, often the relief sought, even if obtained, would not justify the costs incurred in obtaining it."⁶⁰

It is submitted that the introduction, and reform of the oppression section was to provide a more active role for the courts, particularly in disputes involving the close corporation or the incorporated partnership. As Shapira concludes:

"If the price of meaningful minority protection is increased judicial involvement, so be it. Lack of business expertise of the judiciary has never been a convincing argument. After all, laying down fair standards of corporate practice and ethics is no more intractable than, say, formulating standards of liability in complex negligence cases. The courts conduct this type of inquiry every day."⁶¹

I would support the conclusions of Shapira. The legislature introduced s.260 to give the judiciary a more interventionist role in corporate decision making. When the original oppression remedy failed to achieve satisfactory protection the legislative amendments were introduced to

57 D Wishart 'A Fresh Approach to Section 320' [1987] 17 WALR 94 at 127.

58 Prentice, *supra* n.10 at 60.

59 *Ibid* at 61.

60 Shapira, *supra* n.19 at 160; Shapira was quoting from a summary of the American experience with derivative suits.

61 *Ibid* at 163.

cover a wider range of conduct. The courts should no longer hide behind the veil of non-interference in matters of business judgment. These questions are no less difficult than the myriad of issues that the courts face regularly.

Conclusion

There is no doubt that the oppression remedy has overcome many of the problems for the minority shareholder in seeking to redress a wrong done to the corporation. Given a broad interpretation by the courts many of the difficulties which arise from the interpretation of the section; such as the definition of 'affairs of the company'; whether a resolution of the general meeting is an act of the company; whether conduct is prejudicial or discriminatory if it affects all members the same and the interaction of s.260 with other statutory provisions, can be defeated. The opportunity is there for the judiciary to allow s.260 to realise its full potential.