A New Concern for the Minority Shareholder; Ebrahimi v. Westbourne Galleries Ltd. (In re Westbourne Galleries Ltd.): **[1972] 2 W.L.R. 1289 (H.L.).**

Introduction

In *In re Westbourne Galleries Ltd.*, the House of Lords pursued an initiative undertaken some fourteen years before in the landmark case of *Scottish Co-operative Wholesale Soc. Ltd.* v. *Meyer*,[1] when new life was very effectively breathed into the provisions of section 210 of the U.K. *Companies Act, 1948*,[2] which gives minority shareholders a remedy where the affairs of their company are being conducted oppressively toward them. In this more recent case, the Court set itself a similar task in relation to the interpretation of section 222(f) of the *Companies Act*,[3] which makes it a ground for winding-up a company that the court is of the opinion that it is just and equitable that the company be wound up. This provision in company legislation is of long-standing, dating back to the U.K. *Joint Stock Companies Winding-Up Act, 1848*[4] and in partnership law has even longer antecedents. Partly, perhaps, because of the largely uncharted discretion that it confers in courts, it has tended to be interpreted conservatively. Partly also because of the draconian consequences for a company of the application of the provision, it has not proved a popular remedy among aggrieved minority shareholders. In *In re Westbourne Galleries Ltd.*, the House of Lords set about remedying the first of these deficiencies.

The significance of the decision can best be evaluated by highlighting differences of judicial viewpoint that manifested themselves as the case made its way up to the House.

The facts of the case were simple, and in the present context, somewhat familiar. A partnership with two equal partners, S and N, which was engaged in the business of selling Persian and other carpets, was incorporated. 1000 shares were issued, 400 each being held by S and N, and 200 by N's son, G. All three were directors. S alleged a number of improprieties in the conduct of the company's business by N and G and brought a petition under section 210 seeking either to buy out N and G for a fair price or be bought out himself,

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[1] [1959] A.C. 324 (H.L. Sc.).
[2] 11 & 12 Geo. 6, c. 38 (Imp.).
[3] *Ibid. Cf. Winding-up Act*, R.S.C. 1970, c. W-10, s. 10(e).
[4] 11 & 12 Vict., c. 5 (Imp.).

and in the alternative sought a winding-up order under section 222(f). The specific matters of which S complained were:

(1) That he had been removed as director of the company by an extraordinary general meeting of the company purportedly under either an expulsion clause in the company's articles or section 184 of the *Companies Act*.[5]

(2) That N, who imported carpets from Persia, had sold the carpets at artificially high prices to the company and thus taken profits for himself which would otherwise have enured to the company.

(3) That the company, through the control of N and G, were paying overheads for N's antique business which was being carried on at the company's place of business.

(4) That N and G had refused to concur in the sale of the company's lease of these premises after the company had resolved that they be put up for sale, allegedly because N himself wished to purchase the lease.

Plowman, J., at first instance,[6] rejected the second and third of these allegations as not being made out on the evidence and held, in relation to the fourth, that even if accepted, standing in isolation, it was insufficient to support relief under section 210 and, presumably, under section 222(f). These findings were not disturbed in appellate proceedings and thus the focus of the case narrows to the first allegation, namely that the petitioner had been improperly expelled from the board.

I. Oppression

On the petition for relief under section 210, Plowman, J. held that the requirements of the section were not satisfied. First, the conduct complained of affected the petitioner in his capacity as director and not that as "member", which is the term used in section 210. Secondly, it was held that the section requires proof of lack of probity or fair dealing, which elements were not proven in this case. The first proposition is, of course, supported by respectable authority,[7] was impliedly endorsed by the Court of Appeal,[8] and

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[5] 11 & 12 Geo. 6, c. 38 (Imp.). *Cf. The Business Corporations Act*, R.S.O. 1970, c. 53, s. 140.

[6] [1970] 1 W.L.R. 1378 (Ch.).

[7] *Elder* v. *Elder*, [1952] Sess. Cas. 49 (Scot.); *In re H.R. Harmer Ltd.*, [1959] 1 W.L.R. 62 (C.A.); *In re Lundie Bros.*, [1965] 1 W.L.R. 1051 (Ch.).

[8] [1971] 1 Ch. 799, at p. 811, *per* Russell, L.J.

expressly endorsed by Lord Cross in the House of Lords.[9] This is distinctly unfortunate. In small family or domestic companies, it is often not meaningful to distinguish between the dual capacities of a person as both director and shareholder. All parties, as in the instant case, may possess both capacities and the functions of each may never be differentiated. For example, in *In re Westbourne Galleries Ltd.* itself, the company had never paid any dividends but instead paid out all its profits in the form of directors' remuneration. This might have been prompted by a number of factors ranging from tax implications to simple considerations of convenience but it certainly in no way reflected a conscious desire to differentiate the roles of the parties as either shareholders or directors. As Lord Wilberforce recognized in the House of Lords in this case, once S had been removed as director, he had for all practical purposes largely lost his financial stake in the company notwithstanding the fact that he remained a shareholder.[10] While Plowman, J.'s conclusions on section 210 were not the subject of appeal, and therefore did not call for comment from the Court of Appeal or the House of Lords, it is particularly unfortunate that the latter, given the reforming spirit it exhibited in relation to section 222(f), did not find an opportunity to lay this aberration to rest.

The second reason advanced by Plowman, J. for refusing to invoke section 210 is, if anything, more unfortunate than the first, not the least because it was again endorsed in passing by Lord Cross in the House of Lords,[11] but, more importantly, because it appears to impose a new restriction on the scope of the section. In the former's view, lack of probity appears to mean lack of integrity, something akin to actual dishonesty. The case cited as a paradigm example of lack of probity — *Loch* v. *John Blackwood Ltd.*[12] — appears to bear this out. This inference is further borne out by the learned judge's finding on section 222(f) that an order lay because there had been "an abuse of power and a breach of the good faith which parties owe to each other [not] to exclude one of them from all participation in the business upon which they have embarked on the basis that all should participate in its management".[13]

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[9] [1972] 2 W.L.R. 1289, at p. 1303.

[10] *Ibid.*, at p. 1299.

[11] *Ibid.*, at p. 1303.

[12] [1924] A.C. 783 (P.C.). Cited by Plowman, J. at: [1970] 1 W.L.R. 1378, at p. 1383.

[13] [1970] 1 W.L.R. 1378, at p. 1389.

It is difficult to see why, if an "abuse of power" and "breach of good faith" on the part of the majority had occurred here "oppression" should not have been regarded as made out. "Oppression" is a highly subjective term and there is no reason why it must necessarily mean lack of probity, as defined, and not abuse of power or breach of good faith. As cases such as *In re H. R. Harmer Ltd.*[14] show, "oppression" can, and should readily, be found in cases of honest, but heavy-handed and discriminatory exercise of power. In Australia, in *Re Broadcasting Station 2 G.B. Ltd.*,[15] Jacobs, J. held that in determining the scope of the term "oppression", reliance should be placed on developed principles pertaining to fraud on the minority and directors' duties. In both contexts, it is clear that breach of duty is not conditioned upon proof of dishonesty or "lack of probity".

II. The Just and Equitable Ground for Winding-Up

Plowman, J., at first instance, granted the petitioner relief under this head for reasons mostly given above. The learned judge accepted that the company was a "quasi-partnership" under the principles laid down in *In re Yenidje Tobacco Co. Ltd.*[16] He rejected principal propositions from both sides, namely from the petitioner that in a "quasi-partnership" case, the removal of the petitioner from the board was of itself sufficient to entitle him to a winding-up order, and, from the respondents that the removal of a director under the powers conferred by the articles or by the Act, even in a quasi-partnership situation, is never in itself ground for a winding-up order.

In the Court of Appeal, Plowman, J.'s decision to grant a winding-up order was reversed. The Court (Russell, Megaw and Buckley, L.JJ.) said that expulsion in these circumstances does not afford a ground for winding-up unless it can be shown that the power was not exercised *bona fide* in the interests of the company, or that the grounds for exercising the power were such that no reasonable man would think that the removal was in the interest of the company. On the question of good faith, the Court said that this was a matter for the shareholders' judgment and that the Court was not entitled to substitute its own judgment on this point. Both N and G had testified that they believed their actions were in the

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[14] [1959] 1 W.L.R. 62 (C.A.).

[15] [1964-65] N.S.W.R. 1648.

[16] [1916] 2 Ch. 426 (C.A.).

best interests of the company, and the Court said that it could not possibly be asserted that reasonable men could not have come to the same conclusion. This concluded the case against the petitioner. The Court approved the decision in *In re Cuthbert Cooper & Sons Ltd.*[17] and disapproved *In re Lundie Bros. Ltd.*,[18] a previous decision of Plowman, J., where he had granted a winding-up order in circumstances similar to the instant case.

In the House of Lords, the decision of the Court of Appeal was reversed and the order of Plowman, J. restored.

Lord Wilberforce (Viscount Dilhorne and Lord Pearson concurring), in describing the history of section 222(f), pointed out that until the turn of the century a *dictum* of Lord Cottenham, L.C. in *Ex parte Spackman*,[19] that "just and equitable" had to be construed *ejusdem generis* with the other grounds for winding-up, had inhibited the proper development of the section. In addition, Lord Wilberforce rejected two other restrictive interpretations of the section: first, that cases must be brought within certain established categories or headings — "general words should remain general and not be reduced to the sum of particular instances"[20] — and, secondly, that the circumstances complained of must affect the petitioner in his capacity as shareholder and not primarily in some other capacity. The learned judge, while recognizing that a more constructive judicial attitude has been taken to the section since the turn of the century, said that even so "the courts may sometimes have been too timorous in giving [the section] full force".[21]

Lord Wilberforce then addressed himself to what had previously been regarded as a leading case on the section, *In re Cuthbert Cooper and Sons Ltd.*[22] In this case, Simonds, J. had refused relief to the successors of a deceased shareholder, who complained that the directors of the company had arbitrarily refused to register share transfers, purportedly acting under powers in the company's articles. Simonds, J. adopted a "strict constructionist" approach to the statute:

> Whether it be a matter of articles of association or articles of partnership the rights of the parties are determined by these articles, and the question whether it is right for me applying here the principles of partnership to the question of dissolution to wind up this company or not largely depends on what are the contractual rights of the parties as

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17 [1937] Ch. 392, [1937] 2 All E.R. 466.
18 [1965] 1 W.L.R. 1051.
19 (1849) 1 Mac. & G. 170, at p. 174; 41 E.R. 1228, at p. 1230.
20 [1972] 2 W.L.R. 1289 (Ch.), at p. 1293.
21 *Ibid.*, at p. 1297.
22 [1937] Ch. 392, [1937] 2 All E.R. 466.

> determined by the articles of association in this case. Accordingly, when I come to consider the allegations which are made in the petition, I must be guided by what are the legal rights of the parties as determined by the bargain into which they entered.[23]

On this view, the literal contract between the parties is almost exhaustive of their obligations to each other, and scarcely any scope is left for the concept of judicial restraint on the abuse of power.

Lord Wilberforce rejected this reasoning peremptorily:

> ...I am unable to agree as to the undue emphasis he puts on the contractual rights arising from the articles, over the equitable principles which might be derived from partnership law, for in the result the latter seem to have been entirely excluded in the former's favour. I think that the case should no longer be regarded as authority.[24]

Lord Wilberforce also disapproved another decision of Plowman, J., *In re Expanded Plugs Ltd.*,[25] which had applied the reasoning of Simonds, J. in *In re Cuthbert Cooper & Sons Ltd.*,[26] and impliedly approved the later decision of Plowman, J. in *In re Lundie Bros. Ltd.*[27] He warned of the dangers of too close a reliance on the partnership analogy, pointing out that the interposition of the corporate structure created new relationships among the directors and shareholders to each other and to the company. Lord Wilberforce then suggested the following guidelines for the exercise of judicial discretion under the section:

> The superimposition of equitable considerations requires... 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.[28]

Lord Cross of Chelsea, delivering the other judgment of the Court (Lord Salmon concurred generally), was no less thorough in his cleaning of the judicial closet. He agreed that *In re Cuthbert Cooper and Sons Ltd.* was wrongly decided and repudiated that portion of a decision of the Court of Appeal to which he had been

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[23] [1937] Ch. 392, at p. 398; [1937] 2 All E.R. 466, at p. 468.
[24] [1972] 2 W.L.R. 1289, at p. 1295.
[25] [1966] 1 W.L.R. 514.
[26] [1937] Ch. 392, [1937] 2 All E.R. 466.
[27] [1965] 1 W.L.R. 1051 (Ch.).
[28] [1972] 2 W.L.R. 1289, at p. 1298.

a party, *Charles Forte Investments Ltd.* v. *Amanda*,[29] which had approved *In re Cuthbert Cooper and Sons Ltd.*[30] He endorsed the previously embattled decision in *In re Lundie Bros. Ltd.*[31] and held that *In re K/9 Meat Supplies (Guilford) Ltd.*[32] was wrongly decided, that a winding-up order should have been granted, and on the factual footing on which the judge dealt with the case, took the same view of *In re Leadenhall General Hardware Stores Ltd.*[33] Lord Cross rejected, shortly, the argument that the respondents' actions fell with the terms of the articles by finding simply that the minds of the parties, when agreeing to these terms, had never been directed to their use in the present contingency.

Conclusion

This almost dizzying spell of overruling and disapproving has clearly opened the way for a much more activist judicial role in the protection of minority shareholders. While in the statement of specific guidelines to the operation of section 222(f), little may have changed, the shift in emphasis is unmistakable and significant. In this respect, the decision in *In re Westbourne Galleries Ltd.* is to be most warmly welcomed. However, it is at the same time important to note that the second deficiency in relief available under section 222(f) necessarily remains: the draconian and inflexible nature of the remedy provided. This feature of the section was one of the major reasons for the enactment of section 210 which allows a court to fashion any relief at all which it considers will stop the oppression complained of. In those Commonwealth jurisdictions which have adopted it, section 210 has already proved a valuable adjunct to the remedies available to aggrieved minority shareholders. The experience in these jurisdictions belies the view of the Lawrence Committee on Company Law Reform[34] that such a provision is an irresponsible abdication of legislative responsibility.[35] The growing body of carefully charted case-law demonstrates that the courts are well able to handle the task of fleshing out, pragmatically, a general mandate of this kind. It is fortunate

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[29] [1964] Ch. 240.
[30] [1937] Ch. 392, [1937] 2 All E.R. 466.
[31] [1965] 1 W.L.R. 1051.
[32] [1966] 1 W.L.R. 1112.
[33] February 4, 1971 (Unreported).
[34] *1967 Interim Report of the Select Committee on Company Law*, (Queen's Printer, Ontario: 1967).
[35] *Ibid.*, at p. 60.

that the Dickerson Committee[36] has taken a different view of the merits of the section. It is, of course, a pity that section 210 was not directly before the House in *In re Westbourne Galleries Ltd.*, but it is to be hoped that the Court will find an early opportunity to transpose its heightened concern for the position of the minority shareholders to the scene of its earlier endeavours and complete the task of revitalization there begun.

M. J. Trebilcock *

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[36] *Proposals for a New Business Corporations Law for Canada,* (Information Canada, Ottawa: 1971), para. 485.

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