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OPPRESSION OF MINORITY SHAREHOLDERS-  
REFLECTIONS ON *BLISSET v DANIEL*

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**ABSTRACT**

*The leading modern case on the law relating to the rights of minority shareholders is the decision of the House of Lords in O'Neill v Phillips,<sup>1</sup> in which Lord Hoffmann, giving the only speech, appeared to place heavy reliance upon the seminal speech of Lord Wilberforce in Re Westbourne Galleries Ltd.<sup>2</sup> The main purpose of this article is to compare and contrast the reasoning of Lord Hoffmann with that of Lord Wilberforce. It is proposed to begin with a close look at the old case of Blisset v Daniel,<sup>3</sup> and to analyse the use to which that authority was put by Lord Hoffmann and Lord Wilberforce. It is proposed to conclude by considering the question whether the reasoning of Lord Hoffmann in O'Neill v Phillips is, or was indeed ever meant by him to be, of general or wide application.<sup>4</sup>*

**BLISSET v DANIEL**

*Blisset v Daniel,<sup>5</sup> like its better known elder sibling Foss v Harbottle,<sup>6</sup> has had a remarkable influence on modern company law.*

It was an action before the then Vice-Chancellor (nowadays called “the Chancellor” in anticipation of the abolition of the office of Lord Chancellor), Sir W Page Wood, in the old Court of Chancery, whose workings were colourfully described in Charles Dickens’ novel “Bleak House”. It concerned the affairs of a partnership business of melting and making copper, brass and mixed metals at Bristol, Swansea and elsewhere. The partnership deed contained a clause empowering the holders of at least two-thirds of the

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<sup>1</sup> *O'Neill v Phillips* [1999] 1 WLR 1092.

<sup>2</sup> *Re Westbourne Galleries Ltd* [1973] AC 360.

<sup>3</sup> *Blisset v Daniel* (1853) 10 Hare 493.

<sup>4</sup> It is a mystery why *O'Neill v Phillips* has not been reported in the Appeal Cases reports – perhaps this is some indication of its status as a decision on its facts!

<sup>5</sup> See n 3 above.

<sup>6</sup> *Foss v Harbottle* (1843) 2 Hare 461.

partnership shares to expel a partner without cause and to purchase his shares at a value stipulated in the deed (which excluded any account of future profits). A two-thirds majority purported to expel a long-established partner. The long and short of it was that the Vice-Chancellor (with the greatest reluctance and finding it hard to believe that “gentlemen” could act with such harshness) concluded that the majority had no reason for his expulsion other than the desire to purchase his share at a favourable price. He therefore set aside the expulsion.

*Blisset v Daniel*<sup>7</sup> has had something of a chequered history, having been on occasions interpreted narrowly and distinguished.<sup>8</sup> It was, however, wholeheartedly embraced by Lord Wilberforce in *Re Westbourne Galleries Ltd*,<sup>9</sup> the well-known case on the scope of the just and equitable winding up remedy of the Insolvency Act 1986.<sup>10</sup> It then was taken up by Lord Hoffmann in *O’Neill v Phillips*,<sup>11</sup> the modern leading case on both the unfair prejudice (the Companies Act 1985)<sup>12</sup> and the just and equitable winding up remedies, and was relied upon by him as an integral part of his analysis of the scope of those remedies.

There are significant differences in the analyses of Lord Wilberforce and Lord Hoffmann respectively, and in their respective uses of *Blisset v Daniel*,<sup>13</sup> and neither may be wholly satisfactory or provide a complete set of principles applicable to all cases.

The factual context common to all three cases, and typical to disputes between majorities and minorities in companies, is the exclusion of the minority by the majority from participation in the management and profits of the company. Exclusion can cover a multitude of circumstances, ranging from the clear case where a minority shareholder is removed as a director and sacked as an employee, to the less clear case where a minority shareholder leaves claiming to have been forced out, to the remote case where a minority shareholder with no management participation complains about the non-payment of dividends coupled with the payment of excessive remuneration to the controlling shareholders.

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<sup>7</sup> See n 3 above.

<sup>8</sup> See *Russell v Russell* (1880) 14 Ch D 471; *Albert Phillips v Manufacturers Securities Ltd* [1917] 116 LT 290, 297, where Lord Cozens-Hardy M.R. stressed the freedom of a shareholder to exercise his rights selfishly and even maliciously.

<sup>9</sup> *Re Westbourne Galleries Ltd* [1973] AC 360 (HL).

<sup>10</sup> Section 122(1)(g) of the Insolvency Act 1986.

<sup>11</sup> *O’Neill v Phillips* [1999] 1 WLR 1092 (HL).

<sup>12</sup> Section 459 of the Companies Act 1985 now Section 994 of the Companies Act 2006.

<sup>13</sup> See n 3 above.

First it is desirable to make some general remarks about the rights of minority shareholders.

## **PROTECTION OF MINORITY SHAREHOLDERS**

Two cardinal principles of judge-made English company law are that in general the will of the majority shareholders binds the minority and shareholders are entitled to exercise their rights as shareholders in their own selfish interests. This reflects the fact that most companies are the vehicles for a purely commercial relationship between the joint venturers, who as businessmen expect their relationship to be governed essentially by the terms they have agreed between themselves as governing their association. There is, of course, no general duty of good faith as between contracting parties under English law of contract. The famous leading case on the above two cardinal principles is the decision of the Privy Council in *North-West Transportation v Beatty*.<sup>14</sup> In that case the majority shareholder proposed to sell a ship to the company, a transaction which on its face raised a conflict of interest, and he procured the passing of a shareholders' resolution authorising this purchase against the votes of all independent shareholders. It was held that the minority shareholders had no ground for complaint on the facts of the case, there being no allegation of actual impropriety beyond the existence of a conflict of interest.

Minority shareholders enjoy some protection against the tyranny of the majority under two statutory provisions:

- (i) section 459 of the Companies Act 1985, re-enacted as section 994 of the Companies Act 2006, on the ground that the affairs of the company have been conducted in an "unfairly prejudicial" manner;
- (ii) section 122(1)(g) of the Insolvency Act 1986, on the ground that it is "just and equitable" that the company should be wound up

In each case, the principal remedy that the statute provides is a realisation of the minority shareholder's interest in the company, in other words a divorce from the majority and a termination of their relationship through the vehicle of the company.

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<sup>14</sup> *North-West Transportation v Beatty* [1887] 12 App Cas 589. Under section 239 of the Companies Act 2006 wrongdoing directors can no longer ratify as shareholders their own breaches of duty.

## OPPRESSION OF MINORITY SHAREHOLDERS

The winding-up remedy has been part of the Companies Acts since 1862. The unfair prejudice remedy is of more recent origin and its principal purpose (even in its original form as section 210 of the Companies Act 1948) has always been to provide an alternative and less drastic remedy to the blunt instrument of winding up. It is now well established, and this is not doubted given its obvious sense as part of a rational and coherent set of legal principles, that, in general,<sup>15</sup> the principles underlying the two remedies are essentially the same and the winding-up remedy is no wider than the unfair prejudice remedy: see *O'Neill v Phillips*.<sup>16</sup> and *Re Guidezone Ltd*.<sup>17</sup> Given that winding-up is a drastic remedy and that the court has much wider powers under section 459 (ie, to order one side to buy out the other at a fair value), the unfair prejudice remedy is nowadays by far the most important remedy available to a minority shareholder.

To put the above statutory remedies into context, a minority shareholder has other sources of protection independent of those statutory remedies. These remedies are as follows:

- (i) The protection afforded by the articles of association and any shareholders' agreement.
- (ii) The protection afforded by equity under its doctrine of "fraud on a minority", including the right to bring derivative proceedings under what are called the "exceptions to the rule in *Foss v Harbottle*".<sup>18</sup>

Unless a minority shareholder has specifically bargained for a right to realise his investment in the company (as professional investors will often do), none of these non-statutory remedies enables a court to order the realisation of his investment.

## FRAUD ON MINORITY

The scope of the equitable doctrine on "fraud on a minority" is controversial and, so far as decided cases are concerned, very limited.

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<sup>15</sup> There is an unresolved doubt as to whether the aggrieved minority shareholder, in order to obtain the winding-up remedy, needs to show that he has been prejudiced in his capacity as a member for the purposes of the winding-up remedy or that the misconduct complained of is conduct of the affairs of the company: see per Lord Wilberforce in *Re Westbourne Galleries* [1973] AC 360 at p 375A-B.

<sup>16</sup> See n 1 above.

<sup>17</sup> *Re Guidezone Ltd* [2000] 2 BCLC 321.

<sup>18</sup> See n 6 above.

Shareholders do not in general owe any fiduciary duties to the company or their co-shareholders – shares are property rights which can be exercised for the selfish ends of their owners. But there are exceptional occasions when equity will intervene. The classic example is the right of a minority shareholder, by way of an exception to the rule in *Foss v Harbottle*,<sup>19</sup> to bring a derivative action for the company’s benefit where the majority derive benefits from the company in colourable circumstances and stifle any claim to recover those benefits. The modern leading case on the scope of this exception is *Prudential v Newman Industries*.<sup>20</sup> Derivative actions are now to be put on a statutory footing under the Companies Act 2006. This will give the courts the opportunity to widen the availability of derivative actions: whether the courts will take up this opportunity is open to doubt.

The doctrine also encompasses the principle that, where passing special resolutions to alter the articles, the majority must act “bona fide for the benefit of the company as a whole”: per Lindley M.R. in *Allen v Gold Reefs of West Africa Ltd*.<sup>21</sup> The notorious example of the weakness of this principle is *Greenhalgh v Arderne Cinemas*,<sup>22</sup> where the court refused to strike down a special resolution designed to confer an advantage on the majority by freeing them from the application of pre-emption provisions. The principle has been applied in cases where the majority have sought to expropriate the minority improperly: *Dafen Tinplate Co Ltd v Llanelly Steel Co*.<sup>23</sup>

There is, however, some controversial support for an argument that the principle is of wider application, is not confined to the case of alteration of the articles and is based on general equitable principles derived from the law of partnership: *Clemens v Clemens*.<sup>24</sup> In that case Foster J, citing *Re Westbourne Galleries*,<sup>25</sup> struck down a proposed allotment of shares authorised by ordinary resolution of the members, on the ground that the majority’s purpose was not to raise capital but to dilute the interest of the minority. Furthermore, in the well-known judgment of Dixon J in *Peters American Delicacy Co Ltd v Heath*,<sup>26</sup> he drew an analogy between the exercise by a shareholder of its voting rights and the exercise by a mortgagee of its powers of sale,<sup>27</sup> although the conventional view is that equity will only draw such an analogy in special

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<sup>19</sup> See n 6 above.

<sup>20</sup> *Prudential v Newman Industries (No. 2)* [1982] Ch 204.

<sup>21</sup> *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, 671.

<sup>22</sup> *Greenhalgh v Arderne Cinemas* [1951] Ch 286.

<sup>23</sup> *Dafen Tinplate Co Ltd v Llanelly Steel Co* [1920] Ch 124.

<sup>24</sup> *Clemens v Clemens* [1976] 2 All ER 268.

<sup>25</sup> See n 2 above.

<sup>26</sup> *Peters American Delicacy Co Ltd v Heath* [1938-1939] 61 CLR 457.

<sup>27</sup> *Ibid* at 504.

cases, such as expropriation of the minority. He explained Lord Lindley's test of "bona fide for the benefit of the company as a whole" in the following way:

"The chief reason for denying an unlimited effect to widely expressed powers such as that of altering a company's articles is the fear or knowledge that an apparently regular exercise of the power may in truth be but a means of securing some personal or particular gain, whether pecuniary or otherwise, which does not fairly arise out of the subjects dealt with by the power and is outside and even inconsistent with the contemplated objects of the power. **It is to exclude the purpose of securing such ulterior and particular advantages that Lord Lindley used the phrase "bona fide for the benefit of the company as a whole". The reference to "benefit as a whole" is but a very general expression negating purposes foreign to the company's operations, affairs and organizations.** ... [But no]one supposes that in voting each shareholder is to assume an inhuman altruism and consider only the tangible notion of the benefit of the vague abstraction called 'the company as an institution'. An investigation of the thoughts and motives of each shareholder voting with the majority would be an impossible proceeding. When the purpose of a resolution is spoken of, a phrase is used which refers rather to some characteristic implicit in the resolution in virtue of the circumstances or of some larger transaction of which it formed a part or step"<sup>28</sup>

As will be seen below, this analysis of the basis of equitable intervention is remarkably similar to the analysis of Page Wood V-C in *Blisset v Daniel*.<sup>29</sup>

### THE CONVENTIONAL WISDOM

In the case of "quasi-partnerships", ie companies which are in substance partnerships, typically incorporated partnerships where the parties have not consciously agreed the terms of their new association in the guise of a company, the conventional wisdom is as follows:

- (a) A minority shareholder and quasi-partner will be granted relief under the statutory grounds if he is excluded from management

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<sup>28</sup> Ibid at 511-513.

<sup>29</sup> See n 3 above.

by the majority, but that relief may be refused if the majority persuade the court that the dismissal of the minority was justified by his misconduct: *Mears v Mears*;<sup>30</sup> *Re Jayflex Construction Ltd*;<sup>31</sup> *Woolwich v Milne*.<sup>32</sup>

- (b) Absent exclusion of the minority from management, it is not sufficient merely that there has been a breakdown of the relationship of trust and confidence between the quasi-partners, unless of course the breakdown is caused by the wrongful conduct of the majority: *O'Neill v Phillips*;<sup>33</sup> *Re Guidezone Ltd*;<sup>34</sup> *Larvin v Phoenix*;<sup>35</sup> *Grace v Biagioli*;<sup>36</sup> *Strahan v Wilcox*.<sup>37</sup>

The above conventional wisdom can be questioned. The “hard” officious bystander, who favours the sanctity of contract in commercial relations, would question whether an excluded minority shareholder should obtain relief if the majority excluded him in good faith in the interests of the company’s business: such was the view of a strong Court of Appeal in the *Westbourne Galleries* case.<sup>38</sup> “Quasi-partners” may start off with the *expectation* that each will be involved in the management, but circumstances change rapidly in business and how can it be said that it is outside the contemplation of the parties that circumstances may change which render it desirable that the majority exercise their power to remove the minority? If the test, therefore, is that of the content of the parties’ understandings, it is difficult to infer the existence of any absolute agreement or understanding between them that, defeasible only by proof of demonstrable fault on one side, the majority will not remove the minority. Furthermore, the minority shareholder had the opportunity of protecting himself by bargaining for protection in a shareholders’ agreement and the court should not assist him if he has not succeeded in doing so. The “soft” officious bystander, on the other hand, would say that, in a company which was in substance a partnership without any specifically agreed partnership agreement, there should be a parting of ways, by winding up if necessary, if there had merely been an irretrievable

<sup>30</sup> *Mears v Mears* [2002] 2 BCLC 1.

<sup>31</sup> *Re Jayflex Construction Ltd* [2004] 2 BCLC 145.

<sup>32</sup> *Woolwich v Milne* [2003] EWHC 414 (Ch).

<sup>33</sup> See n 1 above.

<sup>34</sup> See n 17 above.

<sup>35</sup> *Larvin v Phoenix* [2003] 1 BCLC 76.

<sup>36</sup> *Grace v Biagioli* [2006] BCC 85.

<sup>37</sup> *Strahan v Wilcox* [2006] BCC 320.

<sup>38</sup> [1991] Ch 799.

breakdown of relations, ie as if it were a partnership at will, particularly if this was the pre-existing relationship. If this were the law, this would obviate the unsatisfactory situation (arising under the conventional wisdom) where quasi-partners fall out but the majority dare not exclude the minority, even if it is in the interests of the business to do so, for fear of being forced to buy him out. It would also obviate the need for a minute and undesirable dissection of the reasons for the breakdown, although there would have to be an exception for the case where the minority has so seriously misconducted himself that it would not be just to grant him relief or at any rate that his shares should be valued with a full discount for a minority shareholding. Arguments based on economic utility in support of the “hard” and “soft” points of view respectively would be fairly evenly balanced.

There is much to be said for the conventional wisdom as a rough and ready and fair compromise, but is it based on sound principles?

### THE HOLY GRAIL OF A “MIDDLE WAY”

In the 1990’s there was much discussion in the political arena of a “third” or “middle” “way” between the extremes of capitalism (the “right”) and socialism (the “left”). At the same time, there was a debate in the courts as to the principles which applied in determining whether a minority shareholder should be granted relief under the statutory remedies. Parliament had framed these remedies in very broad terms and in effect left the courts to work out the principles to be applied. Instinctively in this context, the courts declined to dispense palm-tree justice according to the whim and pleasure of the individual judge (or according to “the length of the Chancellor’s foot”): not only does equity have an instinctive aversion to wide discretionary powers,<sup>39</sup> but also, in a commercial context, it was important that the law was as certain and predictable as possible: see per Warner J in *Re JE Cade & Son Ltd*,<sup>40</sup> cited by Lord Hoffmann with approval in *O’Neill v Phillips*.<sup>41</sup> But it was also fairly clear from the legislative history at least of the unfair prejudice remedy, and acknowledged at an early stage, that, in enacting the statutory remedies, Parliament had not merely intended to give the courts a wider battery of remedies (eg the power to make a share purchase order) for cases which, apart from the new statutory remedies, were already established as wrongs to the

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<sup>39</sup> See per Harman LJ in *Re Caribbean Products (Yam Importers) Ltd* [1966] Ch 331, 346.

<sup>40</sup> *Re JE Cade & Son Ltd* [1992] BCLC 213, 227.

<sup>41</sup> See n 1 above.

minority: eg cases of “fraud on the minority” and breaches of personal rights as shareholders.<sup>42</sup>

So the search was for a middle way between the extremes of palm-tree justice and the remedying of existing wrongs. The courts flirted with the concept of a minority shareholder’s “legitimate expectations” as the foundation of his protection, a concept which was well-known in the public law context and derived some support from the speech of Lord Wilberforce in the *Westbourne Galleries* case.<sup>43</sup> see eg per Hoffmann LJ in *Re Saul D. Harrison & Sons plc*.<sup>44</sup> Lord Wilberforce had said:

“The foundation of it all lies in the words “just and equitable” and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal 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 amongst it, there are individuals, with **rights, expectations and obligations inter se which are not necessarily submerged in the company structure**. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The “just and equitable” provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.”<sup>45</sup>

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<sup>42</sup> See per Hoffmann J in *Re A Company* [1986] BCLC 382, 387-388, and Hoffmann LJ in *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, 17-20.

<sup>43</sup> See n 2 above.

<sup>44</sup> *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, 19.

<sup>45</sup> See n 2 above at 379.

## O'NEILL v PHILLIPS – THE “BARGAIN” BETWEEN SHAREHOLDERS

That search for the holy grail of a middle way apparently came to an end with Lord Hoffmann’s speech in the House of Lords in *O’Neill v Phillips*,<sup>46</sup> where Lord Hoffmann enunciated what have since been understood to be principles of general application to all cases where a minority shareholder sought to rely upon the statutory remedies. He recanted on his use of the concept of “legitimate expectations” in *Re Saul D Harrison & Sons plc*<sup>47</sup> but otherwise adopted what he had said in that case. He held that the courts should usually grant relief only in circumstances where there had been a breach of the terms on which the shareholders had agreed that the affairs of the company should be conducted (ie the articles of association and any shareholders’ agreement, together with general provisions of company law and statute), including (and this was new) any breach of fiduciary duty by the directors of the company without the restrictions of the rule in *Foss v Harbottle*.<sup>48</sup> So, save to the extent that any breach of fiduciary duty by the directors was now a potential ground for relief (because it was treated as a breach of the terms of association, ie the “bargain” between the shareholders) and subject to the exception discussed below, Lord Hoffmann closed the door on a “middle way” and held that the petitioner had to show a breach of the terms of association, ie a wrong independent of the statutory remedies. But he did not close the door completely and recognised an exception: he held that exceptionally it would be appropriate to grant relief by applying equitable principles of good faith typically to be found in the law of partnership. However, in order not to open the door too far, he emphasised that the only applicable equitable principles were ones that were already “established”, “traditional” and “reasonably settled”, not general notions of fairness nor ones based on “legitimate expectations”. He explained what equitable principles he had in mind.

In reaching his conclusions Lord Hoffmann relied upon the speech of Lord Wilberforce in the *Westbourne Galleries* case.<sup>49</sup> Lord Hoffmann and Lord Wilberforce had each relied upon the same earlier lines of authority: first, the judgment of Page Wood V-C in *Blisset v Daniel*,<sup>50</sup> which will be analysed in detail later (which, incidentally, was cited to Lord Wilberforce but not Lord Hoffmann); secondly, the judgment of Smith J in *Re Wondoflex*

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<sup>46</sup> See n 1 above.

<sup>47</sup> See n 44 above.

<sup>48</sup> See [1999] 1 WLR at 1098D-1099B, and [1995] 1 BCLC 14, 18. This has subsequently become controversial: see *Re Chime Corp Ltd* [2004] 3 H K L R D 922.

<sup>49</sup> See n 2 above.

<sup>50</sup> See n 3 above.

*Textiles Pty Ltd*<sup>51</sup> (which, incidentally, was cited to neither of them in argument). In a passage cited with approval by both Lord Wilberforce in the *Westbourne Galleries* case<sup>52</sup> and Lord Hoffmann in *O'Neill v Phillips*,<sup>53</sup> Smith J had held:

“It is also true, I think, that, generally speaking, a petition for winding up, based on the partnership analogy, cannot succeed if what is complained of is merely a valid exercise of powers conferred in terms by the articles: .....To hold otherwise would enable a member to be relieved from the consequences of a bargain knowingly entered into by him: .....It would seem to follow that as a general rule a valid exercise of a power of exclusion conferred by the articles cannot afford a ground for winding up. But this, I think, is subject to an important qualification. **Acts which, in law, are a valid exercise of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company;** and in such cases the fact that what has been done is not in excess of power will not necessarily be an answer to a claim for winding up **Indeed, it may be said that one purpose of [the just and equitable winding up remedy] is to enable the Court to relieve a party from his bargain in such cases.**”<sup>54</sup>

Lord Wilberforce expressed the same thought in these words:

“A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and **it is through the just and equitable clause that obligations, common to partnership relations, may come in.**”<sup>55</sup>

So, it is clear that, notwithstanding the dicta of Foster J in *Clemens v Clemens*,<sup>56</sup> the application of equitable partnership principles to companies was not something that equity managed on its own but was something that

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<sup>51</sup> *Re Wondoflex Textiles Pty Ltd* [1951] VLR 458.

<sup>52</sup> See n 2 above.

<sup>53</sup> See n 1 above.

<sup>54</sup> See n 51 above at 467.

<sup>55</sup> See n 2 above at 380.

<sup>56</sup> See n 24 above.

only the statutory remedies enabled. Given the existence of the statutory remedies, however, this issue of the scope of equity does not matter.

In the light of the analysis of Smith J, approved by both Lord Wilberforce and Lord Hoffmann, the crucial question was: when was it appropriate to relieve a minority shareholder from the legal bargain he had made, ie the bargain to be found in the articles of association, any shareholders' agreement, and the usual incidents of company law apart from the statutory remedies?

Lord Hoffmann's answer to that question in *O'Neill v Phillips*,<sup>57</sup> leaving aside the case where breach of fiduciary duty by a director was in issue, was: it was only appropriate to relieve a minority shareholder from the bargain he had made where (1) it was appropriate to import equitable principles into the relationship and (2) the majority's conduct was unconscionable under established equitable principles. So far as (1) was concerned, the label attached to companies where it was appropriate to import equitable principles is a "quasi-partnership". So far as (2) was concerned, unconscionable behaviour in a "quasi-partnership" would "usually" be found in the breach of an agreement or understanding between the members (even if that was not a legally binding promise).<sup>58</sup> Other examples of unconscionable behaviour given by Lord Hoffmann were the maintenance of the association in circumstances where an event has occurred which puts an end to the basis of the association, and which the others can reasonably say they did not agree to.<sup>59</sup>

In summary, it is clear that Lord Hoffmann wanted the starting point of his analysis to be the "bargain" between the shareholders: in other words, a contract-based analysis. He recognised, however, that in exceptional circumstances the court might enforce promises between the shareholders which were not legally binding, but only under settled equitable principles. In most cases, that bargain would be found in what had actually been agreed in the articles of association and any shareholders' agreement.

Although the evident intention of Lord Hoffmann was to introduce as much certainty as possible to claims of unfair prejudice, thereby significantly narrowing its scope, his reasoning obviously needs to be understood in the light of the facts of the case before him in *O'Neill v Phillips*.<sup>60</sup> As one would expect, he chose his words carefully:

“ ..I think that *one useful cross check in a case like this* is to ask whether the exercise of the power in question would be

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<sup>57</sup> See n 1 above.

<sup>58</sup> See n 1 above at 1101.

<sup>59</sup> See n 1 above at 1101-1102, cited at p 26 below.

<sup>60</sup> See n 1 above.

contrary to what the parties, by words or conduct, have actually agreed” (emphasis added),<sup>61</sup>

ie it was only a cross-check, it was not the only cross-check, and in any event it was a cross-check that could usefully be applied on the facts of the case. The facts were that the petitioner had initially become a shareholder not as a partner but as an employee: he was a labourer promoted to management. The agreement very casually reached at the time of his initial promotion was that, so long as the petitioner managed the business for the principal shareholder, he would receive 50% of the “profits”, which were never defined. The business flourished and the profit-sharing arrangement operated, albeit imperfectly. Circumstances changed, however, and the petitioner became in substance a working partner, because he agreed to the capitalisation of some of the profits rather than their distribution under the profit-sharing arrangement. The good times then came to an end, the majority shareholder felt that he had to retake control of the company, and, having obtained the minority’s consent to this new arrangement, he stated that henceforth the profit-sharing arrangement was at an end in accordance with their original agreement. The petitioner felt that he could not accept this sudden and unilateral termination of the profit-sharing arrangement, and he left the business. The majority shareholder denied any obligation to buy his shares out at a fair value.

Applying his “bargain” analysis, Lord Hoffmann held that there had been no breach of any promise made by the majority shareholder or of any other term of the association, because the profit-sharing agreement was expressly conditional upon his being relieved from running the business. The fact that the unilateral and peremptory withdrawal of the profit-sharing arrangement, which had been in operation for many years during which period the minority had agreed to the capitalisation of substantial profits, had serious financial consequences for the minority was not sufficient: such hardship did not suffice under traditional equitable principles because no unconditional promise had been made.<sup>62</sup> Furthermore, so Lord Hoffmann held, although it was proper to apply equitable principles to their relationship, the majority had not *excluded* the minority shareholder, who had elected to leave because the majority had exercised his express right to withdraw the profit-sharing

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<sup>61</sup> See n 1 above at 1101F.

<sup>62</sup> It could be argued that Lord Hoffmann’s implicit conclusion, that the condition that the majority was relieved from running the business remained in force after such a long period and in such changed circumstances, was harsh; but commerce is not fair and His Honour Judge Paul Baker QC, the judge at first instance, made adverse comments in his judgment about the credibility of the Petitioner.

arrangement in the new circumstances which prevailed upon his return to the management of the company.

### THE WESTBOURNE GALLERIES CASE

*Westbourne Galleries*<sup>63</sup> was an exclusion case. Partners in a partnership at will agreed to incorporate the business: upon its incorporation, the majority shareholders had the statutory right (now section 168 of the Companies Act 2006) to remove any director from office and the right under the standard articles of association to decline to re-appoint a director retiring by rotation, but there was no evidence that the parties had given any thought at the time of incorporation to the existence of these powers. Several years later, the parties fell out (without any obvious fault on either side) and the majority voted to remove the minority as a director. The minority sought a winding-up order on the just and equitable basis.

The House of Lords had no difficulty in attaching the label of a “quasi-partnership” to this company and therefore importing equitable principles from the law of partnership. On the facts the shareholders were in substance partners: there was no evidence that the incorporation of the partnership business was understood by them to change the nature of their relationship

The three classic characteristics of a quasi-partnership, and favouring the application of equitable principles, were listed by Lord Wilberforce as follows:

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

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<sup>63</sup> See n 2 above.

**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' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere."<sup>64</sup>

Characteristic (ii) is the key element: (i) and (iii) will be much more common and not confined to cases of incorporated partnerships.

Lord Wilberforce made further reference to the second characteristic, namely the understanding of management participation, later in his speech:<sup>65</sup>

“The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved. And the principles on which he may do so are those worked out by the courts in partnership cases where there has been exclusion from management<sup>66</sup> even where under the partnership agreement there is a power of expulsion.”<sup>67</sup>

But it is at this point in his speech that difficulties arise in Lord Wilberforce's analysis and doubts arise as to precisely what the case decides. Lord Wilberforce could have stopped at this stage in his analysis and held that the petitioner was entitled to a winding up on the just and equitable basis because the majority had broken a fundamental agreement that the minority should be entitled to be involved in the management. The reasoning would go as follows: the partnership which had been converted into a company had been a partnership at will without any written partnership agreement; before the conversion each partner had the right of management participation; that right survived the conversion (and “trumped” the normal incident of incorporation that a director could be removed) because that reflected the substance of the parties' relationship; the right of each party to terminate the relationship at will did not, however, survive the conversion, because that

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<sup>64</sup> See n 2 above at 379.

<sup>65</sup> See n 2 above at 380.

<sup>66</sup> Citing *Const v Harris* [1824] *Tur & Rus* 496, 525.

<sup>67</sup> Citing *Blisset v Daniel* [1853] 10 *Hare* 493; *Lindley on Partnership*, 13th ed (1971) pp 331, 595.

would be inconsistent with the new corporate structure. Without much doubt, this is how Lord Hoffmann in *O'Neill v Phillips*<sup>68</sup> understood the *Westbourne Galleries*<sup>69</sup> case to have been decided, since otherwise it would not have fitted in with his analysis.

However, Lord Wilberforce did not rest his judgment on this point. As Lord Wilberforce had well in mind, partnership cases establish that a partner cannot be excluded from management participation *unless it is otherwise agreed between the partners*: see *Lindley on Partnership*,<sup>70</sup> cited by Lord Wilberforce in the above passage in his speech. As Lord Wilberforce took pains to acknowledge because of the statutory right of removal of directors and the normal provisions in the articles for retirement of directors by rotation<sup>71</sup> the case before him was one where the shareholders *had agreed otherwise*, ie had agreed that the majority could exclude the minority. The crucial question was, according to Lord Wilberforce:

“Did he [the petitioner] establish a case which, *if he had remained in a partnership with a term providing for expulsion*, would have justified an order for dissolution?”  
[emphasis added]

Given the context, Lord Wilberforce must have been referring here to a general power of expulsion,<sup>72</sup> as opposed to one only exercisable in the event of misconduct: such were the facts in *Blisset v Daniel*,<sup>73</sup> upon which Lord Wilberforce founded his analysis. After posing the question, Lord Wilberforce quoted the findings of fact in the judgment at first instance and concluded:

“Reading this in the context of the judgment as a whole, which had dealt with the specific complaints of one side against the other, I take it as a finding that the respondents were not entitled, in justice and equity, to make use of their legal powers of expulsion and that, **in accordance with the principles of such cases as *Blisset v Daniel***,<sup>74</sup> the only just and equitable course was to dissolve the association. To my

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<sup>68</sup> See n 1 above.

<sup>69</sup> See n 2 above at 380G-H.

<sup>70</sup> See n 67 above at pp 331 and 594-595.

<sup>71</sup> See n 2 above at 380.

<sup>72</sup> Lord Cross in his speech assumed that an expulsion clause in partnership articles would be exercisable only in the case of misconduct ([1973] AC at p 386H), but this does not appear to have been Lord Wilberforce’s assumption.

<sup>73</sup> See n 3 above.

<sup>74</sup> See n 3 above.

mind, two factors strongly support this. **First, Mr. Nazar made it perfectly clear that he did not regard Mr. Ebrahimi as a partner, but did regard him as an employee. But there was no possible doubt as to Mr. Ebrahimi's status throughout, so that Mr. Nazar's refusal to recognise it amounted, in effect, to a repudiation of the relationship.** Secondly, Mr. Ebrahimi, through ceasing to be a director, lost his right to share in the profits through directors' remuneration, retaining only the chance of receiving dividends as a minority shareholder. It is true that an assurance was given in evidence that the previous practice (of not paying dividends) would not be continued, but the fact remains that Mr. Ebrahimi was thenceforth at the mercy of the Messrs. Nazar as to what he should receive out of the profits and when. He was, moreover, unable to dispose of his interest without the consent of the Nazars. All these matters lead only to the conclusion that the right course was to dissolve the association by winding up."<sup>75</sup>

In a case where the partnership deed confers an express general power of expulsion of a partner, it is not the law that the exercise of that power will generally (absent misconduct) justify an order for the dissolution of the partnership. Cases such as *Const v Harris*<sup>76</sup> and *Blisset v Daniel*<sup>77</sup> (the two cases referred to by Lord Wilberforce) are to the effect that, under traditional equitable principles, a power of expulsion, because it is expropriatory in nature without a corresponding duty to pay a fair value for the expelled partner's share, must be exercised in good faith for the benefit of the partnership as a whole.<sup>78</sup>

The facts in *Blisset v Daniel*<sup>79</sup> are summarised on page 5 above. The expelled partner commenced proceedings for reinstatement, alternatively for payment of the true value of his share of the partnership. Page Wood V-C struck down the expulsion firstly on the ground that it was impossible in the circumstances to carry out the stipulated valuation of the expelled partner's share. The Vice-Chancellor, however, went on to strike down the expulsion

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<sup>75</sup> See n 2 above at 381 C-E.

<sup>76</sup> See n 66 above.

<sup>77</sup> See n 3 above.

<sup>78</sup> See *Lindley & Banks on Partnership* 18<sup>th</sup> Edition (2002) at paragraphs 10-119 to 10-125.

<sup>79</sup> See n 3 above.

on a second ground, namely that the majority had acted in bad faith.<sup>80</sup> This bears a strong resemblance to the equitable doctrine of a fraud of the minority discussed above.<sup>81</sup>

So, a power of expulsion in a partnership agreement must be exercised in good faith for the benefit of the partnership as a whole. But, and here is the rub, Lord Wilberforce made it clear in the *Westbourne Galleries*<sup>82</sup> case that it was not necessary for the minority to prove that the majority had acted in bad faith within this doctrine and it was on this very point that he disagreed with the Court of Appeal:

“I must deal with one final point which was much relied on by the Court of Appeal. It was said that the removal was, according to the evidence of Mr Nazar, bona fide in the interests of the company; that Mr. Ebrahimi had not shown the contrary; that he ought to do so or to demonstrate that no reasonable man could think that his removal was in the company's interest. This formula "bona fide in the interests of the company" is one that is relevant in certain contexts of company law and I do not doubt that in many cases decisions have to be left to majorities or directors to take which the courts must assume had this basis. It may, on the other hand, become little more than an alibi for a refusal to consider the merits of the case, and in a situation such as this it seems to have little meaning other than "in the interests of the majority." Mr. Nazar may well have persuaded himself, quite genuinely, that the company would be better off without Mr. Ebrahimi, but if Mr. Ebrahimi disputed this, or thought the same with reference to Mr. Nazar, what prevails is simply the majority view. **To confine the application of the just and equitable clause to proved cases of mala fides would be to negative the generality of the words.** It is because I do not accept this that I feel myself obliged to differ from the Court of Appeal.”<sup>83</sup>

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<sup>80</sup> The facts of *Blisset v Daniel* bear a remarkable resemblance to the recent case of *Mullins v Laughton* [2003] Ch 250, even to the extent that the businesses in both cases were based in Bristol. In *Mullins v Laughton* a partnership was dissolved by the court in circumstances where the partners had acted in bad faith in exercising a power of expulsion.

<sup>81</sup> See above at pages 8-10.

<sup>82</sup> See n 2 above.

<sup>83</sup> See n 2 above at page 381 F-H.

There is an echo in this passage of a main theme in Lord Wilberforce's speech that the court should give full effect to the generality of the statutory words: see the following sentence in the earlier passage in his speech cited on page 13 above:

“The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force.”

It is not easy to reconcile Lord Wilberforce's apparent finding that the majority had acted in bad faith in accordance with *Blisset v Daniel* principles<sup>84</sup> with his later statement that the majority may well have acted in good faith in the interests of the company.<sup>85</sup> It may be theoretically possible that partners can at the same time act in good faith in the interests of the partnership and with bad faith towards the expelled partner (eg because they does not even recognise him as a partner). However, it is a reasonable assumption that Lord Wilberforce was not intending to reverse the decision of the Court of Appeal on the narrow basis of a factual finding that the majority had failed to recognise the minority as a quasi-partner. The case has not been understood as turning on any such finding – if it had been so understood, then the conventional wisdom would be that, in expulsion cases, the minority has to show that the majority acted in breach of the duties of good faith that a partner owes to his co-partners. The only fair conclusion is that Lord Wilberforce was saying that the just and equitable remedy enabled the court to grant relief in circumstances going *beyond established equitable principles*. It is clear that Lord Wilberforce was going significantly beyond what was actually decided in the *Wondoflex* case.<sup>86</sup> In that case Smith J said that it would have been a “question of some difficulty” to determine whether a winding up order should be made if the majority had acted in good faith. He granted a winding up order because he found as a fact that the majority had acted in bad faith.

Whereas Lord Wilberforce used *Blisset v Daniel*<sup>87</sup> as authority for the proposition that a power of expulsion must be exercised in good faith and not for any selfish motive, in *O'Neill v Phillips*<sup>88</sup> Lord Hoffmann, whilst acknowledging that fact, cited it as authority for a different and novel purpose:

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<sup>84</sup> See n 3 above at 381 C.

<sup>85</sup> See n 3 above at 381 G-H.

<sup>86</sup> See n 51 above.

<sup>87</sup> See n 3 above.

<sup>88</sup> See n 1 above.

“An example of such equitable principles in action [upon which the court decides that the conduct is unjust, inequitable or unfair for the purposes of the statutory remedies] is *Blisset v Daniel*<sup>89</sup> (1853) 10 Hare 493 to which Lord Wilberforce referred in *In re Westbourne Galleries Ltd.*<sup>90</sup> Page Wood V-C held that upon the true construction of the articles, two-thirds of the partners could expel a partner by serving a notice upon him without holding any meeting or giving any reason. But he held that the power must be exercised in good faith. He said,<sup>91</sup> that "the literal construction of these articles cannot be enforced" and, after citing from the title "De Societate" in Justinian's *Institutes*, went on, at pp 523-425:

**"It must be plain, that you can neither exercise a power of this description by dissolving the partnership, nor do any other act for purposes contrary to the plain general meaning of the deed, which must be this - that this power is inserted, not for the benefit of any particular parties holding two-thirds of the shares, but for the benefit of the whole society and partnership . . ."**

.....[T]here is more than one theoretical basis upon which a decision like *Blisset v Daniel*<sup>92</sup> can be explained. **Nineteenth century England law, with its division between law and equity, traditionally took the view that while literal meanings might prevail in a court of law, equity could give effect to what it considered to have been the true intentions of the parties by preventing or restraining the exercise of legal rights.** So Smith J<sup>93</sup> speaks of the exercise of the power being valid "in law" but its exercise not being just and equitable because contrary to the contemplation of the parties. This way of looking at the matter is a product of English legal history which has survived the amalgamation of the courts of law and equity. But another approach, in a different legal culture, might be simply to take a less literal view of "legal" construction and

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<sup>89</sup> See n 3 above.

<sup>90</sup> See n 2 above at 381.

<sup>91</sup> See n 3 above at 523.

<sup>92</sup> See n 3 above.

<sup>93</sup> In the *Wondoflex* case see n 51 above.

interpret the article themselves in accordance with what Page Wood V-C called “the plain general meaning of the deed.” Or one might, as in Continental systems, achieve the same result by introducing a general requirement of good faith into contractual performance. These are all different ways of doing the same thing. I do not suggest there is any advantage in abandoning the traditional English theory, even though it is derived from arrangements for the administration of justice which were abandoned over a century ago. On the contrary, a new and unfamiliar approach could only cause uncertainty. So I agree with Jonathan Parker J when he said in *In re Astec (BSR) plc*:<sup>94</sup>

“in order to give rise to an equitable constraint based on ‘legitimate expectation’ what is required is a personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former.”

This is putting the matter in very traditional language, reflecting in the word "conscience" the ecclesiastical origins of the long-departed Court of Chancery. As I have said, I have no difficulty with this formulation...”

## CRITIQUE

The analysis of Lord Wilberforce in the *Westbourne Galleries*<sup>95</sup> case is not wholly consistent with the analysis of Lord Hoffmann in *O’Neill v Phillips*.<sup>96</sup> Lord Hoffmann identified the true basis of the decision in the former case as being that (a) it was right to apply equitable principles borrowed from the law of partnership insofar as they were compatible with the new and permanent corporate structure, and (b) there had been a breach of the minority’s fundamental right, recognised under the law of partnership and not expressly excluded by the parties, to management participation. Lord Hoffmann held that this analysis, ie the application by analogy of traditional equitable principles, provided the answer to the facts of the case before him. However, it does not necessarily follow that he meant that established

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<sup>94</sup> *In re Astec (BSR) plc*<sup>94</sup> [1998] 2 BCLC 556, 588.

<sup>95</sup> See n 2 above.

<sup>96</sup> See n 1 above.

equitable principles provided the answers in all cases, although this is not a point made in any subsequent case: see eg the recent statement of general principle by the Court of Appeal in *Grace v Biagioli*.<sup>97</sup>

It is apparent from the passage in the speech of Lord Hoffmann in *O'Neill v Phillips*<sup>98</sup> that he was conscious of the difficulties of a “one theory fitting all cases” solution. He nevertheless suggested *obiter*, with the citation of virtually no authority, that other cases fell within his “bargain” analysis. He said this:

“I do not suggest that exercising rights in breach of some promise or undertaking is the only form of conduct which will be regarded as unfair for the purposes of section 459. For example, there may be some event which puts an end to the basis upon which the parties entered into association with each other, making it unfair that one shareholder should insist upon the continuance of the association. The analogy of contractual frustration suggests itself. The unfairness may arise not from what the parties have positively agreed but from a majority using its legal powers to maintain the association in circumstances to which the minority can reasonably say it did not agree: non haec in foedera veni. It is well recognised that in such a case there would be power to wind up the company on the just and equitable ground (see *Virdi v Abbey Leisure Ltd*)<sup>99</sup> and it seems to me that, in the absence of a winding up, it could equally be said to come within section 459. But this form of unfairness is also based upon established equitable principles and it does not arise in this case.”<sup>100</sup>

The principles enunciated in Lord Hoffmann’s speech (ie the bargain between shareholders subject to established equitable exceptions) should not, however, be taken as the answer to all cases, for a number of reasons:

- (a) That cannot have been Lord Hoffmann’s intention because otherwise his principles would suffer from an internal inconsistency.

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<sup>97</sup> *Grace v Biagioli* [2006] 2 BCLC 70, 92.

<sup>98</sup> See n 1 above at 1101E-H.

<sup>99</sup> *Virdi v Abbey Leisure Ltd* [1990] BCLC 342.

<sup>100</sup> See n 1 at 1101-1102.

(b) Contrary to a main theme of Lord Wilberforce's speech in the *Westbourne Galleries* case,<sup>101</sup> those principles fail to give "full effect" to the generality of the statutory words and amount to judicial legislation.

(c) It is not easy to discern the settled or traditional equitable principles that Lord Hoffmann was referring to.

(d) As appears from the passage in his speech at page 1101F cited on pages 16-17 above,<sup>102</sup> Lord Hoffmann himself was conscious that he was not legislating for all cases.

So far as (a) and (b) are concerned, on the one hand Lord Hoffmann held that resort could only be had to "settled" or "traditional" equitable principles. On the other hand he also said in *Re Saul D Harrison & Sons plc*<sup>103</sup> in the passage cited below that Parliament's intention in enacting the unfair prejudice remedy had been to free the courts from the limitation of having to find that the case fell within the exceptions to the rule in *Foss v Harbottle*.<sup>104</sup> But those exceptions are based on the doctrine of "fraud on the minority", an equitable doctrine par excellence.

"The answer to this question often turns on the fact that the powers which the shareholders have entrusted to the board are fiduciary powers, which must be exercised for the benefit of the company as a whole. If the board act for some ulterior purpose, they step outside the terms of the bargain between the shareholders and the company. As a matter of ordinary company law, this may or may not entitle the individual shareholder to a remedy. It depends upon whether he can bring himself within one of the exceptions to the rule in *Foss v Harbottle* [1843] 2 Hare 461. But the fact that the board are protected by the principle of majority rule does not necessarily prevent their conduct from being unfair within the meaning of s 459. **Enabling the court in an appropriate case to outflank the rule in *Foss v Harbottle* was one of the purposes of the section.** So in *Re a Company* (No 00370 of 1987), ex p Glossop [1988] BCLC 570, [1988] 1 WLR 1068, where the complaint was of a consistent refusal by the board

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<sup>101</sup> See n 2 above.

<sup>102</sup> See n 1 at 1101 F.

<sup>103</sup> See n 44 above.

<sup>104</sup> See n 6 above.

## OPPRESSION OF MINORITY SHAREHOLDERS

to recommend payment of a dividend, Harman J said that such conduct could make it just and equitable to wind up the company. He did so by reference to the seminal judgment of Lord Wilberforce in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] 1 All ER 1126, [1974] AC 821 on the principles by which the court decides whether the board has acted within its fiduciary powers and said that on the facts alleged it was arguable that the board had exceeded them. This seems to me in principle the correct point at which to start the inquiry into both whether the conduct in question could justify a just and equitable winding up and also whether it is unfair for the purposes of s 459. It seems clear that but for a technical objection which was removed when the section was amended in 1989, Harman J would have allowed the petition to proceed on both grounds, as Peter Gibson J did before the amendment in *Re Sam Weller & Sons Ltd* [1990] BCLC 80, [1990] Ch 682. I should however add that while I respectfully think that Harman J was right in asking himself whether the board had abused its fiduciary powers, I would not necessarily subscribe to the theory of corporate hubris on which he decided that it arguably had. Although one begins with the articles and the powers of the board, a finding that conduct was not in accordance with the articles does not necessarily mean that it was unfair, still less that the court will exercise its discretion to grant relief. **There is often sound sense in the rule in *Foss v Harbottle* (1843) 2 Hare 461.** In choosing the term 'unfairly prejudicial', the Jenkins Committee (para 204) equated it with Lord Cooper's understanding of 'oppression' in *Elder v Elder and Watson* 1952 SC 49:

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

So trivial or technical infringements of the articles were not intended to give rise to petitions under s 459."

Thus, it may be doubted whether, if the purpose of the statutory remedy was to outflank a settled equitable doctrine, it was also Parliament's intention that in all other respects settled equitable principles should reign supreme.

Lord Wilberforce did not himself believe that he was applying traditional equitable principles in the *Westbourne Galleries*<sup>105</sup> case – on the contrary, he went beyond such principles. Even if that case is analysed in the way suggested on page 25 above, it is very difficult to see how such an analysis is based on traditional equitable principles. In any event, since the analysis is that of the application of equitable principles *by analogy*, the argument in favour of sticking to the settled equitable principles (developed *ex hypothesi* in a different context) is fundamentally weakened.

So far as (c) is concerned, Lord Hoffman must have had in mind in the passage cited on p 26 above the line of authority to the effect that a court will wind up a company on the just and equitable basis where the whole substratum of the company has gone. But this ground for winding up is a narrow one: *Re Perfectair Holdings Ltd.*<sup>106</sup> Lord Hoffmann referred in *O'Neill v Phillips*,<sup>107</sup> as an example of a settled equitable principle, to the happening of “some event which puts an end to the basis upon which the parties entered into association with each other, making it *unfair* that one shareholder should insist upon the continuance of the association”, but that formulation, divorced from settled equitable principles, comes close to returning to a test of mere unfairness. Indeed, in the recent case of *Re Metropolis Motorcycles Ltd.*,<sup>108</sup> Mann J came close to applying that formulation as one merely of fairness – it was not suggested before him that he was guided by any earlier authority.

As to the factual situations in other cases of alleged minority oppression, Lord Hoffmann did not disapprove of the result in any previous decided case on the statutory remedies and he did not seek to explain how any such case (other than the *Westbourne Galleries* case)<sup>109</sup> could be fitted within his analysis.

One recent example of the difficulties that would arise if Lord Hoffmann’s analysis were to be taken as applicable to all cases may be cited. It concerned the common allegation of minority oppression that the majority favour themselves by paying themselves excessive remuneration and paying inadequate dividends to shareholders: a remote example of exclusion of the minority. Such had been the allegation in two of the cases cited by Lord Hoffmann in the passage in his judgment in *Re Saul D Harrison & Son plc*<sup>110</sup> cited above and explained there as cases of breach of fiduciary duty. Under Lord Hoffmann’s principles, the petitioner had to establish that the directors

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<sup>105</sup> See n 2 above.

<sup>106</sup> [1990] BCLC 423.

<sup>107</sup> See n 1 above.

<sup>108</sup> *Re Metropolis Motorcycles Ltd* [2006] EWHC 364 (Ch).

<sup>109</sup> See n 2 above.

<sup>110</sup> See n 44 above.

had acted in breach of their fiduciary duties, which in most cases will require proof of bad faith on the part of the directors. However, prior to *O'Neill v Phillips*<sup>111</sup> it had never been held that bad faith or breach of fiduciary duty needed to be shown. The prevailing view was that expressed by Sir Richard Scott V-C (as he then was) in *Re A Company*,<sup>112</sup> to the effect that the relevant standard, against which the fairness of the majority's conduct was to be judged, was "objective commercial criteria" of the proper level of remuneration. In the recent case of *Re Campbell Irvine (Holdings) Ltd*,<sup>113</sup> Blackburne J applied the test of "objective commercial criteria" rather than the test of good faith.

### CONCLUSION

It is submitted:

- (i) The test of the "bargain" between shareholders, as supplemented by traditional equitable principles, which was enunciated by Lord Hoffmann in *O'Neill v Phillips*,<sup>114</sup> is sufficient to decide many cases of minority oppression, particularly those where a minority claims that the majority have broken a promise.
- (ii) That test was not intended and should not be taken as governing every case and factual circumstance. It may be the starting point of the analysis in a given case, but it is to be considered in the light of other lines of authority in factual contexts closer to the case in point than that in *O'Neill v Phillips*.<sup>115</sup> It is always worth remembering Lord Upjohn's wise words in *Phipps v Boardman*:

"Rules of equity have to be applied to such a great diversity of circumstances that they can be stated only in the most general terms and applied with particular attention to the exact circumstances of each case."<sup>116</sup>

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<sup>111</sup> See n 1 above.

<sup>112</sup> *Re A Company (No. 004415 of 1996)* [1997] 1 BCLC 479.

<sup>113</sup> *Re Campbell Irvine (Holdings) Ltd* [2006] EWHC 406 (Ch).

<sup>114</sup> See n 1 above.

<sup>115</sup> See n 1 above.

<sup>116</sup> *Phipps v Boardman* [1967] 2 AC 46, at 123.

- (iii) There is an inconsistency between the reasoning of Lord Wilberforce in *Westbourne Galleries*<sup>117</sup> case and that of Lord Hoffmann in *O'Neill v Phillips*,<sup>118</sup> which can only be resolved by the House of Lords. One is left with the strong suspicion that, had the earlier case come before Lord Hoffmann rather than Lord Wilberforce, he would have dismissed the appeal and approved the reasoning of the very strong Court of Appeal below,<sup>119</sup> on the basis that there was no unconscionability on the part of the majority under traditional equitable principles. In that event, the rights of minority shareholders would have been even narrower than they are now.

Where does this leave the “conventional wisdom” discussed on pages 10 – 12 above, ie the grounds upon which a court will grant relief in the case of a breakdown of relations in a quasi-partnership? It is submitted that there is no over-arching general test applicable to all cases of unfair prejudice. The search for any holy grail, be it a “middle way” or an extremer version, is pointless. Just as the courts adopt an incremental, case-by-case, common-sense and practical approach in common-law negligence cases, so it is submitted they should adopt a similar approach in unfair prejudice cases. The “conventional wisdom” can be seen to strike a fair balance in a commercial context between competing interests and therefore is to be commended. That “fair balance” of competing interests is to be looked for in other factual contexts where a minority shareholder claims to have been oppressed.

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<sup>117</sup> See n 2 above.

<sup>118</sup> See n 1 above.

<sup>119</sup> [1971] Ch 799.