A FRESH APPROACH TO SECTION 320

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Section 320 of the *Companies Act, 1981* (C'th)[1] provides for the regulation by the courts of unfair decisions made by or on behalf of a company. It has been the subject of recent academic discussion provoked by two linked events.[2] The first event was the amendment of s. 320 in 1984.[3] The most important effect of the alterations was to expand the criteria by which the acts or omissions are to be judged as warranting the interference of the court.[4] The second was the progress of *Wayne v. New South Wales Rugby League Ltd.*[5] to the High Court of Australia. Not only was

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1 This legislation is applicable in each state by virtue of the various *Companies (Application of Laws) Acts*. The legislation will be hereafter referred to as the "Companies Code". A generic name for the provisions of the companies legislation as applicable nationwide is needed, but by the nature of the scheme cannot be enacted. All references hereafter are to the Companies Code, unless otherwise stated.

2 E g I Cameron, "Rugby League Footballers and 'Oppression or Injustice' " (1985), 8 N S W L J 236, S. Kapnoullas, "Protection of Minority Shareholders — Recent Developments" (1986), 60 Law Inst. J 660; J F. Corkery, "Oppression or Unfairness by Controllers — What Can a Shareholder Do About It? — An Analysis of s 320 of the Companies Code" (1985), 9 Adel L.R 437

3 *Companies and Securities Legislation (Miscellaneous Amendments) Act,* 1983 (Cth). It came into effect on 1 January 1984

4 They are now " oppressive or unfairly prejudicial to, or unfairly discriminatory against contrary to the interests of the members as a whole": see s 320(2).

The amendments also broadened the section by:

i permitting legal personal representatives and transmittees to apply for relief [s 320(4A)(a)];

ii including certain matters previously thought to be excluded from the category of acts or omissions subject to examination by the courts [s 320(4) and s 320(4A)(b) & (c)], and

iii specifying that the court may order what is popularly known as the derivative action [s 320(2)(g)]

5 (1985), 3 A C L.C 158 (1st instance), (1985), 3 A C.L C. 177 (full court), (1985), 61 A L.R 225 (High Court)

this case the first application under the amended s. 320 to reach the High Court, but it was about sport, in particular, football. The purpose of this essay is to point out how sterile the current interpretations of "unfair" are, and to suggest a new, fresh approach to the issue.

A. CURRENT INTERPRETATIONS

1. The Internal Management Rule

One of the mainstays of company law is the doctrine that the internal management of companies should not be fettered.[6] The enactment of the "just and equitable" ground for a petition to the court to wind up the company[7] was one legislative inroad in the principle,[8] but one with a drastic result. The liquidation of the company was an apt choice of remedy, however, for it ensured that were the courts to enquire into and judge the running of the company the result would not be its regulation, rather its destruction. When the Cohen Committee recommended the insertion of a new section providing that the courts should be able to settle matters in cases of oppression under the "just and equitable" ground in any way which the court thinks just and equitable,[9] it seemed to be taking a small step. According to the Committee, if the winding up for oppression led to unfair results for the oppressed minority, the court ought to be able to remedy the results of its own decision. But, as Professor Wedderburn has shown,[10] in the initial working of the section the companies were not worth saving.[11] In

6. The paradigm case is *Mozley v Alston* (1847), 1 Ph. 790, 41 E R. 833, more recent discussions can be found in *Winthrop Investments v Winns Ltd*, [1975] 2 N.S.W.L R. 666 and *Rayfield v Hands* [1958] 2 W L R. 851, 2 All E R 194 among many others.

7. Section 364(1)(j)

8. There are, of course, many others; e.g. the requirements as to a director and the voidness of provisions indemnifying officers or auditors: see ss 219-238A. Much of the Companies Code can be viewed as interference with the management of a company.

9 *Report of the Committee on Company Law Amendment*, (Lionel L Cohen, Chairman) Cmd. 6659, June 1945 p. 60, 95 (Hereinafter this report will be referred to as "Cohen Committee").

10. K.W Wedderburn, "Oppression of Minority Shareholders" (1966), 29 M.L.R. 321, 326

11 *Ibid* The cases Professor Wedderburn referred to are: *Scottish Co-operative Wholesale Society Ltd v Meyer,* [1959] A C 324 and *Re H R Harmer Ltd,* [1958] 3 All E R. 689. He also pointed out that in the subsequent case of *Re Five Minute Car Wash Service Ltd*, [1966] 1 All E.R. 242 no remedy was given even though the company was healthy, but the problem was serious In *Re Lundie Brothers Ltd,* [1965] 1 W.L.R. 1051 a healthy company was wound up.

any case, the ability to remedy the unfair results for the minority always existed, as was demonstrated in *Re Tivoli Freeholds Ltd.*[12] In that case the making of the winding up order was stayed for a period to allow the negotiated sale of minority shares to the majority shareholders. This back-door method existed in all but cases where the parties were adamant to retain their shares beyond all economic reason.

Despite its avowed intent, the introduction of the remedy was bound to be viewed to open the door to regulation of the affairs of the company at the behest of the minority. It was initially viewed this way by the judiciary.[13] The divorce of the oppression remedy from its origins of non-interference,[14] as a remedy to defects in the winding up provisions, occurred as soon as it was assumed to grant jurisdiction in the internal affairs of the company, regardless of how much these discretions might be feared by the judiciary. Thus the Jenkins Committee could view s. 210 of the *Companies Act, 1948* (U.K.) as a separate remedy and one to be expanded.[15] It was regarded as an albeit partial substitute for the fraud on the minority exception to the rule in *Foss v. Harbottle.*[16] Academic opinion had no doubts and later repeatedly railed against the subsequent growth of judicial restrictiveness.[17]

The courts expressed narrower interpretations in the late 1960's. Starting with the early voicing of the need for a distinction between being outvoted and oppression, "as distinguished from mere

12 [1972] V R 445, 480 Also *Re City Meat Company Pty Ltd* (1984), 2 A C L.C 149, 150, *Re Wondoflex Textiles Pty Ltd* (1951), V L R 458, *Re Straw Products Pty Ltd* (1942), V L R 139, 143

13 Thus in *Re H R Harmer Ltd*, [1959] 1 W L R 62 the court ordered that the delinquent be a consultant at a named salary, that he be "president" of the company for life but without any duties, rights or powers

14 See G Shapira, "Minority Shareholders' Protection – Recent Developments" (1982), 10 N.Z U L R 134, 137-139, where it is argued that interference was linked to the "quasi-partnership" or closely-held company and the abandonment of the link resulted in the broader jurisdiction for the courts

15 *Report of the Company Law Committee* (Jenkins, Chairman) Cmnd 1749, 1962 para 264 (Hereinafter this report will be referred to as "Jenkins Committee")

16 (1843) 2 Hare 461, 67 E R 189

17 E g B H McPherson, "Oppression of Minority Shareholders" (1963), 36 A L J 427; K W Wedderburn, "Oppression of Minority Shareholders" (1966), 20 M L R 321; R Baxt, "Oppression of Shareholders – The Australian Remedy" (1971), 8 M U L R 91, D Prentice, "Protection of Minority Shareholders" (1972), 25 Current Legal Problems 124, 145-148, A Boyle, "Power of the Court to Grant Relief on a Petition Alleging Unfair Practice" (1980), 1 Company Lawyer, 280

resentment on the part of the minority at being outvoted on some issue of domestic policy",[18] the view grew that the courts should not in fact be arbiters of business judgment. It resulted in decisions such as *Re Broadcasting Station 2GB Pty Ltd*[19] and *Re Five Minute Car Wash Service Ltd.*[20] Full-blooded assertions of the internal management principle began to appear around 1970, as in *Re Bright Pine Mills Pty Ltd*[21] and *Re Tivoli Freeholds Ltd.*[22]

Given that the courts confined the effect of "oppressive" in allowing the regulation of the internal management of companies, even to the same point as the internal management rule of *Mozley v. Alston*,[23] the adoption of the new criteria can be taken to be a positive statement that s. 320 must allow for such regulation. The limits of regulation are not defined and it cannot be stated with any certainty that the legislature intended to broaden the jurisdiction of the courts beyond all prior definitions of "oppressive". Parliament may merely have wished to stem the trend in judicial interpretation, perhaps to the early broad approach. The question of the limits of the jurisdiction of the courts in making orders regulating the internal affairs of companies is completely open. So is the question of whether the legislature has been wise in providing for it at all. It is these questions that this essay attempts to answer.

II. "Oppression"

If the interpretation of the new section is not to fall into the same trap as that of the old, the reasons for the judicial restrictiveness should be investigated. It is facile to suggest the judiciary is stupid. To this end it is useful to analyse the numerous definitions of "oppression" as having had three foci:

1. The motivations of the behaviour;
2. The behaviour as acts or events; and
3. The effect of the behaviour.

18. *Elder v Elder and Watson, Limited*, 1952 S.C. 49, 55; echoed in *Re H R Harmer Ltd*,[1959] 1 W L.R 62, 87.

19 [1964-5] N S.W R. 1648

20 [1966] 1 W.L.R 745; [1966] 1 All E R. 242

21 [1969] V.R 1002. "It is true to say, however, that it was not intended by s 186 or s 94 [its predecessor] to give jurisdiction to the Court (a jurisdiction the courts have always been loath to assume) to interfere with the internal management of a company " (P 1011)

22. [1972] V R 445, 454.

23 (1947), 1 Ph 790, 41 E.R 833.

The first, requiring an explanation of the motives of the oppressors, clearly placed a considerable hurdle in the way of claimants. The age-old problems of investigating objective intention had to be faced. It was rejected for this reason and as being irrelevant to the normal definition of "oppression" in many cases.[24] Nevertheless, it was often raised as a factor in defining "oppression".[25] The usual way this occurred was an assertion that the conduct must be examined from the point of view of the alleged oppressor as well as the alleged oppressed, or by looking to the designs of the conduct.[26]

As a description of the behaviour, "oppression" was interpreted as a measure of wrongfulness. The three most quoted definitions were (1) "burdensome, harsh and wrongful"[27]; (2) "an unfair abuse of powers and an impairment of confidence in the probity with which the company's affairs are being conducted as distinguished from mere resentment on the part of the minority at being outvoted on some issue of domestic policy"; and (3) "at the lowest involve 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 the company is entitled to rely".[28]

The language of harm, unfairness and "fair play" did not solve the problem of whether some sort of illegality or breach of duty was implied by the term "oppression". The tendency[29] was to re-

24 *Meyer v Scottish Co-operative Wholesale Society Limited*, 1954 S.C 381, 393; *Re H R Harmer*, [1959] 1 W.L R 62, 84; *Re M Dalley and Co Pty Ltd* (1968). 1 A.C.L.R. 489, 492.

25 *Re Broadcasting Station 2GB Pty Ltd*, [1964-5] N S.W.R 1648, 1662; cf. *Re M Dalley and Co Pty Ltd* (1968), 1 A.C.L.R. 489, 492; *Re Bright Pine Mills Pty Ltd*, [1969] V.R. 1002, 1011

26. *Re Tivoli Freeholds Ltd*, [1972] V.R. 442. Menhennit J. seems to have misunderstood his authority, *Re Jermyn Street Turkish Baths Ltd*, [1971] 1 W.L.R. 1047, 1060, at this point. "Overbearing" need not refer to the point of view of the oppressor, it can and seems to have been taken by the Court of Appeal to mean the type of suffering of the oppressed.

27. *Scottish Co-operative Wholesale Society Ltd v Meyer*, [1959] A C 324, 342, per Viscount Simonds.

28. Both per Cooper L.J. in *Elder v Elder and Watson*, 1952 S.C. 49, 55.

29. This tendency was repeatedly disapproved of by writers: B.H. McPherson, "Oppression of Minority Shareholders" (1963), 36 A.L J. 427, 431-2; K W. Wedderburn, "Oppression of Minority Shareholders" (1966), 29 M.L.R. 321, 324-327; K.L. Fletcher, "Section 209 of the Companies Act 1955: A Step towards Shareholder Protection" (1970), 5 Vict. U. Wellington L Rev. 479, 480-487; H Rajak, "The Oppression of Minority Shareholders" (1972), 35 M.L.R. 156, 162-167. Also disapproved of by the Jenkins Committee, para. 202.

quire illegality or breach of duty,[30] or, at least, to require that the conduct breach the specifically directed duty that the majority, whether or not the decision benefits it, should have a genuine belief in the benefit of the company in that decision.[31] Courts have, at times, also referred to the moral or emotional content of "oppression", namely, that it implies tyrannical governments.[32] This was almost always[33] regarded as an additional requirement to illegality, breach of duty or lack of probity as the primary test.

As the judiciary became more aware of the extent of possible regulation offered to it, the judges tightened the description of "oppressive" behaviour to exclude all but positive wrongs. In *Re Lundie Brothers Ltd*[34] they went so far as to apply the proper plaintiff aspect of the rule in *Foss v. Harbottle*.[35] In a few cases even the contract basis of corporate law has found expression when the acts complained of were permitted by a provision in the company's articles.[36] If the courts had succeeded in narrowing "oppression" to this extent there would have been no jurisdiction at all to interfere in the running of the company.

The final category of tests for oppression was an examination of the effect of the behaviour. This involved ascertaining whether the behaviour had discernible effects on the claimant and, if so, what was sufficient to bring the section into operation. Thus in *Scottish Wholesale Co-operative Society Ltd v. Meyer*[37] the complainants suffered loss in the value of shares. It was subsequently suggested

30 See: *Re Associated Tool Industries Ltd* (1963), 5 F.L.R. 55, 56-67; *Re Five Minute Car Wash Service Ltd*, [1966] 1 W L.R. 745, 751; *Re Jermyn Street Turkish Baths Ltd*, [1971] 1 W L R. 1042, 3 All E.R 184; *Re Tivoli Freeholds Ltd*, [1972] V.R. 445, 453; *Cumberland Holdings Ltd v Washington H Soul Pattinson and Co Pty* (1977) C.L.C 29, 370 and 29, 378.

31 *Re Broadcasting Station 2GB Pty Ltd* [1964-5] N S W.R. 1648, 1662.

32 *Re M Dalley & Co Pty Ltd* (1968), 1 A.C L.R 489, 492, *Re Jermyn Street Turkish Baths Ltd*, [1971] 1 W.L.R. 1042, 1060; *Re Tivoli Freeholds Ltd*, [1971] V.R. 445, 453.

33. The exception is *Re M Dalley & Co Pty Ltd* (1968), 1 A.C.L.R 489.

34 [1965] 1 W.L R. 1051

35. K W. Wedderburn, "Oppression of Minority Shareholders" (1966), 29 M.L.R. 321, 322-3 See also· G. Shapira, "Minority Shareholders Protection – Recent Developments" (1982), 10 N.Z.U.L R 134, 143-144, 156-162, H. Rajak, "The Oppression of Minority Shareholders" (1972), 35 M.L.R 156, 164-5.

36 *Re Warrick Howard (Aust) Pty Ltd* (1983), 1 A C.L.C 634; *Irvin and Johnson Ltd v Oelofse Fisheries Ltd* 1954 (1) S A. 231; cf. *Caratti Holding Co Pty Ltd v Zampatti* (1976), 2 A.C L.R. 152, *Re Empire Building Ltd*, [1973] 1 N Z L.R 215

37 [1959] A.C 324

that suffering in a pecuniary way was necessary to oppression.[38] Unfortunately, any behaviour adversely affecting shareholders' interests is detrimental in a pecuniary sense. The market for securities is an objective valuer of interests. The analysis was seen to be useless in the long run because some interests in a company are peculiar to that company and the participating individuals,[39] and "oppression" was directed at companies the market for whose securities fails.[40] The exercise was circular because a purported detriment will only affect the price of the share if the court thinks it would.

The currently most popular analysis of the meaning of "oppression", the partnership analogy, has sprung from the perception of the section as remedying market failure. In its present form this analysis derives from *Ebrahimi v. Westbourne Galleries Ltd*,[41] but has its true source in the comments made quite early in the history of the section referring to the expectations of shareholders.[42] Shareholders have expectations as to how the affairs of a company should be conducted, and in small companies which could be partnerships the expectations may relate to a number of matters; for example, participation in management, method of and participation in remuneration, extrication of investment and the relation between formal entities.[43] These are not relevant to companies where the shares are freely marketable and therefore are merely an investment. The denial of expectations has been taken to be

38. Although unequivocally rejected in *Re H R Harmer Ltd*, [1959] 1 W.L.R. 62, 84, it was more acceptable twelve years later: *Re Broadcasting Station 2GB Pty Ltd*, [1964-5] N.S.W.R. 1648, 1662; *Re Tivoli Freeholds Ltd*, [1972] V.R. 445, 453. The suggestion is a reference to the concept of a share as an interest measured in a sum of money: *Borlands Trustee v Steel Brothers & Co Limited*, [1901] 1 Ch 279, 288.

39. *Re Richard Pitt and Sons Pty Ltd* (1978-80), 4 A.C.L.R. 459; *Re Cumberland Holdings Ltd*, [1975-6] A C.L C. 28, 515, 28, 530. See also Eisenberg, Melvin A. *The Structure of the Corporation*. U.S.A.: Little Brown & Co., 1976, 30-68.

40. In *Re Cumberland Holdings Ltd,* [1975-6] A.C.L.C. 28, 515, a strong argument of market-rigging was used to counteract the defendant's point that the market value was fair.

41 [1973] A.C 360, 378-80. This case relied heavily on *Re Wondoflex Textiles Pty Ltd* (1951), V L R. 458, 467.

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

43. These are not in fact defined as such by Lord Wilberforce who refers to situations giving rise to equitable considerations in *Ebrahimi v Westbourne Galleries Ltd*, [1973] A.C 360, 379.

oppresion in some recent cases,[44] in so doing the courts have adopted the dramatic but unfortunate language of "equitable consideration" as used in *Ebrahimi v. Westbourne Galleries Ltd*[45] rather than referring to the prosaic, but broader, earlier language. The term "equitable considerations" ties oppression into the partnership analogy of the just and equitable ground due to its historical source.[46] This could well, in time, have resulted in the remedy being confined to its original role of a mere supplement to winding up even in jurisdictions, including the Australian states, where the formal connection had been severed.[47]

The judiciary changed from an initial broad stance in its interpretation of "oppression" to a highly restrictive one. This trend is apparent in all approaches to defining remediable behaviour, and happened despite academic opinion. It results directly from the desire not to regulate companies in their internal affairs. In order to interpret the words, the courts looked at the dictionary meanings rather than philosophizing about the section.[48] There seemed to be little perception of the purpose and effect of the remedy. This permitted the old analyses based on *Foss v. Harbottle*[49] and *Mozley v. Alston*[50] to be reimposed. When a concept such as "oppression" is created to cut through these doctrines, the products of evolution over a hundred years, it would seem appropriate that some deeper understanding than that provided by a dictionary be reached as to its scope in relation to the concept of company.

III. "Unfairness"

The Jenkins Committee, which most writers support and which

44. *Re Richard Pitt and Sons Pty Ltd* (1978-80), 4 A.C L R. 459, 479, *Re Cumberland Holdings Ltd*, [1975-6] A.C.L.C. 28,515, 28,531; *Caratti Holding Co Pty Ltd v Zampatti* (1976), 2 A.C L C. 32,002, 32,008; *Aspek Pipe Co Pty Ltd v Mauerberger* 1968 (1) S A.R. 517, 533.

45 [1973] A C. 460, 378-60. This is particularly true of the cases on "unfair prejudice" and "unfair discrimination", reviewed later.

46. *Ebrahimi v Westbourne Galleries Ltd*, [1973] A.C 360, concerned the just and equitable ground for winding up [s. 364(1)(j)].

47 See s. 320(4).

48. Some samples of the rather simplistic approach to the purpose and effect of the section can be found in *Re H R. Harmer*, [1959] 1 W.L.R. 62, 87; *Re Broadcasting Station 2GB Pty Ltd*, [1964-5] N.S.W.R. 1648, 1662; *Re Bright Pine Mills Pty Ltd*, [1969] V R. 1002, 1011

49. (1843), 2 Hare 461; 67 E.R. 189.

50 (1847), 1 Ph 790, 41 E.R. 833

many jurisdictions have followed,[51] acknowledged that a section based on "oppression" did not grant remedies in sufficient cases.[52] As one aspect to increasing the applicability of the section and in order to cover acts or omissions falling short of illegality, the committee decided that the definition of remediable behaviour should be extended. However it provided no clue as to the extent of reprehensibility that it should have, preferring to merely list situations of injustice. The committee had an unmitigated confidence in the capacity of the judicial process to resolve defects in the section as well as problems in companies, a confidence which the judiciary itself does not share. Nevertheless its recommendations were accepted in Australia.

The 1984 wording, using the terms, "unfair discrimination", "unfair prejudice" and "contrary to the interests of the members as a whole", has provoked as little original thought as "oppression". The obvious point that the wording suggested by the Jenkins Committee is broader than "oppression" but that otherwise it gives little guidance as to the extent of the discretion, has been made in many cases.[53] In their search for boundaries for their discretion, the judiciary has adopted the expectations analysis.[54] There is, however, an additional trend towards viewing the exercise of the discretion as a balancing of interests of differing groups.[55] This inevitably leads to the perception of the problem as freedom of management on one side and the protection of minorities from ill-defined frauds on the other.

51 Legislation which has enacted parts or all of the recommendation include *Ghana Companies Code, 1961*, s 218, *Singapore Companies Act, 1965*, s. 181; *Malaysian Companies Act, 1967*, s 181, *(British Columbia) Companies Act, 1973,* s 244; *Canada Business Corporation Act, 1974-75*, s 234, *U K Companies Act, 1980*, s 75; *N Z Companies Act, 1955* (as amended in 1980) s. 209

52 Jenkins Committee, *op cit* n 15, para 201

53 *Re a company*, [1983] 2 All E.R. 36, 44, *Re H W Thomas Ltd* (1983), 1 A.C.L.C. 1256, *C A C v Orlit Holdings Ltd* (1983), 1 A.C.L R. 1038, 1052-3, *Wayde v New South Wales Rugby League Ltd* (1985), 61 A.L.R 225, 233.

54 Professor Ford notes that the expectations analysis was originally directed at distinguishing between situations where the member suffers as a member and those of suffering in some other capacity. Whilst this requirement has been expressly removed from Australian legislation [s. 320(4A)(b) & (c)], Professor Ford states that it cannot be that every relationship with the company entitles relief. Criteria may be adopted to decide "whether the particular relationship in the circumstances has significance independent of his membership of the company" (Ford, H.A.J *Principles of Company Law* Supplement to 3rd ed Australia. Butterworths, 1984, pp 50-51)

55 See especially: *Wade v New South Wales Rugby League Ltd* (1985), 2 A C.L.C. 158 (Hodgson J), reversed on appeal (1985), 3 A.C.L C 177, affirmed (1985), 61 A.L.R 225 See also· G Shapira, "Minority Shareholders' Protection — Recent Developments" (1982), N Z U L R 134, 145-6

Two recent cases exemplify these trends. In *Thomas v. H.W. Thomas Ltd.*[56] the New Zealand Court of Appeal interpreted at length the equivalent of s. 320[57] and was quoted with approval in *Wayde v. New South Wales Rugby League Ltd.*[58] The latter case also demonstrates that the new wording is likely to suffer the same fate as the old at the hands of the internal management rule.

In *Thomas v. H.W. Thomas Ltd*, a third generation family private company carried on a carting and building material supply business. Power was effectively centralized in a managing director but members of the family employed by the company held a few shares in their own right. The plaintiff, a non-working member of the family, succeeded to one third of the issued capital of the company. The company was run very conservatively so that its profits were much lower than they could have been. The plaintiff wanted to realize higher returns on the assets he had inherited. At a general meeting he tried to have the policies of the company changed, but failed. He gave notice after one year that he wished to sell his shares, but nothing formal ensued. A further thirteen months later, he issued a petition seeking that the court either order that his shares be purchased or the affairs of the company be otherwise regulated. In the New Zealand High Court, Ongley J. dismissed the application, but his judgment added little to what had been said in earlier cases.[59] The Court of Appeal, however, reviewed the legislation and its interpretation at length in upholding the opinion of Ongley J. Richardson, J., gave the leading judgment. He first looked at the history of the oppression section and its interpretation, concluding, as would be expected, that Parliament intended the new wording to grant petitioners 'a wider base on which to found a complaint'.[60] He was of the opinion that each of the criteria, "oppressive", "unfairly discriminatory" and "unfairly prejudicial", was not meant to be a distinct alternative and that the "underlying concern" of the whole expression was:

> that conduct of the company which is unjustly detrimental to any member of the company whatever form it takes and whether it adversely affects all members alike or discriminates

56. (1984), 2 A.C L C. 610
57 Section 209 *Companies Act 1955* (N.Z.)
58. (1985), 61 A.L.R. 225, 230, 233
59 In particular, *Re a company*, [1983] 2 All E R. 36. *Re G Jeffrey (Men: Store) Pty Ltd* (1984), 2 A.C.L.C 421 in the Supreme Court of Victoria adds even l ss.
60. *Thomas v H W Thomas Ltd* (1984), 2 A C.L C. 610, 616.

against some only is a legitimate foundation for a complaint under s. 209. The statutory concern is directed to instances or courses of conduct amounting to an unjust detriment to the interests of a member or members of the company. It follows that it is not necessary for a complainant to point to any actual irregularity or to an invasion of his legal rights or to a lack of probity or want of good faith towards him on the part of those in control of the company.[61]

This focuses the three criteria onto the justice and equity of the particular case and links s-s (1) of s. 209 of the New Zealand Act with s-s (2) which gives the court a discretion to make orders "if it is of the opinion that it is just and equitable to do so".[62] Richardson J. felt that s-s (2) called for an assessment of the position of the company according to the expectations analysis of Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd*[63] to determine the parameters of what is unfair or unjust made under s-s (1):

Fairness cannot be assessed in a vacuum or simply from one member's point of view. It will often depend on weighing conflicting interests of different groups within the company. It is a matter of balancing all the interests involved in terms of the policies underlying the companies legislation in general and s. 209 in particular: thus to have regard to the principles governing the duties of a director in the conduct of the affairs of a company and the rights and duties of a majority shareholder in relation to the minority; but to recognise that s. 209 is a remedial provision designed to allow the court to intervene where there is a visible departure from the standards of fair dealing; and in the light of the history and structure of the particular company and the reasonable expectations of the members to determine whether the detriment occasioned to the complaining member's interests arising from the acts or conduct in that way is justifiable.[64]

Applying his reasoning to the case at hand, Richardson J. felt that the plaintiff was entitled to apply commercial criteria in determining what was unfairly detrimental to himself. Although it was

61 *Ibid*, 617
62 Cf s 320 Companies Code
63 [1973] A C 360, 379
64 *Thomas v H W Thomas Ltd* (1984), 2 A C.L C 610, 618

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

Somers J.[65] and Sir Thaddeus McCarthy[66] agreed with Richardson J. but emphasized the necessity for managerial discretion. Their simplistic statements set a regrettable scene for the similarly simplistic reasoning of the Supreme Court of New South Wales and the evasions of the High Court of Australia in *Wayde v. New South Wales Rugby League Ltd.*[67] In this case a football club, Western District Rugby League Club "Wests", was excluded from competition. The management board of the League had decided that too many games were being played. Wests' representatives on the League, an incorporated company, sought redress under s. 320. At first instance, Hodgson J., after dismissing the claim that the representative of the club could not sue in relation to harm done to the club itself, decided that the exclusion was oppressive and "also unfairly prejudicial within the same paragraph".[68] The duty of the League was to act for the benefit of the members and not football generally. Since exclusion would mean the destruction of a substantial source of goodwill for a multi-million dollar business, it was contrary to the interests of a member and therefore not in the best interests of the company, being the members as a whole.

The Full Court of the Supreme Court founded its decision on the phrase, "contrary to the interests of the members as a

65 *Ibid* , 619

66 *Ibid* , 620.

67 (1985), 3 A C L C 158 (first instance), (1983), 3 A C L.C 177 (Full Court), (1985), 61 A.L R 225 (High Court)

68. (1985), 3 A C L C 158, 176

whole".[69] After a little trouble with the use of the word "members", the court decided that the phrase was a statutory recognition of the long established principle that the company should act "bona fide for the benefit of the company as a whole". Having so brought itself onto familiar ground, the court found it easy to dispose of the case. In contrast to the opinion of Hodgson J., the interests of the company as revealed in the corporate constitution were held to include the proper management of football generally. Having regard to the alternatives available, the decision to exclude Wests was properly made. The question of whether the benefit of the League outweighed the detriment to Wests was one for the management of the League itself:

> Courts may only interfere in the directors' decisions, relevently, where oppression or unfair prejudice be shown. Whilst it is true that the Code should be given a beneficial construction and not unduly narrowed by judicial decisions, the terms of s. 320 must not lead Courts into assuming the management of corporations, substituting their decisions and assessments for those of directors, who can be expected to have much greater knowledge and more time and expertise at their disposal to evaluate the best interests of the members of the corporation as a whole.[70]

By this means the Court reintroduced the traditional logic of freedom of management on one side and protection of minorities from ill-defined "frauds" on the other.[71] The tentative steps in *Thomas v. H. W. Thomas* towards a definition of fairness based on the nature of the particular company were entirely ignored. Further, the test "bona fide for the benefit of the company as a whole" is simply not effective in cases of discrimination, as was strongly pointed out in *Peters American Delicacy Co. v. Heath*.[72]

In the High Court, the majority (Mason A.C.J., Wilson, Deane and Dawson J.J.) drew a distinction between the exercise of a

69. This phrase does not appear in s. 209, *N Z Companies Act, 1955.*

70 (1985), 3 A.C.L.C. 177, 190

71. To revive Lord Lindley's test (*Allen v' Gold Reefs of West Africa Ltd*, [1900] 1 Ch. 656) harks back to the common law confusions as to what is fraud on the minority. Section 320 was designed to overcome rather than enact them One would have thought the relationship between fraud on the minority and s. 320 was perfectly clear — but it seems that courts in Australia, Malaysia and the Privy Council have found that "unfair" confuses them· See *Re Kong Thai Sawmill*, [1976] 1 M L J. 59, [1978] 2 M.L.J. 227 (P.C.).

72. (1939), 61 C.L.R. 457.

general power of management and the instant case. In the former a balancing of interests was required of the court:

> It is not a case where the directors of a company, in the exercise of the general powers of management of the company, might bona fide adopt a policy or decide upon a course of action which is alleged to be unfairly prejudicial to a minority of the members of the company. In that kind of case it may well be appropriate for the court, on an application for relief under s. 320, to examine the policy which has been pursued or the proposed course of action in order to determine the fairness of unfairness of the course which has been taken by those in control of the company. The court may be required in such circumstances to undertake a balancing exercise between the competing considerations disclosed by the evidence.[73]

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

> . . . no amount of sympathy for Wests can obscure the fact that the League was expressly constituted to promote the best interests of the sport and empowered to determine which clubs should be entitled to participate in competitions conducted by it.[74]

Bearing in mind the special expertise and experience of the board, the admitted fact that the decision was made in good faith and that a decision would necessarily prejudice either Wests or the League through the effect of a prolonged season, the Court decided that "it has not been shown that those decisions of the Board were such that no Board acting reasonably could have made them."[75]

In a minority, but assenting, judgment, Brennan J. concentrated on the nature of unfairness. He expressely[76] adopted Richarson J.'s argument in *Thomas v. H. W. Thomas Ltd*,[77] but noted that the just and equitable requirement of s. 209 (2) of the New Zealand legislation might make a material difference. At this point of divergence from Richardson J., Brennan J. formulated a test based on "ordinary standards of reasonableness and fair dealing"[78]:

73 (1985), 61 A.L R. 225, 230
74 *Ibid* , 230-1
75 *Ibid.*, 231.
76 *Ibid* , 233
77 [1984] 2 A C L C. 610
78 (1985), 61 A L R 225, 234.

> The court must determine whether reasonable directors, possessing any special skill, knowledge or acumen possessed by the directors and having in mind the importance of furthering the corporate object on the one hand and the disadvantage, disability or burden which the decision will impose on a member on the other, would have decided it was unfair to make that decision.[79]

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

If the courts accept the argument that the test for the application of the new wording involves a balancing of the interests of differing groups, it is inevitable that some form of the internal management rule will be applied. Managerial discretion is a fundamental principle in law because the corporate form depends on strong central management for its effectiveness or efficiency. It is, therefore, seen as an argument against court interference. But asserting that management has a role or discretion does not draw the line between those situations where the court should balance interests and those where this is the task of management.

The test enunciated by Brennan J. appears to draw this line by reference to the objective standard of what reasonable directors would think unfair. But the essentials of the test merely comprise a weighing of interests with the standards of reasonable directors in mind rather than the simple morality of the early cases on "oppression". By asking what a reasonable manager would think in the ambit of the discretion defined by "unfair", Brennan J. asks management itself to define what the scope of internal management is. He makes no mention of the interests of shareholders or of a way of assessing their rights. Thus the test is not an improvement on the majority rule of the common law principle of internal management.

In summary, courts have failed to develop a means of ascertaining the standard by which the conduct of a company's affairs are to be measured. Indeed, "unfairness" seems to have added to their confusions and forced a retreat behind the walls of managerial discretion.

79. *Ibid*

Reference to the writings of academics adds little to these conclusions. Some writers leave the extent of review of business decisions to the courts with perhaps an examination of a few fact situations.[80] A few support the expectations analysis.[81] Shapira, in perhaps the most reasoned article,[82] abandons the problem to the judiciary with a statement of the principles involved. He establishes his confidence in the judicial process thus: "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."[83] This justifies his "basic formula for establishing unfair prejudice"[84]:

> The court should seek to balance protection of the minority's interest against the policy of preserving freedom of action for management and the right of the members to back up their investment by their vote. The fair view of the majority should carry considerable weight, but should not be

80 K W. Wedderburn, "Oppression of Minority Shareholders" (1966), 29 M.L R. 321, 327, Gower, L C.B. *Principles of Modern Company Law* London: Stevens & Sons, 1979, 668, Ford, H A.J. *Principles of Company Law*. Supplement to 3rd edition. Australia: Butterworths, 1984, 50-51; A. Boyle, "Power of the Court to Grant Relief on a Petition Alleging Unfair Practice" (1980) 1 Company Lawyer 280. Their confidence is shared, perhaps even prompted, by the Jenkins Committee, which left the matter to the judiciary to solve

81. L. Crabb, "Minority Protection and Section 75" (1982), 3 Company Lawyer 3, 8; B. Slutsky, "Note on *Diligenti v R W.M D Operations Kelowna Ltd*" (1977), 11 U.B.C. L. Rev. 326. Crabb would subject actions of the company to a test deriving from *Allen v. Gold Reef of West Africa Ltd*, [1900] 1 Ch. 565: "If a reasonable person would consider the action to be the detriment of the company or would consider that it would confer no benefit upon the company, the action is unfair." (p.8) This, he contends, encompasses the expections test, so resolving the difficulty of deciding to which companies it should be applied. The test, however, is deficient when dealing with the shareholders' opinion of the interests of the company and the degree to which they should be taken into account in deciding what the reasonable person would consider to be the interests of the company. Crabb asserts that shareholders interests should not be disregarded but merely subordinated to the objective view of the court of the interests of the company. Some process of "weighting" of interests is explored, disregarding the voting process as the agreed method of "weighting" interests.

Although this is a valiant attempt at a reconciliation, it is not workable because the interests of the company derive directly from the interests of the shareholders. Vague assertions of a relationship between the two is no substitute for a full understanding; the vote as "property right" is more than "perhaps a little explicit" (p. 6), it is downright misleading in focusing attention on the status of shareholders rather than as a member of a structure. The vote is a means to ascertaining the interests of the company as provided in the articles. To subject it, as Crabb would have, to external criteria deprives if of its purpose.

82. G. Shapira, "Minority Shareholders' Protection – Recent Developments" (1982), 10 N.Z.U.L.R. 134.

83. *Ibid.*, 163.

84. *Ibid* , 145-6.

critically important. The history, nature and structure of the company, the essential nature of the association, the type of rights affected and general company practice should all be considered.

More concretely, the test of the unfair prejudice should encompass the following considerations: the protection of underlying expectations of shareholders in closely held companies; and the detriment to the members proprietary interests as a shareholder.

IV. Rationale

If the task of finding the ambit of "unfairness" has proved fruitless, so is recourse to explanations of why the section exists and how it operates.

The work of Berle and Means[85] is often regarded[86] as throwing some sort of light and even as being the ultimate rationale of the section.[87] Of their many propositions, the most relevant here is that shareholders have no effective voice in the formulation of corporate policy and no substantial measure of control over management's activities. As a self-perpetuating oligarchy, the board of directors is freed from the necessity of looking to the interests of shareholders. It is able to oppress. The contrary theories[88] contend that there are a number of controls upon the board, most particularly the right to withdraw one's investment and the market for managerial control. However much the by-products of these theories might be applicable, the theories themselves are aimed at a different problem. They examine whether or not the stucture of the corporation in the U.S.A. is efficient or just,[89] whereas here

85 Berle, A.A., and Means, G.C. *The Modern Corporation and Private Property*. Rev. ed., New York: Harcourt Brace & World, 1967.

86. J. Rajak, "The Oppression of Minority Shareholders" (1972), 35 M.L.R 156, 156, 162-3; G. Shapira, "Minority Shareholders' Protection – Recent Developments"(1982), 10 N.Z.U.L.R. 134, 137-139; Eisenberg, M.A. *The Structure of the Corporation* Boston: Little Brown, 1976, 1-85: A. Chayes, "The Modern Corporation and the Rule of Law",: edited by Edward S. Mason *The Corporation in Modern Society* Atheneum, 1966, 25.

87 D. Prentice, "Protection of Minority Shareholders" (1972), 25 Current Legal Problems 124, 124-130.

88. H.G. Manne, "Our Two Corporation System: Law and Economics" (1967), 53 Va. L Rev. 259, 265-268; Eugene V. Rostow, "To Whom and For What Ends is Corporate Management Responsible?", Mass. U.S.A.: edited by Edward S. Mason. *The Corporation in Modern Society*, Atheneum, (1969) 39 Economica 426.

89. Whilst not accepting the ultimate conclusions of Hayek, F.A. *Law Legislation and Liberty*, Vol. 1. London: Routledge and Kegan Paul, 1973 and Popper, K.R. *The Open Society and Its Enemies*. 12th impression. London: Routledge and Kegan Paul, 1977.

the problem is at what point does the structure fail in the efficiency and justice which we assume for most purposes it to have.[90]

The injustices which the Cohen and Jenkins Committees aimed at, however blunt their instrument, are well known: where there is no deep and broad market for the shares in a company, a member may suffer in a multitude of ways at the hands of controllers without the necessary contravention of any enforceable law, article or duty.[91] The suffering is supposedly logically unconnected with such contraventions. Even within its own assumptions this approach is problematic. The question as to what "suffering" is was the rock on which "oppressive" foundered and there is no reason to suspect that "unfair prejudice", "unfair discrimination" or "contrary to the interests of the members as a whole" will fare more safely. The articles define the agreement of the members and they are free to vary it as they please. As in contract law,[92] the parties create the interests which belong to them and are protected by the law. To impose additional or different interests is a statement that the legal system knows better than the parties what they want. The second round effect of judicial enforcement of unstated or unagreed interests of the parties is that there is little incentive for potential members to negotiate to protect themselves against future contingencies. The cost of future settlement becomes less as the protection of the court grows, redistributing it onto the community through the cost of an expanded legal system. This may be greater than the total cost of individual negotiation because it is increased by the indeterminacy of the interests involved: How can justice, right or wrong be defined when the interest being diminished or destroyed is itself defined by the very agreement stated to be inadequate? The very concept of suffering in this context is tautology

90. Howsoever much one sympathizes with the separation of ownership and control arguments, s. 320 and its equivalents has not been interpreted as an answer to them. Withdrawal of investment seems to have been sufficient answer as no case concerning a listed company has been won. The theory of company presented later does have implications for the separation arguments, but they will be dealt with elsewhere.

91. The illustrations of possible injustices given by the Jenkins Committee were (para 205): excessive remuneration granted to directors depriving members of dividends, authorized refusals to register transmissions of shares to personal representatives forcing sales to directors at inadequate prices, issues of shares to directors at inadequate prices or otherwise advantageous terms and passing non-cumulative preference dividends.

92. This should not be taken to imply an acceptance of the rather facile contract theory of companies based on *Automatic Self-Cleaning Filter Syndicate Co Ltd v. Cuninghame* [1906] 2 Ch. 34, 44 (per Cozens-Hardy L.J.) and s. 78.

unless escape can be effected through some external conception imposing standards of behaviour.

Inasmuch as "justice" provides no coherent rationale for the section unless some external code of conduct is accepted, so economics is indifferent. If economic theory assumes that, where markets operate, unregulated contracts will promote efficiency, the obvious conclusion would seem to be that contracts should be enforceable in the legal system. If a company is a set of "contracts",[93] the point of minimization of agency costs with a maximum of efficiency will lie where parties are free to contract and each contract is enforceable.[94] Within this analysis, regulation of the internal affairs of the company and mitigation of the effect of contractual enforcement is excluded as useful by the definition of efficiency.

The reality of law is more complex than allowed for in economic theory of the firm. The internal management rule is a major exception to the enforceability of the constitution of the company. The rule states that courts will not enforce all the provisions of the corporate constitution or, more generally, that courts will not interfere with properly made decisions of the general meeting.[95] Its impact in economic analysis[96] is that some parts of the express arrangements at the base of the company are unenforceable by the members. Many of the structural provisions of the articles fall into this category.[97] As the draftsmen of company constitutions

93. "Contract" is here used in the informal sense of the economic theorists. The analysis of corporation as "contracts" between *all* the factors of production was developed in R.H. Coase, "The Nature of the Firm" (1937), 4 Economica, 386.

94. The agency cost approach to answering the question why has the corporation survived follows on from Coase's article, *ibid*, and is developed in C. Jensen and W.H. Meckling, "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure" (1976), 3 Journal of Financial Economics 305.

95. *Mozley v Alston* (1847), 1 Ph. 790, 41 E.R. 833 is the paradigm case of a long list, some of the more recent of which are *Rayfield v Hands*, [1958] 2 W.L.R. 851, 2 All E.R. 194; *Clemens v Clemens*, [1976] 2 All E.R. 268; *Winthrop Investments v Winns*, [1975] 2 N.S W.L.R. 666; *Kraus v Lloyd Pty Ltd*, [1965] V.R. 232.

96 The internal management rule does not disprove the economic analysis based on contract, it merely infers that the arrangements are more complex than the language of the analysis implies. When Coase states: "A firm, therefore, consists of a system of relationships which comes into an existence when the direction of resources is dependent on an entrepreneur. ." (1937), Economica 386, 394, he makes no statement as to the contents of the relationships. The law can still be described in the terms of the economic theories, although the exercise is not useful for my present purposes.

97. *Eley v Postive Government Life Association* (1876), 1 Ex. D. 88; *Beattie v E & F Beattie Ltd*, [1938] Ch. 708; *Mozley v Alston* (1847), 1 Ph. 790, 41 E.R. 833; *Pullbrook v Richmond Consolidated Mining Co.* (1878), 9 Ch. D 613; *Browne v La Trinidad* (1887), 37 Ch D. 1, *Re Dale and Plant Ltd* (1889), 61 L.T. 206; *Baring Gould v Sharpington Combined Pick and Shovel Sydnicate* [1899] 2 Ch. 80.

realized that the emphasis of protection lay on statements of rights, structure was not inserted in the articles. Neither was there an incentive to research the existence and requirements of corporate structure and, therefore, as a concept it remains largely unknown.

Within the bounds of the prescriptive legislation the company is mutable. A remedy, whether common law or statutory, becomes more necessary as the structure and acts of companies go beyond what is deemed to be acceptable behaviour. A definition of "acceptable" is necessary for the remedy to be justifiable. If the idea of standards of business behaviour is dismissed so is the need for s. 320. A number of points bear directly on this problem.

The Agreed Structure

There is an inherent conflict between the memorandum and articles of a company as an agreement, or even as a constitution, and remedy. The Cohen and Jenkins committees saw the section as enabling redress in situations where there were no other remedies available to the claimant, in other words, where the actions were permitted by the relevant act, the memorandum or the articles. On the other hand, the memorandum and articles represent an agreed definition of what the various parties can do. By prohibiting otherwise permitted acts the court is interfering in that agreement. In the majority of cases the issue is not important simply because the parties did not or could not foresee the situation that arose, but in some the court has been asked to disallow the exercise of a specific article. The two sides of the conflict are represented in these cases. In *Re Warrick Howard (Aust.) Pty Ltd*[98] Olney J. said: "The removal of a director cannot of itself be oppressive when it is specifically provided for in the articles". In the *Caratti Holding Co. Pty Ltd*[99] series of cases one of the major issues was whether a right of compulsory acquisition could be used to deprive the complainant of his status as member and also to discredit the ground for complaint that the shares were to be acquired at an undervalue. The Privy Council on appeal from the Supreme Court of Western Australia eventually stated: "Article 32 was neither understood nor

98. (1983), 1 A.C.L.C. 634, 636.

99. (1975), 1 A.C.L.R. 87 (Supreme Court of W.A.); [1975] W.A.R. 183 (Full Court of the Supreme Court of W.A.); [1979] A.C.L.C. 32002 (Privy Council) and various other unreported associated cases.

accepted by Mr. Caratti and Mr. Zampatti as having any reference to the business agreement between them: and the use of its provisions against Mr. Zampatti is inconsistent with the agreement.[100] According to the Privy Council, then, the oral agreement should override the written one. In *Wayde v. New South Wales Rugby League Ltd*[101] the distinction the High Court made between exercising a general power of management and exercising a power directly conferred on the board could have been taken to raise the conflict as an issue. However, the High Court did not state that, because Wests had agreed to the exercise of the power of exclusion, it could not complain. The decision of the board was still susceptible to being considered unfair but, on the facts, was not held to be so. The fact of agreement was not in itself a criterion of fairness, although the discretion of the court was further limited by it. Whilst *Re Warrick Howard (Aust.) Pty Ltd*[102] can be distinguished on the grounds that the claimant had previously used the subject article and thus could be said to have accepted it as representing the agreement, the case does stand for the proposition that to disallow permitted activities is overriding the express agreement.[103] Perhaps it is for this reason that some cases on oppression have emphasized breaches of duty in the absence of a contrary agreement.[104]

Contracting Out

These considerations raise the further question of whether or not parties should be able to contract out of the application of the section. Efficiency would indicate that whatever structures defining property are available, the parties should be able to create their own structure if they see a reduction of costs in doing so. Thus, if the possibility of actions under the section creates diseconomies, the parties should be able to do without them. Section 320 is not

100. [1979] A.C.L.C. 32002, 32008. One would have thought a discrepancy between the desires of the parties and the form of their agreement would have provoked damning comments, and perhaps a negligence suit, but the court heaped praise on the principal advisor of the parties.

101. (1985), 61 A.L.R. 225.

102. (1983) 1 A.C.L.C. 634.

103. See also *Irvin and Johnson Ltd v Oelofse Fisheries Ltd* 1954 (1) S.A. 231.

104. E.g. *Re Bright Pine Mills Pty Ltd*, [1969] V.R. 1002 where, although the notion that "oppression" only applied to wrongful conduct with existing remedies was rejected, there was an emphasis on the breach of duties; see R. Baxt, "Oppression of Shareholders – the Australian Remedy" (1971), 8 M.U.L.R. 91, 95-96. In *Re Tivoli Freeholds Ltd*, [1972] V.R. 445, 452 there is an emphasis on illegality.

expressed to be subject to the memorandum or articles of the company and therefore cannot be directly avoided. However, the extent to which well-drafted provisions could induce a court to decide that they define unfairness by their breach is a different problem. The cases discussed above reflect a degree of uncertainty, although *Re Warrick Howard (Aust.) Pty Ltd*[105] indicates that the more the parties are seen to accept the corporate constitution as the agreement defining the relationship between them, the greater the chance of its enforcement as such.

Relations between Parent and Subsidiary Companies

Not only are the contents of the memorandum and articles subject to such considerations, but the courts also have toyed with the concept of the separate existence of the company. Whilst the very idea of competition is the endeavour to take business away from another entity, to follow the Benthamite ideal of self-interest promoting the group interest, cases involving the relationship between parent and subsidiary companies have promoted concepts of fair dealing between them.[106] In *Scottish Co-operative Wholesale Society Ltd. v. Meyer*[107] Lord Keith expressly stated that although the Company and its owner, the Society, in law were independent organizations, as parent and subsidiary, the utmost good faith was required between them. It is probably not sufficient that the pre-existing relationship between the parties be merely of ownership by one of the other, but what more is required was ill-defined. Whilst in the reported cases there has been an overriding implied agreement, the extent to which groups of companies have been recognised as having a relationship between their member companies created solely by their ownership structure has been equivocal in various other areas of law.[108] In any event, the concept of fair dealing between the companies has never been fully explored. It is possible to construct a duty between them from the words of the judgments, but the decisions may not in fact have turned on the

105. (1983), 1 A.C.L.C. 634.

106. *Meyer v. Scottish Co-operative Whole Society, Limited* 1954 S.C. 381 (Court of Session), affirmed, [1959] A.C. 324 (House of Lords); *Re Bright Pine Mills Pty Ltd* [1969], V.R. 1002; *Re Broadcasting Station — 2GB Pty Ltd* [1964-5] N.S.W.R. 1948; *Re Cumberland Holdings Ltd*, [1975-6] A.C.L.C. 28,515.

107 [1959] A.C. 324, 360-361.

108. E.g. directors' duties and the meaning of profit under s. 565.

behaviour of the holding companies.[109] Petitioners have in reality complained of the use of controlling power to induce, or to fail to prevent, loss to the subsidiary company. The "duty" of the holding company was used in the cases to establish that, because the holding company benefited, its absence of action as the controller of the subsidiary could be construed as "behaviour". As such, the failure to save the company was oppressive. The criteria for "negative behaviour" had to be extreme: in cases of the run-down of a company the "behaviour" has to date always been stated to amount to a breach of duty to the company.

Creditors

In some jurisdictions[110] creditors can take advantage of the remedy and, in Australia, although it is members alone who can complain, the claim may be in respect of any capacity that the member might have.[111] This involves the same issue as the previous three matters: to what extent should express contracting be overcome by notions of justice as defined in the section. Even if in individual situations wrong might seem to have been done, to substitute vague notions of appropriate behaviour for the agreed capacities of parties in a commercial context invites the parties to fail to define their interest in the future and to increase the community cost of running dispute resolving machinery.

The Partnership Analogy

The final factor which the criteria for the operation of the section should take into account is the partnership analogy referred to previously. It is this concept which is said to have enabled the courts to overrule the express constitutions of companies in favour of implied agreements. In *Thomas v. H.W. Thomas Ltd*[112] it was used as the source of a standard of fairness. The idea is that in a few situations "behind it [the legal entity] or amongst it, there are individuals, with rights expectations and obligations inter se which are not

109. Cf. *Meyer v. Scottish Co-operative Wholesale Society, Limited*, [1959] A.C. 324, 341 (per Viscount Simonds).

110. Notably Singapore and Malaysia (s. 181 of both the Malaysian *Companies Act, 1967* and Singapore *Companies Act, 1965*).

111. Section 320(4A)(b) and (c).

112. (1984), 2 A.C.L.C. 610, 618.

necessarily submerged in the company structure".[113] In effect "expectations" refers to arrangements not reflected in the constitution of the company, even when this is almost entirely at the discretion of the parties. The court provides an alternative structure to that defined by the constitution of the company. The legislature has implicitly confirmed this analysis by allowing relief to be given in capacities other than that of member.[114]

The notion of an overriding, perhaps unexpressed, but agreed structure or standard of behaviour is simple, yet it raises the difficult problem of when the court should decide that the hidden arrangements exist. In *Ebrahimi v. Westbourne Galleries Ltd* Lord Wilberforce developed a two part test. Firstly the company had to be small, and secondly it was not to be a "purely commercial" association. To satisfy the second element "something more" is required[115]:

> . . . 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 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.

Although the test is a useful guide to finding what the expectations are, it is not helpful in its ostensible purpose. The court is faced with the problem of whether the overriding understanding which exists in most cases should be enforced or not, rather than whether or not the understanding exists.

Similar, but more useful, considerations are involved in the distinction between the close and open corporation as discussed

113. *Ebrahimi v. Westbourne Galleries Ltd*, [1973] A.C. 360, 379, (per Lord Wilberforce). The case concerned whether or not the company should be wound up on the just and equitable ground and is, therefore, about relief from obligations and not the alteration of the bargain, *ibid.*, 378: the purpose of the ground for winding up is "to enable the court to relieve a party from his bargain in such cases". The ground is not concerned with the regulation of internal management.

114. s. 320(4A).

115. [1973] A.C. 360, 379.

in much literature from the U.S.A. O'Neal gives four typical attributes of the close coporation:[116]

1. Few shareholders (often only one or two).
2. The shareholders usually live in the same geographical area, knowing each other and acquainted with each other's business skills.
3. Shareholders who participate in management.
4. No established market in corporate stock, not listed nor dealt with by brokers; rarely traded.

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

No matter what criteria are used, the fundamental dichotomy between those companies where the agreement lies behind the articles and those where it is the articles remains.[117] If two such inconsistent positions on the status of the articles are taken, the law will provide only arbitrary justice. The mere existence of a market for the shares does not provide a sufficient solution because a market values the shareholding according to what exists rather than what would have been the just rights of a member.[118]

B. THE FRESH APPROACH

Section 320 and its predecessors and equivalents were taken by the judiciary to be discretions granted by the respective legislatures to counteract the effects of the internal management rule. However, whilst working within current theories, the courts did not find any way of regulating the exercise of the discretion so as to give management a predictable freedom to operate without reintroducing the rule itself. Motive, as the source for a definition of "oppression", was too narrow and faced the usual difficulties of mind-reading. The effect of behaviour depended too much on the value of shares, leading to circularity of argument. Characterising the behaviour itself led to the conceptual difficulties of conflicts between the memorandum and articles as agreements and the criteria for in-

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

117 It is interesting to note that in *Rayfield v Hands*, [1958] 2 W.L.R. 851; [1958] 2 All E.R 194 the court decided that the *articles* were enforceable as a contract because on the facts of the case the company resembled a partnership, and in partnership law the agreement is enforceable as a contract.

118. Precisely what is a sufficient market would also require definition.

terference, and the nature of voting rights as defining the interests of shareholders. None of these difficulties with "oppression" are solved by the shift to "unfairness". Indeed, "unfairness" is being taken to imply a balancing of interests of the company and the individual members. This requires a return to the idea of managerial discretion to decide when the court should interfere as opposed to when management should make the decision. Even a concept of the reasonable director as the reference point for unfairness produces the same result.

A means to assessing what is fair is needed to make the section effective, but the criteria for fairness are elusive in the competing interests that make up the fluid structure of a company. The expectations analysis provides one means, but it is applicable in limited situations. This perception, underlying Richardson J.'s opinion in *Thomas v. H.W. Thomas Ltd*[119] and the thesis of Shapira's article,[120] seems to be as far as thinking has gone to date.

The conclusion to be drawn from the first part of this essay is that an approach to s. 320, overcoming the tendency to refer the matter to managerial discretion and the historically inevitable consequent trend to adopting the internal management rule, should involve the following:

1. Establishing the rationale for the present principle that the courts should not interfere in the internal management of companies;
2. The development of a formula for finding standards of behaviour for the management of companies and solving the following problems:
    1. the dichotomy between the articles as agreed and agreements behind the articles;
    ii. whether the memorandum and articles of a company comprise an agreement or a constitution;
    iii. whether creditors should be regarded as being in a purely commercial relationship with the company; and
    iv. the nature of behaviour by or on behalf of a company.[121]

119. (1984), 2 A.C.L.C. 610.

120. G. Shapira, "Minority Shareholders' Protection – Recent Developments" (1982), N.Z.U.L.R. 134.

121. This factor is particularly important for interpreting the wording of the section whereby single acts are only caught if they are "by or on behalf of the company", whereas courses of conduct are limited only by the words "affairs of the company". See s. 320(a)(i) and (ii).

What now follows is an attempt to fulfill these requirements.[122]

I. The Constitution

When a reference is made to acts of a corporation, human characteristics are attributed to the corporate structure. Whilst anthropomorphism may be a useful tool for analysis of the relationship of the corporation to outsiders, the analogy is inappropriate when the relations between the constituent parts of the corporation are at issue. Deprived of the trappings necessary for activity "by" corporations, a legal entity is simply a pool of capital.[123] There is or is deemed to be a group of people whose members are either those who contributed to the pool or are the recipients of the rights and liabilities of contributors.[124] The group bears the primary risks and therefore receives that stochastic residual inflows of value from the use of the pool of capital.[125] Because this is an efficient structure for using the accumulation of assets,[126] the group is recognized by society as owning the pool of capital which itself is recognized as existing as a separate legal entity. Although the legal entity is deemed to "act", the internal structure of a company is, in reality, that of a group of people defined by ownership of the rights and liabilities of a contributor.[127] This group may be

122 The theory hereinafter espoused has its origins in Stoljar, S.J. *Groups & Entities*. Canberra: A.N.U. Press, 1973, especially at pp. 175-189. Eisenberg, M.A. *The Structure of the Corporation*. Boston: Little Brown & Co., 1976 and R.H. Coase, "The Nature of the Firm" (1937), IV Economica 386 are also relevant. The additional features are the idea of an association all but incapable of directly making a decision and its relation with the legal entity. The underpinning of the theory and its consequences for the common law are explored in D.A. Wishart, "A Conceptual Analysis of the Control of Companies" (1984), 14 M.U L R. 601.

123. Stoljar, S.J. *Groups and Entities*. Canberra: A.N.U. Press, 1973, 175-189

124. The law has developed the company for accumulations of capital, i.e. where more than one person has provided it. A single owner may exist in reality, but is not recognized as such by law.

125. Eugene F. Fama and Michael C. Jensen, "Agency Problems and Residual Claims" (1983), 26 Journal of Law and Economics, 327.

126. R.H. Coase, "The Nature of the Firm" (1937), IV Economica 386, where the general question posed is why does the firm emerge and survive in a specialized exchange economy (p. 391). A distinction must be made between the Coase "firm" and "corporation" or "company". Whereas Coase analyses the totality of relations of the business unit in the economy, law has a narrower definition of legal entity. The relations between the factors of production are dealt with, where necessary, by discrete sections of law, company law dealing with the relations of capital to the outside world (and between its contributories). Labour relations deal with labour, and simple contract with raw material and management

127 Hence s 35(4): "the subscribers to the memorandum, together with such other persons as from time to time become members of the company, *are* an incorporated company . . ." (my emphasis).

called the "association". If the pool of capital is to be used and therefore the legal entity to "act", decisions have to be made by the association, yet as individuals each member may have a different opinion of the desirability of any course of action.[128] A constitution which overcomes this difficulty by prescribing how decisions are to be made is required by law to be accepted as a condition of membership if the pool of capital is to be the legal entity called a "company". The constitution is comprised of the memorandum, the articles and the elements provided by law.

To replace the constitution with some supervening agreement is illogical because the pool of capital would automatically lose its status of company; further it is incompatible with the rest of company law which states that what is agreed to in writing or explicity should not be subject to the merely implicit, and is detrimental to the future acceptance of the structure of corporate constitutions being as written in the constitution. This is not to imply that the courts have no jurisdiction to override the structure of the association, merely that to do so is harmful.

II. Decisions and Their Control

Decision-making by the association is an inherently flawed process because fully informed agreement to a proposal by all members and communication of that fact is an unascertainable ideal. A constantly changing membership, communication of information and the gathering of real opinion from mere external expression are all processes where errors are inevitable in practice and, there is good reason to believe, also in theory.[129] The idea of a constitution is that on acquisition of membership a member accepts the methods of decision-making there outlined or provided and agrees that the decisions will not necessarily be those that the member wants.[130] If potential members do not accept this proposition then they should not become members.[131] In order to increase the ef-

128. Winch, D M. *Analytical Welfare Economics*. England: Penguin, 1971; Buchanan, J.M. and Tullock, E. *The Calculus of Consent*. Ann Arbor: University of Michigan Press, 1967.

129. Arrow, K.J. *Social Choice and Individual Values*. 2nd ed.. U.S.A. Wiley, 1963; and in a more general sense K.R. Popper, *Objective Knowledge* Rev. ed. Oxford: Oxford University Press, 1979.

130. See *Wayde v New South Wales Rugby League Ltd* (1985), 61 A.L.R. 225, 234 for a reference to this principle.

131. The problem with this approach is unintentional membership through devolution, succession, etc. That it proved a practical problem which had to be solved by the enactment of s. 78 and its precursors (see *Land Mortgage Bank of Victoria v Reid*, [1909] V.L.R. 284) is strong support for these theories.

ficiency of the use of assets, a structure founded on a constitution and the society in which the structure exists should both attempt to reduce the flaws in the decision-making process to the extent possible commensurate with the external requirements of business. There will be a demand for this efficiency because associations more accurately reflecting the desires of individual members can demand a higher price for the status of membership.

The evolution of recognized structures for the use of capital has in this economy produced the two tiers of the board of directors and the general meeting. The board is granted varying amounts of power to make decisions representing those which the association would make. The costs of making the decision are reduced at the expense of greater costs of monitoring: the decisions can be made more speedily by experts with large amounts of information, yet with a greater risk of deviation from the decision which the association would have made. Similarly, the general meeting is a mere means of making decisions. The majority of the members present or even voting rights exercised is the best approximation to the decision of the association commensurate with time and difficulty in deciding.

Justice requires retribution from those who breach externally derived moral codes including the proscription of taking from others, particularly the weak or innocent. Certain sectors of society need to be protected from the consequences of their actions. Furthermore, law creators should ensure that decision-making serves the function for which it was made possible and does not cause harm to the society.[132] The contrary principle is that efficiency requires that people should be held to their contracts or arrangements including agreements to abide by a constitution. The costs of negotiating and enforcing for each and every structure the restrictions on the conduct of decision-making bodies necessary to ensure reasonable compatibility with the decision of the association might be greater than having a structure available for adoption as a whole. Efficiency is promoted provided that the available structure may be put aside if not required, and is effective and changes with cost reducing intellectual and physical developments. At what point should the decisions be controlled? This is the problem for

132. This is the thesis of Hurst, James Willard *The Legitimacy of the Business Corporation in the Law of the United States 1780-1970* Charlottesville: University Press of Virginia, 1970.

a legal system in the creation of such a structure resulting from both methods of expression.

Under the preceding analysis, for example, the function of the duties of directors is to control their decisions. The provisos necessary for efficiency are not as easily met. Whilst it is impermissible to relax the duties prescribing certain actual motives,[133] mere disclosure releases the duties setting standards of potential motive.[134] The duties of care and diligence are lax,[135] perhaps because they require positive standards rather than mere proscription. Inasmuch as the statute prohibits the release of some duties,[136] the chance of possible efficiency would seem to be reduced, but the legislation was enacted in 1929 because the individual was not deemed trustworthy in looking after such an abstruse personal interest. The costs of deletion were negligible then as it was considered no reasonable person would relax the duties. Perhaps the relevant questions should be raised again in this era of rapidly increasing requirements of directors and officers in general.

Similarly, fraud on the minority and personal rights of members can be interpreted as doctrines implementing structural controls on decision-making bodies. In situations where controllers of the company have committed a fraud, decisions to disallow suits to remedy the wrongs could not be those of the association. Interference with the rights of a member would not be a decision to which the member acquiesced on joining and is, therefore, invalid. Within the limits of all these sets of criteria, the bodies are free to make whatever decisions they wish. Expressed in legal terms, the constraints on the board of directors or the controllers are limited by the lack of business judgment of the courts and the internal management rule respectively. Given that the context of decisions varies from case to case, it is not surprising that this problem has never been fully resolved.

The internal management rule fails to achieve a coherent, consistent and understandable set of rules defining managerial discre-

133. This has been a hotly debated issue. The most that can be said, and all that is relevant here, is that it has been asserted in some cases that where a director has acted with an improper motive and the conseqeunt fraud is, loosely, "bad" enough, the breach cannot be released by the general meeting: *Cook v. Deeks*, [1916] A.C. 554.

134. I.e. in cases of conflict of duty and interest; e.g. *Queensland Mines Ltd v Hudson* (1978), 18 A.L.R. 1.

135. *Re City Equitable Fire Insurance Co Ltd*, [1925] Ch. 407.

136. Section 237.

tion. The reason for this is that it is an attempt to develop a framework immediately applicable to facts which vary when the principle assumes them constant. It defines the constraints on the decision-making body as the majority in general meeting on the one hand and personal rights or fraud on the power on the other. These limits are intended to apply universally. But the limits on decision making in one company should not be the same as in every other company. They should vary.

The attempt to seek a single meaning for "oppression" failed for the same reason. The limits for one company were hopelessly restrictive for another and since the courts felt the need not to interfere in the management of companies and to make the ambit of managerial freedom predictable, less and less behaviour was seen to be oppressive. The new wording is being similarly treated.

III. A New Test For The Criteria of Section 320

Section 320 uses the terms "unfairly prejudicial to", "unfairly discriminatory against" and "contrary to the interests of the members as a whole" as the criteria for conduct being subject to the control of the court. Standards of conduct are clearly intended. They cannot be simply measures of motive, means and results of behaviour because to accept them as such would be to reintroduce the internal management rule implicitly discarded by the legislature. The source of the standards should not be external to the company, but should derive from the nature of the particular institution.

If the conceptions of corporation and company outlined above approach truth, from them a viable standard can be derived. This standard of unfair discrimination or prejudice should be a test something like: Could this member be taken to have acquiesced on joining the company to this decision or inaction? If not, then the decision or failure to decide is unfair to the member. Although its form may be primitive, the test is aimed at focusing examination of the facts onto both the effect of a decision and the constitution of the company.

The test refers to the claimant member because members may have purchased property, their share in the company, which is different from that of other members. There may be classes of shareholders or merely varying shareholders' rights. It is inherent in the concept of company that there is no averaging process of membership rights. Although the members together form a group,

they remain individuals particularly in disputes among themselves. This does not imply that the most inconsequential and private desire of a member must be accommodated, only that a person's reasonable or expressed position is to be taken into account.

The test is equally applicable to the third criterion for the remedy. It is obvious there is no such thing as "the interests of the members as a whole". It is an unnecessary metaphysical construct.[137] Each member of the association has separate interests which that individual will protect to the extent permitted in law. It is inherent in the notion of membership that the interests of a member include a degree of subordination to the accumulated wills of the majority. When joining the group each individual agrees that in any particular decision they might be in the minority and therefore a decision may not reflect their interests. In this context the term "interests of the members as a whole" refers to the range of decisions which the decision-making bodies of the company can make, that is, those to which the members have acquiesced.

Creditors are not members of the association[138] and if their contracts do not sufficiently protect their interests they should bear any consequent losses. By placing the incentive to protect on those most concerned, the best protection will be afforded. The same analysis is not entirely appropriate for members because the nature of a debt contract is conceptually simple, but the property of a shareholder is complex and variable. It may be most efficiently protected by a structure provided by the legal system.

The task of the court in implementing the concept of acquiescence is to find the constitution, or decision-making structure to which the members have agreed, and to compare it with the actual decision made. Whether or not the structure is to be found wholly in

137. It seems to be intended to be a protection for the shareholders against management. Certainly, if the word "unfair" implies some comparison between shareholders it would be necessary. The argument here making the phrase unnecessary is that "unfair" refers to non-compliance with a standard of conduct such that the detriment to shareholders is unacceptable. See *Wayde v New South Wales Rugby League Ltd* (1985), 61 A.L.R. 225, where the grounds of the Supreme Court decision were hardly adverted to, Brennan J. dismissing the "interests of the members as a whole" as a "cant expression" in the instant context (slightly misquoting Rich J. in *Richard Brady Franks Ltd v Price* (1937), 58 C.L.R. 112, 138).

138. Creditors may be deemed to be contributories in the same sense as members are when the company is in difficulty. The members are then no longer that to which management is responsible because there is no longer any cash flow to them. The creditors are the "residual cash flow recipients", and pursuing their interest most efficiently serves the company and hence the community.

the statute, the memorandum and the articles, or whether there are further non-express limitations on decisions, or caveats to the agreement, is a matter of fact.[139] Indeed, it could be shown that all the parties would have agreed that the articles in certain respects did not represent their wishes and should not be enforced.[140] Whilst the test refers to acquiescence on joining the company, changes in structure to which the member can be taken to have acquiesced are quite feasible.

Section 320 is not and never has been aimed at open companies. The market for shares provides a means for disaffected shareholders to recover their investment.[141] Where there are no effective restrictions on the transferability of shares and the market is sufficiently developed, the nature of membership of the company tends to preclude the existence of any provisions of its constitution other than the express statements of the memorandum, articles and law. The courts would recognize in their application of the test of acquiescence that the greater the degree of protection the market affords, the less the need for monitoring and control of the activities of the decision-making bodies to be incorporated in the constitution of the company.

In contrast to companies membership of which is easily marketable property, the members of close corporations are virtually locked into their investment.[142] Monitoring and control become critical issues. The test is designed to focus attention on discovering the limits of decision-making envisaged by members in order to protect their interests. As the variable parts of the corporate structure are drafted by persons of limited experience in business, sets of memoranda and articles do not reflect the agreed structure. There is, and has been, little incentive for those directly concerned to protect themselves from situations which they can

139. This was exactly Lord Wilberforce's point in *Ebrahimi v Westbourne Galleries Ltd*, [1973] A.C. 360, 379.

140. As in *Caratti Holding Co Pty Ltd v Zampatti*, [1979] A.C.L C. 32,002.

141. The sharemarket is not only a protection in the way specified. It also protects through the market for corporate control. See B. Hindley, "Capitalism and the Corporation" (1964), 39 Economica 426, 428; Eugene V. Rostow, "To Whom and For What Ends is Corporate Management Responsible?" Edited by Edward S. Mason *The Corporation in Modern Society* Mass. U.S.A.: Atheneum; 1966, 46; H.G. Manne, "Our Two Corporations System; Law and Economics" (1967), Va. L. Rev. 259, 265-268.

142. Under the test the distinction between open and close corporations is meaningless because the criteria by which the distinction is assessed are mere factors in the exploration of the evidence for the real structure of the corporation. However, the terms do provide a categorisation useful for descriptive purposes.

hardly envisage. In the search for the limits to decision-making, the courts may have regard to the equitable considerations developed as a result of the partnership analogy. These reflect the issues which concern small business and this may form part of the constitution of the association.

Some authors[143] feel that the most important facet of provisions such as s. 320 is the "appraisal right" or the right to force the purchase of a member's shares by either other members or the company. This is seen as attacking the root problem of close corporations, namely that the investment of members is locked in. Such analyses have the defect of not providing criteria for distinguishing between acceptable and other conduct. In the test here espoused, the appraisal right is a mere weapon in the armoury of the court. If decisions could not be those of the association, a wrong has been done to the individual members. The court in its discretion may remedy the wrong and prevent it from happening again. If repayment of the investment, taking into account wrongful decisions, would satisfy the petitioner, there is no reason for preventing it. In many cases it is the most efficient course for the association because it removes a source of divergent interests from the group interest.

IV. The Fate of the Internal Management Rule

By way of conclusion, it is worth restating explicitly the fate of the internal management rule. As formulated in the common law, it is not a relevant principle for the interpretation of s. 320. It concerns decisions made within a structure assumed to be the same for all companies. On the other hand, 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. The analysis of companies set out in this essay allows a test the courts may use in interpreting s. 320. It enables the enforcement of the limits to decision-making agreed to by the parties and therefore does not derogate from economic efficiency. In more conventional language the analysis enables a definition of 'fair' to be developed in situations where justice is a matter of decisions between competing past and present self-interests.

143. Eisenberg, Melvin A. *The Structure of the Corporation.* Boston: Little Brown and Co., 1976, 77-82; O'Neal, F. Hodge *Close Corporations.* Chicago: Callaghan, 1958.