

**STATUTORY PROTECTION OF MINORITY SHAREHOLDERS**

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## Abstract

South African company law has undergone substantial change in recent years. Minority protection is one of the issues at the forefront of this transformation. To determine the degree of protection necessary is a difficult task but, when considering the current state of affairs in terms of the Companies Act 71 of 2008, it would seem as if the legislature has opted for an all-encompassing type of protection.

The correctness of this approach is by no means a settled question and this dissertation will investigate the changes made, the ambit of the new provision as well as the possible lessons to be learnt from foreign jurisdictions. It remains to be seen whether a more established set of rules (or framework) can eventually emanate from the current state of affairs or whether, with the passing of further precedent, more confusion will inevitably be added to an already unclear remedy.

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## 1 INTRODUCTION

### (a) Background

Remedies to protect stakeholders have a long-standing history in company law under various names and by way of various procedures. The oppression remedy is a remedy by which stakeholders challenge certain acts or omissions of a company or directors as falling into one of a number of categories. If the court finds that such act or omission has indeed occurred, the court has various orders which it can then make in order to give effect to a stakeholder's rights or interests.<sup>1</sup> The remedy has many counter parts in different jurisdictions<sup>2</sup> but common among all of them is the purpose of giving specific protection within the company structure to, mainly, minority shareholders and those without alternative redress available to them.

In order to create a holistic picture of the oppression remedy within this dissertation, one must first start with the older of the two remedies, in order to appreciate the changes brought about. Section 252 of the 1973 Act is the section which introduced the oppression remedy in its modern format to South African company law. But some 30 years after its inception, the Companies Act was amended to bring about section 163 of the 2008 Act. Never before had the oppression remedy been extended to as great a degree as it has been by way of this new section. The new oppression remedy has been altered and amended considerably from its predecessor.

Section 252(1) of the 1973 Act constructs two separate scenarios in which the remedy can be used namely; prohibited conduct relating to an act or omission of the company or the affairs of the company being conducted in a prohibited manner. This differs from section 163 in that the section 252 of the 1973 Act does not make provision for instances concerning the exercise of the powers of directors or prescribed officers. A further difference between section 252 of the 1973 Act and section 163 is the trigger mechanisms

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<sup>1</sup> For the various orders, see s 163(2) of the Companies Act 71 of 2008 (hereinafter 'the 2008 Act') and s 252(3) of the Companies Act 61 of 1973 (hereinafter 'the 1973 Act').

<sup>2</sup> Among them, s 994 of the English 2006 Companies Act and s 241 of the Canada Business Corporations Act R.S.C., 1985, c.C – 44 (hereinafter 'the CBCA').

of section 252 of the 1973 Act, these being: unfairly prejudicial conduct, unjust conduct or inequitable conduct.

In order to determine what kind of conduct would give rise to the trigger mechanisms, the court uses fairness as the decisive criteria.<sup>3</sup> The concept of fairness is difficult to succinctly define and thus a vast amount of this dissertation will be devoted to attempting to decipher this seemingly simple term. What can be noted thus far is that conduct which is vague, or which a shareholder dislikes, will not constitute prohibited conduct and thus will not be regarded as unfair. Shareholders must understand that ‘by becoming a shareholder in a company, a person subjects himself to the control of the various types of majority in regard to the conduct of the affairs of the company’.<sup>4</sup>

Unfairness as a requirement can be read into all three triggers present in section 252 of the 1973 Act but the term is specifically used when considering prejudicial conduct. It has been suggested that the term ‘unfairly’, in this context, be interpreted in line with the Afrikaans text (phrased as ‘onredelike’) as ‘unreasonable’.<sup>5</sup> By using case law, we can identify three instances in which the conduct will be considered unfairly prejudicial: excluding a minority shareholder from fair participation<sup>6</sup>; excluding any member from fair participation without the option of removing his/her share capital<sup>7</sup> and; departing from fair dealing.<sup>8</sup> Each of these cases will be discussed in detail.

With the promulgation of the 2008 Companies Act, section 252 of the 1973 Act was transformed into the current oppression remedy found in section 163 of the 2008 Act. Although section 163 of the Act is similar to section 252 of the 1973 Act, some important differences must be highlighted in order to gain a proper understanding of the legislative changes and obtain insight into the reasons for these changes. An overview of the

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<sup>3</sup> *Louw v Nel* 2011 (2) SA 172 (SCA) para 22.

<sup>4</sup> *Communicare v Khan* 2013 (4) SA 482 (SCA) para 10 and also see *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (AD) at 645.

<sup>5</sup> *Garden Province Investments v Aleph (Pty) Ltd* [1979] 1 All SA 248 (D) at 255.

<sup>6</sup> *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 (1) SA 517 (C) at 527.

<sup>7</sup> *Barnard v Carl Greaves Brokers (Pty) Ltd* 2008 (3) SA 663 (C) para 46.

<sup>8</sup> *Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd* 1979 (3) SA 713 (W) at 722.

remedy, as well as an illustration of its application, is provided in the *Visser Citrus*<sup>9</sup> and *McMillan*<sup>10</sup> cases, which will be discussed in this dissertation.

Both the title as well as subsections 163(1)(a)-(c) has re-inserted the term ‘oppression’ or ‘oppressive’, which was omitted from the remedy under the 1973 Act because of its rigid definition and serious connotation. ‘Oppression’ as a requirement previously existed under section 111*bis* of the 1926 Act.<sup>11</sup> It has been stated that ‘unjust or harsh or tyrannical’ conduct qualifies as oppressive.<sup>12</sup>

Furthermore, section 163 introduces the protection of ‘interests’ rather than merely rights, as was provided for under section 252 of the 1973 Act. The introduction of the term ‘interest’ has resulted in section 163 being much wider in the ambit of its protection than its predecessor.<sup>13</sup> It further also brings the doctrine of ‘legitimate expectations’ into play, which, as Kuklin states, is ‘plagued by inescapable vagueness’.<sup>14</sup> Clarifying this so-called ‘vagueness’ will be attempted in this dissertation.

(b) Research problem

How should the court go about interpreting and applying section 163 of the 2008 Companies Act in order to afford shareholders the appropriate amount of protection without overruling the trite principles of company law or interfering in the business judgment of the company itself?

(c) Research questions

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<sup>9</sup> *Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd* 2014 (5) SA 179 (WCC).

<sup>10</sup> *McMillan v Pott* 2011 (1) SA 511 (WCC).

<sup>11</sup> Companies Act 46 of 1926 (hereinafter ‘the 1926 Act’).

<sup>12</sup> *Aspek Pipe supra* note 6 at 526.

<sup>13</sup> See s 163(1)(a)-(c) for ‘unfairly disregards interests’ of the 2008 Act and s 252(1) and (2) of the 1973 Act, where the wording has been interpreted to indicate the protection of rights alone. Also see *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* [2013] 2 All SA 190 (GNP) para 15.2.

<sup>14</sup> Bailey H Kuklin ‘The plausibility of legally protecting reasonable expectations’ (1997) 32 *Valparaiso University LR* 19 at 63.



- i. What are the triggering mechanisms in section 163 of the 2008 Act versus those in section 252 of its predecessor, the 1973 Companies Act?
  - ii. How is the word ‘unfair’ to be interpreted as used in terms such as ‘unfairly prejudicial’ and ‘unfairly disregards’ in section 163(1)(a) – (c) of the 2008 Act as well as in section 252 (1) of the 1973 Act?
  - iii. What constitutes ‘interests’ as introduced by section 163(1)(a) – (c) of the 2008 Act and how does the introduction of this term extend the ambit of protection afforded?
- (d) Methodology

This dissertation will be based on desk-bound research focusing largely on the 1973 Act and the 2008 Act, domestic and foreign case law, journal articles and foreign legislation examining the matter. Selective chapters from company law textbooks will also be considered. The South African Law Journal house-style will be used for style and referencing.

The 2008 Act will be compared to the 1973 Act in order to identify the different trigger mechanisms between both protective provisions. There is not much case law on section 163 but because this section is largely based on (and similar to) section 252 of the 1973 Act, case law on both sections can be used to supplement each other. Section 252 of the 1973 Act can provide valuable insight into the similar terms used in section 163. This same case law also exposes the different and intricate definitions of ‘unfair’, which plays a pivotal role in the application of both the provisions. The insertion of the new ‘oppression’ requirement is an interesting development in that it seems to be the narrowest of the requirements and could prove to be an unnecessary addition.<sup>15</sup>

Recent case law<sup>16</sup>, applying section 163 of the 2008 Act, has introduced ways in which to interpret the new remedy (more specifically because of the insertion of the word

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<sup>15</sup> See s 163(1)(a) – (c) of the 2008 Act.

<sup>16</sup> *Visser Sitrus supra* note 9 and *McMillan supra* note 10.

‘interest’) in company law by using the legitimate expectations doctrine, originally found in foreign case law.<sup>17</sup> Domestic literature on the doctrine of legitimate expectations is sparse, and thus foreign case law and journal articles will be consulted in this regard. Specifically, this dissertation will examine the origin of the doctrine in English public law<sup>18</sup>, the application of the doctrine in the English case of *Ebrahimi*<sup>19</sup> as well as the application in the Canadian case of *BCE*<sup>20</sup>.

Lastly, a brief comparative study of Canadian and English law will be incorporated throughout this dissertation.<sup>21</sup> The comparison will focus mainly on how the Canadian courts interpret the trigger mechanisms and interest inclusion as well as discussing their choice to include creditors under potential applicants. From English law, this dissertation will examine the interpretation of the trigger mechanisms, the origin of the doctrine of legitimate interests and also its application in English company law. The interpretation offered by the Canadian and English courts (as well as notable authors from both jurisdictions) could thus provide guidance to domestic courts on how to apply this remedy.

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<sup>17</sup> See in this regard *Re a company* (No 00709 of 1992) *O’Neill v Phillips* (1999) 2 All ER 961 and *Re Saul D Harrison & Sons plc* 1995 1 BCLC 14. English case law, in particular, is important as it illustrates some of the first encounters of company law with the ‘legitimate expectations’ doctrine.

<sup>18</sup> David Feldman (ed) *English Public Law* (2004) (hereinafter “English Public Law”) and Daphne Barak-Erez ‘The doctrine of legitimate expectations and the distinction between the reliance and expectation interests’ (2005) 11 *European Public Law* 583.

<sup>19</sup> *Ebrahimi v Westbourne Galleries Ltd* 1972 2 All ER 492.

<sup>20</sup> *BCE Inc v 1976 Debentureholders* (2008) 3 SCR 560.

<sup>21</sup> S 241 of the CBCA as well as s 994 of the English Companies Act of 2006.

## 2 DEVELOPMENT OF THE REMEDY

### (a) Introduction

As with any deciphering exercise, one must first consider the history and development of a topic before any analysis of the current position can take place. It is this development that Chapter 2 will focus on, not only drawing attention to the changes in the ‘trigger mechanisms’ of each section, but also illustrating how these changes could affect company law at large.

The trigger mechanisms of section 163 comprise of unfairly prejudicial conduct, conduct that unfairly disregards the interests of the applicant, or oppressive conduct.<sup>22</sup> Although these terms seem self-explanatory at first glance, they have varied meanings. Section 252 of the 1973 Act has its own set of trigger mechanisms that differ from section 163, in that it relates to unfairly prejudicial conduct, conduct which is unjust or inequitable.<sup>23</sup> What is important to note is that even though the mechanisms differ, case law concerning section 252 of the 1973 Act can deliver very useful ways in which to go about applying section 163.

Because minority protection is such an important and often volatile topic, a remedy such as section 163 does not only appear in domestic legislation. Before a South African adoption of the section, the English Companies Act also made provision for situations of minority strife.<sup>24</sup> The Canadian Business Corporation Act<sup>25</sup> will further prove to be a useful tool in the comparative study as the remedy in this Act and the South African counterpart is almost identically phrased.

### (b) Section 252 of the Companies Act

#### (i) Application

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<sup>22</sup> S 163(1)(a)-(c) of the 2008 Act.

<sup>23</sup> S 252(1) of the 1973 Act.

<sup>24</sup> English Companies Act of 2006.

<sup>25</sup> CBCA.

As a starting point, it must be noted that section 252 of the 1973 Act is termed ‘the members remedy’. Applicants can thus only be members (which can be understood to mean shareholders).<sup>26</sup> An accepted state of affairs in company law is that persons with controlling powers conduct the affairs of the company, thus, these persons who are able to conduct the company’s affairs must act in a way that does not trample on those without these controlling powers.<sup>27</sup> Therefore, section 252 of the 1973 Act addresses two specific kinds of behavior: an act or omission of the company, or the conducting of the affairs of the company.<sup>28</sup> When either of these scenarios comes to the fore, coupled with one or more of the trigger mechanisms, the remedy is activated. The court may then make various orders, as it sees fit.<sup>29</sup> It is in the application of the trigger mechanisms that the definitions become less clear and principles become more vague and general.

(ii) Unfairly prejudicial, unjust or inequitable

Section 252 of the 1973 Act, as stated above, will only be applicable in cases where a court has found that the conduct complained of is unfairly prejudicial, unjust or inequitable conduct. None of these terms are defined in the Act and thus it is left to case law to provide guidance as to their meaning.

Before the 1973 Act, the ‘oppression remedy’ (as it was then called) could be found in section 111*bis* of the 1926 Act. This section used the word ‘oppressive conduct’ explicitly, placing a heavy onus on the applicant when attempting to prove his/her case. When the Act was repealed and replaced with the 1973 Act, the legislature thought it best to remove this onerous provision and replace it with the trigger mechanisms mentioned above. Section 252 of the 1973 Act, as a remedy, was a much wider counterpart to

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<sup>26</sup> The 1973 Act used the term ‘member’ as defined in s 103. The 2008 Act uses the term “shareholder” (defined in s 1) with reference to profit companies and ‘member’ (defined in s 1) with reference to non-profit companies. Both the terms ‘shareholder’ and ‘member’ can thus be used interchangeably and carry the same meaning for the purposes of this discussion. For an exposition on the term ‘members’, see the discussion thereof in Delpont *et al Henochsberg on the Companies Act 71 of 2008* (2011) at 206 (hereinafter “Henochsberg on the Companies Act”). Also see *Barnard* para 41.

<sup>27</sup> *Aspek Pipe supra* note 6 at 525.

<sup>28</sup> S 252(1) of the 1973 Act.

<sup>29</sup> S 252(3) of the 1973 Act.

section 111*bis* and thus it received great attention from the courts because of applicant members' tendency to invoke it (often in inappropriate circumstances).

It is clear that there is a much lower threshold for conduct to be unfairly prejudicial in comparison to such same conduct being 'oppressive'.<sup>30</sup> Oppressive conduct will thus always be unfairly prejudicial but the reverse is not necessarily true. An applicant will only be required to prove that the majority has used its power in a prejudicial manner, negating a fair participation in the business of the company on the part of the applicant.<sup>31</sup> After all, majority shareholders (although they have no fiduciary duty towards the company or towards other shareholders) are expected to at least 'act *bona fide* for the benefit of the company as a whole'.<sup>32</sup>

That being said, Tebbutt AJ made it very clear that even though unfairly prejudicial, unjust or inequitable conduct is intolerable, it must always be weighed against the trite principle of majority rule in order to truly determine whether this conduct exists in a manner as could be described by these terms.<sup>33</sup> It has been held that the courts will not easily interfere in the internal management of a company, that the management of the company should be left to its directors, and that shareholders should not be allowed to interfere as they wish.<sup>34</sup> It must be kept in mind that a majority decision will only be valid, in this scenario, if it is arrived at in accordance with the law.<sup>35</sup> When a person advances his/her capital and becomes a member of the company in return, they do so full well knowing that they are not in a position to insist on a remedy (by way of section 111*bis* or any latter version of this section) simply because matters did not go the way they had planned and thus they wish to withdraw from the venture; there is no statutory or other basis for a unilateral right of withdrawal.<sup>36</sup> Unfairly prejudicial conduct requires

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<sup>30</sup> *Garden Province Investments supra* note 5 at 254, *Aspek Pipe supra* note 6 at 527.

<sup>31</sup> *Aspek Pipe supra* note 6 at 527.

<sup>32</sup> *Garden Province Investments supra* note 5 at 255.

<sup>33</sup> *Aspek Pipe supra* note 6 at 529.

<sup>34</sup> Oosthuizen MJ 'Statutêre minderheidsbeskerming in die maatskappyereg' (1981) 105 *Journal of South African Law* at 105.

<sup>35</sup> *Ben-Tovim v Ben-Tovim* 2001 (3) SA 1074 (C) at 1092.

<sup>36</sup> *Barnard supra* note 7 at 289, *Aspek Pipe supra* note 6 at 528.

more than just an unhappy minority shareholder; there must be a ‘visible departure from the standards of fair dealing and a violation of the conditions of fair play’.<sup>37</sup>

What then could be examples of conduct complying with the requirements of section 252 of the 1973 Act? The authors of Henochsberg concisely summarise the main instances that have appeared, time and time again, throughout years of precedent.<sup>38</sup> Shareholders who are precluded from enjoying a fair participation in the venture as a result of the majority using their voting power prejudicially, is a common instance of prohibited conduct.<sup>39</sup> Furthermore, where shareholders advance their capital with the belief that they will participate in the daily management of the venture and then are subsequently barred from doing so by the majority, or where the majority engages in discrimination of minority shareholders, this will also give rise to a successful section 252 of the 1973 Act application.<sup>40</sup> It is the concept of fairness that will remain the ultimate yardstick by which to measure the majority’s conduct.<sup>41</sup> Applicants are expected to prove alleged unfairness in specific terms, and ‘cannot content himself or herself with a number of vague and rather general allegations’.<sup>42</sup> Situations where a member is thus outvoted, or displeased with the manner in which the company is being operated, will not suffice for a successful section 252 of the 1973 Act application.<sup>43</sup>

When drafting section 252 of the 1973 Act, the legislature clearly intended for this provision to be wider than its predecessor. Courts have also held that the remedy must be interpreted in a way to advance it, rather than limit it.<sup>44</sup> One could thus conclude that the wording of section 252 of the 1973 Act indicates that not both the conduct and the result need be unfairly prejudicial, unjust or inequitable; surely the result alone should suffice.

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<sup>37</sup> *Donaldson Investments supra* note 8 at 722.

<sup>38</sup> Henochsberg on the Companies Act *op cit* note 26 at 479.

<sup>39</sup> See *Aspek Pipe supra* note 6 at 527 where a *prima facie* case for the remedy was made. Conduct in this case included; the removal of the applicant as director and property manager, and an omission on the part of the company to declare dividends from excess profits. The relationship between the respondent and the applicant had also irretrievably broken down.

<sup>40</sup> See *Barnard supra* note 7 para 46 and *Donaldson Investments supra* note 8 at 722.

<sup>41</sup> *Louw supra* note 3 para 22.

<sup>42</sup> *Ibid* para 23.

<sup>43</sup> *Ibid* para 24.

<sup>44</sup> *Donaldson Investments supra* note 8 at 719.

Unfortunately, although criticized by authors, the precedent does not agree.<sup>45</sup> It thus stands that both conduct and result must be present in a prohibited form. The motive behind the conduct can be used to determine whether the conduct and result is unfairly prejudicial, unjust or inequitable but it carries little weight on its own in the court's deliberation of a section 252 of the 1973 Act application.<sup>46</sup> As mentioned above, the majority is expected to act *bona fide* and in the best interest of the company as a whole, but there always remains a balancing act between majority rule and minority rights.

The section 252 of the 1973 Act remedy was enacted with the promise of fair minority shareholder treatment and a departure from the strict section 111*bis*, signaling the start of a potentially more liberal approach to minority protection. It did, however, set in motion a multiplicity of judgements, each attempting to define and simplify the rather vague 'trigger mechanisms'. Whether any success was attained during this exercise, is a topic for debate. What can be concluded is that the choice to use undefined terms in section 252 of the 1973 Act left the section open for varied interpretation, thus affording minority shareholders a greater degree of protection but, at the same time, muddying the waters of company law. It remained to be seen whether section 163 of the 2008 Act would follow the same path.

(c) Section 163 of the 2008 Companies Act

(i) Application

Unlike section 252 of the 1973 Act, section 163 of the 2008 Act changed the potential applicants who could make use of this remedy. With the removal of the term 'member'<sup>47</sup>, this section introduced as applicants both shareholders and directors.<sup>48</sup> As will be discussed later, the Canadian remedy also allows for a greater variety of applicants.<sup>49</sup>

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<sup>45</sup> In *Garden Province Investments supra* note 5 at 255, Friedman J held that the applicant has to prove that both the conduct as well as the result is unfairly prejudicial, unjust or inequitable. For criticism on this point, see Hurter 'Unfairly prejudicial, unjust or inequitable conduct by member s in a close corporation' (1997) 9 *SAMLJ* at 208-209.

<sup>46</sup> *Ben-Tovim supra* note 35 at 1091.

<sup>47</sup> See fn 26.

<sup>48</sup> S 163(1) of the 2008 Act.

<sup>49</sup> See definition of 'complainant' in s 238 of the CBCA.

The trigger mechanisms of section 163 of the 2008 Act are ‘oppressive’ conduct, conduct which ‘unfairly prejudices’ or conduct which ‘unfairly disregards the interests’ of an applicant. These three terms may be read in the alternative, but can also be considered as a collective expression.<sup>50</sup>

Whereas section 252 of the 1973 Act only addressed two forms of conduct, section 163 of the 2008 Act is much broader in that it applies to ‘any act or omission of the company’, ‘the business of the company’ or ‘the powers of a director or prescribed officer of the company’.<sup>51</sup> All three of these forms of conduct also include the conduct of any related party.<sup>52</sup> It is at this point in the section that the question of the degree of minority protection rears its head. This type of extension of the remedy could prove to be inappropriate and possibly detrimental to the functioning of companies as a whole.

(ii) Oppressive

As discussed above, ‘oppressive’ as a trigger mechanism was used in section 111*bis* of the 1926 Act and subsequently abandoned in the 1973 Companies Act. The reason for its re-inclusion in section 163 of the 2008 Act is because of a recommendation from the Jenkins Committee<sup>53</sup>, contained (and supported by) the report of the subsequent van Wyk de Vries Commission.<sup>54</sup> In their report, the van Wyk de Vries commission made it clear that the term “oppressive” should be abandoned in favour of the phrase “unjust or inequitable” because of the difficulties found in interpreting “oppressive”. The commission, however, conceded that the new phrase was not easily able to be defined either but that content would be given to it, in due course, by the courts.<sup>55</sup> Suffice it to

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<sup>50</sup> Maleka Femida Cassim ‘Shareholder remedies and minority protection’ in Farouk H I Cassim (managing ed) *Contemporary Company Law* 2 ed (2012) para 16.5.1 (hereinafter “Contemporary Company Law”).

<sup>51</sup> S 163(1)(a)-(c). It is to be noted that an act of a director or a prescribed officer will, in most cases, be considered an act by the company, thus this third ground is probably superfluous. See *Visser Citrus supra* note 9 para 53.

<sup>52</sup> See ‘Related and inter-related persons, and control’ in s 2 of the 2008 Act.

<sup>53</sup> The Jenkins Committee on Company Law was an English committee, formed in 1959 and chaired by Lord Jenkins. It was aimed at investigating the provisions and workings of the English Companies Act 1948.

<sup>54</sup> Van Wyk de Vries Commission of enquiry into the 1926 Act, formed in 1963.

<sup>55</sup> The van Wyk de Vries Commission of enquiry into the Companies Act: *Main report* (1970) at 70.



say, “oppressive” as used in section 163 of the 2008 Act can be defined in line with the previous case law and the meaning has not changed.

Oppressive conduct includes conduct which is ‘harsh or tyrannical’ in nature.<sup>56</sup> Alternatively, it is conduct that is ‘burdensome, harsh and wrongful’.<sup>57</sup> The SCA cited Tebutt J in *Grancy*<sup>58</sup>, as saying that tyrannical conduct ‘represents a higher degree of oppression than conduct which is “harsh” or “unjust”...’ but that an applicant will not be required to prove such a serious state of affairs in order to qualify for relief under section 111*bis*.<sup>59</sup> It can thus be accepted that this statement holds true for an applicant requesting relief under section 163 of the 2008 Act. Furthermore, the term ‘oppressive’ denotes conduct that is of a ‘more egregious kind than conduct which is ‘unfairly prejudicial to’ or that ‘unfairly disregards the interests of’ the applicant’.<sup>60</sup> Thus, oppressive conduct is the most serious form of prohibited conduct and will be difficult to prove. The applicant will have to illustrate a degree of unfairness, ‘if not something worse’.<sup>61</sup>

(iii) Unfairly prejudicial

This type of conduct is the only one of the section 252 of the 1973 Act forerunners, retained in section 163 of the 2008 Act. One can accept that the meaning of this term as found in section 252 of the 1973 Act can be directly transferred to section 163 of the 2008 Act.<sup>62</sup> Thus, not much need be added to the discussion above.

What must be emphasized is the use of the term ‘unfair’, both in ‘unfairly prejudicial’ as well as in ‘unfairly disregards’. The recurrent use of the term indicates clearly that the basis for determining the applicability of section 163 of the 2008 Act is fairness, and not unlawfulness.<sup>63</sup> Conduct can thus be unlawful but not unfair (and the reverse is also

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<sup>56</sup> *Aspek Pipe supra* note 6 at 526.

<sup>57</sup> *Ibid.* Also see *Grancy Property Limited v Manala* [2013] 3 All SA 111 (SCA) para 22.

<sup>58</sup> *Grancy Property supra* note 57.

<sup>59</sup> *Aspek Pipe supra* note 6 at 526 and then *Grancy Property supra* note 57 para 22.

<sup>60</sup> *Visser Citrus supra* note 9 para 54.

<sup>61</sup> *Ibid* para 55.

<sup>62</sup> *Grancy Property supra* note 57 para 22.

<sup>63</sup> Contemporary Company Law *op cit* note 50 para 16.1.5.

true).<sup>64</sup> This, again, illustrates the wide ambit and flexibility of section 163 of the 2008 Act. In light of this development in company law, the English courts have warned that the remedy should not be used in a way that causes the trite principles to be abandoned ‘in favour of some wholly indefinite notion of fairness’.<sup>65</sup> This warning does not negate the current position that the rights of an applicant needn’t be directly affected. What remains, is the possibility of something else - the interests of the applicant.

(iv) Unfairly disregards interests

The difference between section 163 of the 2008 Act and all provisions preceding it, is the introduction of the protection of interests. Because this is such an intricate and important concept, Chapter 4 will be entirely dedicated to this topic, examining both its history and current position in company law across various jurisdictions. However, at this point a short introduction will be offered to place this new provision in context.

As mentioned above, section 163 of the 2008 Act not only protects the rights of an applicant but protects something more; the applicant’s interest or alternatively his/her ‘legitimate expectations’.<sup>66</sup> This protection came about because of a shift in company law to a more equitable application of minority protection provisions. Thus, when weighing up the position of a company respondent versus the position of a minority shareholder applicant, the court is now able to consider ‘equitable considerations’ in the form of legitimate expectations or interest.<sup>67</sup> Domestic case law first encountered this provision in *Visser Sitrus*<sup>68</sup> where Rogers J held that legitimate expectations may be ‘an arrangement or understanding regarding participation in management or concerning dividend policy or remuneration’.<sup>69</sup> But irrespective of its nature, the ‘arrangement or understanding must be proven as a fact’.<sup>70</sup>

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<sup>64</sup> *Ibid.*

<sup>65</sup> *O’Neill supra* note 17 at 968.

<sup>66</sup> This term is most famously used in the *locus classicus* on the topic, *O’Neill supra* note 17.

<sup>67</sup> Contemporary Company Law *op cit* note 50 para 16.5.1

<sup>68</sup> *Visser Sitrus supra* note 9.

<sup>69</sup> *Ibid* para 62.

<sup>70</sup> *Ibid.*

The inclusion of ‘interests’ in the protection of section 163 of the 2008 Act has widened the provision considerably and it is here where there exists a possibility of abuse, or alternatively, an overthrow of company law principles (as English courts have warned). Thus, courts must keep a close eye on the development of this portion of the remedy to ensure that it does not over extend itself and hamper, rather than improve, company law.

- (d) Canadian law
- (i) Introduction to the remedy

In a brief overview of the Canadian oppression remedy<sup>71</sup>, Welling states that ‘a complainant seeking an oppression remedy is not seeking to remedy a wrong. There may have been no wrong at all’.<sup>72</sup> This philosophy, in essence, summarises the thinking behind the Canadian oppression remedy. Even wider in ambit than its South African counterpart, the Canadian section is liberal and all inclusive, possibly to an overly generous degree. The remedy focuses mainly on shareholder expectations, and where equitable considerations plays a new role in the domestic section 163 of the 2008 Act, the courts in Canada have become quite comfortable using statutes to ensure that shareholder expectations are not frustrated, especially by using section 241 (that is discretionary in nature).<sup>73</sup>

Section 241 of the Canada Business Corporations Act is worded in much the same way as section 163 of the 2008 Act.<sup>74</sup> The applicants under this section consist of security holders, directors, officers and creditors.<sup>75</sup> Conduct covered by this remedy comprises of: an act or omission of the company, the carrying on/conducting of the business or affairs of the company, as well as the exercise of the powers of a director<sup>76</sup> and the complaint may include one against the conduct of so called ‘affiliates’ (similar to ‘related party’

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<sup>71</sup> S 241 of the CBCA.

<sup>72</sup> Bruce Welling *Corporate Law in Canada – The Governing Principles* 3 ed (2006) at 535 (hereinafter “Corporate Law in Canada”).

<sup>73</sup> *Ibid* at 503.

<sup>74</sup> CBCA.

<sup>75</sup> See meaning of ‘complainant’ in s 238 as well as s 241(2) of CBCA.

<sup>76</sup> S 241(2)(a)-(c).

used in section 163 of the 2008 Act).<sup>77</sup> By using the terms ‘result’ or ‘manner’ within section 241(2)(a)-(c), it appears that the court is interested only in the effect of the conduct and not in the motive of the respondent.<sup>78</sup>

The trigger mechanisms are identical to those found in section 163 of the 2008 Act; oppressive conduct, unfairly prejudicial conduct or conduct which unfairly disregards the interests of the applicant.<sup>79</sup> In *BCE*<sup>80</sup> the court suggested a simpler approach to the three trigger mechanisms and their fairly similar meanings. By accepting that all three of the trigger mechanisms are merely adjectives for ‘inappropriate conduct’, the need to distinguish between them falls away and so with it, a whole hoard of definitional hurdles because these terms cannot be ‘conclusively defined’.<sup>81</sup> This is in contrast to certain case law, where the courts insisted on differentiating between these terms and compartmentalizing their meaning.<sup>82</sup> South African may benefit from employing the method followed in *BCE*<sup>83</sup>, because, as illustrated by the discussion above, an attempt to define each trigger mechanism exactly, is a futile exercise. As Koehnen notes, ‘the difficulty with adjectives is they provide no assistance in formulating principles that should underlie court intervention’.<sup>84</sup>

In *Wright*<sup>85</sup>, Austin J went as far as to suggest a list of conduct which would qualify as transgressing section 241:

- i. A lack of valid corporate purpose for the transaction.
- ii. Failure on the part of the corporation and its controlling shareholders to take reasonable steps to stimulate an arm’s length transaction.

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<sup>77</sup> See meaning of ‘affiliate’ in s 2(1) of the CBCA as well as ‘affiliated bodies corporate’ in s 2(2) of the same.

<sup>78</sup> Corporate Law in Canada *op cit* note 72 at 537.

<sup>79</sup> S 241(2).

<sup>80</sup> *BCE Inc supra* note 20.

<sup>81</sup> *Ibid* para 54.

<sup>82</sup> See in this regard *Scottish Co-operative Wholesale Society Ltd v Meyer* (1958) 3 All ER 66 in which the House of Lords systematically applied the elements of the previous s 210, individually, and *Diligenti v RWMD Operations Kelowna Ltd.*, 1976 CanLII 238 (BC SC).

<sup>83</sup> *BCE Inc supra* note 20.

<sup>84</sup> M Koehnen *Oppression and related remedies* (2004) 84 as reproduced in *BCE Inc supra* note 20 para 54.

<sup>85</sup> *Wright v Donald S Montgomery Holdings Ltd* 1998 ONSC 14805.

- iii. Lack of good faith on the part of the directors of the corporation.
- iv. Discrimination between shareholders with the effect of benefitting the majority shareholder to the exclusion or to the detriment of the minority shareholder.
- v. A plan or design to eliminate the minority shareholders.<sup>86</sup>

An approach such as this one could be dangerous. Any closed list of conduct limits the oppression remedy in its scope (apart from (i) which is phrased so widely that many complaints may possibly fall within this class). If phrased carefully and broadly enough, it could lend some support to the courts in deciphering how and when to apply the oppression remedy. However, as alluded to above, the over extension of the remedy is a possibility, especially considering the new inclusion of ‘interests’ in section 163 of the 2008 Act. This type of closed list may bode well for companies in this respect.

Canadian law may serve as an example of an extremely generous approach to oppression cases. This remedy was apparently a role player in the drafting of the new section 163 of the 2008 Act, gleaned from their similarities. It will now be examined whether there are any differences between these two approaches and what may be gleaned from the Canadian approach.

(ii) Comparison with South African law

From the above discussion, it is clear that there exists a large array of similarities between section 163 of the 2008 Act and the Canadian oppression remedy. First, the trigger mechanisms are almost identical in wording and virtually the same in their nature. Secondly, the Canadian remedy allows for the inclusion of the conduct of ‘affiliates’ and section 163 of the 2008 Act allows for the inclusion of ‘related parties’. Lastly, both

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<sup>86</sup> *Ibid* para 25 (as originally stated in *Arthur v Signum Communications Ltd* (January 23, 1991), Doc. Toronto 1767/85 (Ont. Gen. Div.). This case dealt with the oppression remedy in s 248 of the Ontario Business Corporations Act RSO 1990 c B. 16, but on a reading of this legislation, it is sufficiently similar to s 241 of the CBCA and can thus be used as a comparison). See also Stephanie Ben-Ishai & Poonam Puri ‘The Canadian oppression remedy judicially considered: 1995-2001’ (2004) 30 *Queen’s LJ* 79 at 89, who conducted empirical research on Canadian oppression remedy cases from 1995 – 2001 and found that their sample of cases did indeed reflect this list accurately.

sections include the concept of ‘interests’ or ‘expectations’ of shareholders as concepts deserving of protection.

The Canadian courts have also gone about interpreting the different possible trigger mechanisms in a similar fashion as discussed in 2.3 above. Again, courts have held that oppressive behavior would be the highest threshold for an application based on section 241 and define the term once more as ‘burdensome, harsh or wrongful’.<sup>87</sup> ‘Unfairly prejudicial conduct’ indicates conduct that is ‘unjustly or inequitably detrimental’.<sup>88</sup> Welling, however, notes how ‘no one seems inclined to give particulars’ on this phrase and the same situation can be seen domestically.<sup>89</sup> In *Brant Investment*<sup>90</sup>, the court suggested examples of a fair process and thus, fair outcome.<sup>91</sup> This would indicate that courts are more inclined to state reasons why a specific type of conduct is fair, rather than explaining why it is not unfair.<sup>92</sup> This may be as a result of the wide array of definitions for the term ‘unfair’ and the confusion that accompanies it (see Chapter 3 for a detailed discussion). As for ‘unfairly disregards the interests’ of a person, this trigger is dealt with much the same in Canadian courts as it is in domestic courts. Courts have defined it as ‘unjustly or without cause...pay no attention to, ignore or treat as of no importance the interests of’<sup>93</sup> a person or ‘ignoring an interest as being of no importance, contrary to the stakeholders’ reasonable expectations’.<sup>94</sup> However, Canada has a much longer history of, and greater exposure to, this concept than South Africa does.<sup>95</sup>

By far the biggest difference found in section 241 is the inclusion of creditors as petitioners. This is another indication of the wide ambit of the section and also of the discretion allowed to the courts. In *Matthews*<sup>96</sup> the court held that creditors, too, have a

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<sup>87</sup> Corporate Law in Canada *op cit* note 72 at 543.

<sup>88</sup> *Ibid.* Also see *Diligenti supra* note 82 para 27.

<sup>89</sup> Corporate Law in Canada *op cit* note 72 at 543.

<sup>90</sup> *Brant Investments Ltd. v. KeepRite Inc.*, 1991 CanLII 2705 (ON CA).

<sup>91</sup> Corporate Law in Canada *op cit* note 72 at 544.

<sup>92</sup> See fn 130.

<sup>93</sup> Corporate Law in Canada *op cit* note 72 at 544 and *Waxman v Waxman* (2002) 25 BLR 3d 1 (Ont).

<sup>94</sup> *BCE Inc supra* note 20 para 67.

<sup>95</sup> See Chapter 4 for a detailed discussion.

<sup>96</sup> *Matthews v Ocean Nutrition Canada Ltd* 2012 NSSC 142.

‘legitimate stake’ in the way in which a business is operated.<sup>97</sup> The court describes the position of the creditor as one of those parties who have a genuine stake in the business but no control over the running of that specific business, and that this is the very situation that the oppression remedy is designed to address.<sup>98</sup> In their empirical study of oppression cases, Ben-Ishai and Puri comment that a possible reason for this inclusion may be because of Canada’s new jurisprudence indicating the possibility of director’s owing a fiduciary duty to creditors as well.<sup>99</sup>

The Canadian oppression remedy is thus very similar to section 163 of the 2008 Act and the interpretation of the Canadian courts can be easily transposed onto the South African section 163 of the 2008 Act. Apart from the inclusion of creditors, both oppression remedies seek to right wrongs or restore an interest prejudicially affected. The yardstick for both remedies is essentially fairness and the balancing of various parties within one entity.

- (e) English law
- (i) Introduction to the remedy

The English oppression remedy (although this could be considered a misnomer because of the abrogation of the term ‘oppression’) can be found in section 994 of the Companies Act of 2006. The section has as its predecessor, section 210 of the Companies Act of 1948, which still used ‘oppression’ to describe the conduct falling within its provisions. To understand section 994, one must first look at the structure of section 210 in order to understand the changes in thought which English courts have undergone when adjudicating minority protection cases.

First, section 210 could only be used by a member in the capacity as member. Thus, a member who was also a director and is removed from the board by the majority, could

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<sup>97</sup> *Ibid* para 30.

<sup>98</sup> *Ibid*.

<sup>99</sup> Ben-Ishai & Puri *op cit* note 86 at 99-102. See also a range of cases on this shift in same study at 99-100. South Africa has no precedent justifying fiduciary duties towards any kind. For an exposition of the topic, see Sulette Lombard *Directors’ duties to creditors* (unpublished LLD thesis, University of Pretoria, 2006).

not use section 210.<sup>100</sup> In terms of section 994, courts now interpret the term ‘member’ much more liberally, allowing for members who are also directors to claim if what occurred while in their capacity as director, has an influence on their investment as a member etc.<sup>101</sup> Secondly, section 210 could only be used in cases where conduct was considered ‘oppressive’. Oppressive was defined by the House of Lords as ‘burdensome, harsh or wrongful’.<sup>102</sup> Thus, section 210 could only be invoked if the member could prove that the conduct infringed their rights, in turn limiting the scope of section 210.<sup>103</sup> However, when interpreting the current section 994, courts use fairness and equity as the yardstick, thereby not limiting cases to only those which can be considered legally ‘wrongful’.<sup>104</sup>

Now to turn to section 994 specifically. This trigger mechanism required by this section is conduct which is unfairly prejudicial to the interest of the member himself/herself or to some part of the members (including at least himself/herself).<sup>105</sup> There is no mention of oppressive conduct or conduct which unfairly disregards the interest of the applicant. Thus, section 994 is much narrower, however, the inclusion of ‘unfairly prejudicial’ as the only trigger combined with a liberal interpretation by the courts, could mean that this ground is wide enough to encompass all the necessary scenarios that the Canadian and South African remedy has had to face.

There are, further, two types of conduct covered by section 994 by which an applicant member can show unfair prejudice. This section makes provision for: the affairs of the company have been or are being conducted in an unfairly prejudicial manner, or that an actual or proposed act or omission of the company would be or is so prejudicial.<sup>106</sup> The addition of the words ‘proposed’ and ‘would be’ is interesting and does not appear in the

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<sup>100</sup> See s 210(1) of the 1948 Companies Act. Also see Paul L Davies *Gower and Davies’ principles of modern company law* 9 ed (2012) para 20-7 (hereinafter “Gower and Davies”).

<sup>101</sup> Gower and Davies *op cit* note 100 para 20-7.

<sup>102</sup> *Scottish Co-operative Wholesale Society supra* note 82.

<sup>103</sup> For a more detailed discussion, see Gower and Davies *op cit* note 100 paras 20-6 to 20-9.

<sup>104</sup> *Visser Citrus supra* note 9 para 60.

<sup>105</sup> S 210(1)(a) and (b).

<sup>106</sup> S 994(1)(a) and (b).



Canadian or South African provision.<sup>107</sup> This could indicate that the remedy allows for conduct that would be prejudicial in the future, or threatens to be prejudicial. Acts or omissions of the company include those on behalf of the company and thus this form of the remedy can apply to situations where directors or majority shareholders have acted and may even include corporate groups acting on behalf of the company.<sup>108</sup>

(ii) Comparison with South African law

The first stark change from the domestic provision, which allows for three types of conduct, is the single trigger mechanism provided for in section 994. The section does not use ‘oppressive’ or ‘unfairly disregards’. It may bode well for the remedy to not complicate its application with the addition of relatively similar terms. Perhaps the domestic legislature should also consider slimming section 163 of the 2008 Act down in order to make it easier to apply.

Secondly, the English remedy makes no provision for the powers of directors or the business of the company being exercised or conducted in a way that unfairly prejudices the applicant. There is only one category of conduct. However, Davies states that this section is ‘clearly wide enough to catch the activities of the controller of companies, whether they conduct the business of the company through the exercise of their powers as directors or as shareholders or as both’.<sup>109</sup> Again, the English counterpart is simpler, with fewer synonyms for essentially the same concept.

Lastly, whereas section 163 of the 2008 Act makes no provision for future conduct, section 994 includes the words ‘would be’ in section 994(1)(b). It will be argued that this insertion is unnecessary and may complicate matters further.

From the above discussion it is clear that the English remedy is very different in wording from the domestic section 163 of the 2008 Act. However, when examining how it is

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<sup>107</sup> S 994(1)(b) specifically.

<sup>108</sup> Gower and Davies *op cit* note 100 para 20-3.

<sup>109</sup> *Ibid.*

applied, one can see that the fundamental motivation is essentially the same; to ensure fairness to minority shareholders by both protecting their rights as well as their expectations.

(f) Conclusion

Minority protection has undergone various changes throughout the years. Termed ‘the oppression remedy’, it made its first appearance in company law in the 1926 Act and has come full circle to once again including ‘oppression’ as a trigger mechanism in the 2008 Companies Act. The trigger mechanisms have changed from unfairly prejudicial, unjust and inequitable to oppressive, unfairly prejudicial or unfairly disregarding the interest of the applicant. Where older remedies were only available to members of the company, section 163 of the 2008 Act of the 2008 Companies Act is available to both shareholders and directors. What has remained unchanged is the emphasis on fairness when adjudicating each case. South African law has recently borrowed the doctrine of legitimate expectations from the English provision, not only protecting minority shareholder’s rights but also the interests of such applicants in section 163 of the 2008 Act. Canadian courts, too, have become quite comfortable with the concept of interests and have a much longer tradition of using equitable considerations to ensure that shareholder expectations, if legitimate, are not frustrated. It is thus clear that across various jurisdictions, the remedy for minority shareholders has become one with a wide ambit, capable of adapting to the needs of varied applicants, within different factual scenarios.

### 3 DEFINITION OF ‘UNFAIR’

#### (a) Introduction

It follows logical that an entire chapter of this dissertation is dedicated to the term ‘unfair’ as it appears in both section 252 of the 1973 Act as well as in section 163 of the 2008 Act of the 2008 Act.<sup>110</sup> Fairness, as noted above, is the cornerstone of minority protection and the basis of adjudication by the courts, both in South Africa as well as in the English and Canadian provisions. It is the only trigger mechanism that has remained intact after all the changes enacted when section 252 of the 1973 Act was replaced by section 163 of the 2008 Act. In order for an applicant to be successful in a section 163 of the 2008 Act application, the conduct complained of must be unfair (unless the applicant raises an ‘oppression’ claim which, as discussed, is unlikely due to the high threshold of proof).<sup>111</sup> Mere prejudice, or a mere disregard of interests, will not suffice. Thus, the term ‘unfair’ must be carefully unpacked to determine what exactly it means in the context of ‘unfairly prejudicial’ and ‘unfairly disregards’. It must also be noted that the use of fairness as the standard for section 163 of the 2008 Act, enables this section to extend itself to protect the interests of the minority shareholder/director and not only the rights of these applicants.

#### (b) Different interpretations

As mentioned, the term ‘unfair’ has never been succinctly defined and consists of a wide array of possible meanings. One can only rely on past precedent in order to come to some conclusion as to its meaning. It must be kept in mind that whatever definition is followed, it must be one that extends rather than restricts the meaning.<sup>112</sup>

Unfairness can be understood to mean ‘unreasonable’ as in the sense of the Afrikaans use of the word ‘onredelik’.<sup>113</sup> The conduct of the majority must thus be unreasonable

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<sup>110</sup> See s 252(1) of the 1973 Act as well as s 163(1)(a)-(b) of the 2008 Act.

<sup>111</sup> Corporate Law in Canada *op cit* note 72 at 543.

<sup>112</sup> *Donaldson Investments supra* note 8 at 720.

<sup>113</sup> *Garden Province Investments supra* note 5 at 255.

towards the applicant. Apart from it being unreasonable, the conduct must show a ‘lack of probity or fair dealing, or a visible departure from the standards of fair play on which every shareholder is entitled to rely’.<sup>114</sup> The court is not primarily interested in the lawfulness of the conduct but it can give an indication of whether (un)fairness may be present. Rogers J states in *Visser Sitrus*<sup>115</sup>:

*‘Where the impugned conduct is unlawful, and the conduct has a consequence that is prejudicial to the applicant, the prejudice to or disregard of the interest of the applicant is likely to be, perhaps invariably will be, ‘unfair’ within the meaning of section 163.’*<sup>116</sup>

From the above it can be seen that conduct that is unlawful will almost always be unfair whereas the opposite is not necessarily true. The test for fairness remains an objective one, and the motive of the respondent does not play a cardinal role (although it may be an aid to the court when adjudicating the case).<sup>117</sup>

Although it cannot be argued that section 163 of the 2008 Act is indeed wide and capable of covering numerous scenarios, conduct which is vague, or which a shareholder dislikes, will not constitute prohibited conduct and thus will not be regarded as unfair. Shareholders must understand that ‘by becoming a shareholder in a company, a person subjects himself to the control of the various types of majority in regard to the conduct of the affairs of the company’.<sup>118</sup> The ambit of the section does not somehow override the principle of majority rule. If this is not kept in mind, section 163 of the 2008 Act could potentially be overextended.

By using case law, we can identify three instances in which the conduct will be considered unfairly prejudicial: excluding a minority shareholder from fair

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<sup>114</sup> *Donaldson Investments supra* note 8 at 722.

<sup>115</sup> *Visser Sitrus supra* note 9.

<sup>116</sup> *Ibid* para 56.

<sup>117</sup> Henochsberg on the Companies Act *op cit* note 26 at 572.

<sup>118</sup> *Communicare supra* note 4 para 10 & 14 and also see *Sammel supra* note 4 at 645.

participation<sup>119</sup>; excluding a member from fair participation without the option of removing his/her share capital<sup>120</sup> and; departing from fair dealing.<sup>121</sup> If, however, an applicant in a section 163 of the 2008 Act petition is offered a fair price in return for his/her shares, and chooses to refuse such an offer, then the ‘unfairness disappears’.<sup>122</sup> Heher JA held in *Bayly* that ‘fairness requires that the minority shareholder should not have to maintain his investment in a company managed by the majority with whom he has fallen out’<sup>123</sup>, however, if he is then offered a ‘way out’ and chooses not to accept it, the majority cannot then be held to act unfairly. Thus, the conduct of the minority may potentially play a role in the success or otherwise of a section 163 of the 2008 Act application.<sup>124</sup>

- (c) Comparative study
- (i) Canadian law

As is the case domestically, ‘oppression’ is the trigger mechanism with the highest threshold of proof. Because of this, applicants tend to claim ‘unfairly prejudicial’ conduct, instead. Whereas ‘oppression’ is given a narrow interpretation, the concept of ‘unfairly prejudicial conduct’ is much wider.<sup>125</sup> The reason for this seems to be that, where oppression is determined by looking at the motives or nature of the conduct, unfairly prejudicial conduct is based on the effect of the conduct on shareholders etc.<sup>126</sup> ‘Unfairly prejudicial’ acts are those ‘that are unjustly or inequitably detrimental’.<sup>127</sup> Whether the respondent acted *bona fide* or *mala fide* is of no consequence and thus, the test is an objective one (as is the case in a section 163 of the 2008 Act application).

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<sup>119</sup> *Aspek Pipe supra* note 6 at 527.

<sup>120</sup> *Barnard supra* note 7 para 46.

<sup>121</sup> *Donaldson Investments supra* note 8 at 722.

<sup>122</sup> *Bayly v Knowles* 2010 (4) SA 548 (SCA) para 23.

<sup>123</sup> *Ibid.* For an example of where the respondent refused to allow the applicant to remove its/his capital, see *McMillan supra* note 10 paras 36-39. The court in this case considered the refusal an example of ‘unfairly prejudicial, unjust or inequitable’ conduct in terms of s 252 of the 1973 Act.

<sup>124</sup> *Louw supra* note 3 para 23.

<sup>125</sup> Brian Cheffins ‘The oppression remedy in corporate law: the Canadian experience’ (1988) *The University of Pennsylvania Journal of International Business Law* 305 at 321.

<sup>126</sup> Cheffins *op cit* note 125 at 321.

<sup>127</sup> *Corporate Law in Canada op cit* note 72 at 543.

It must be kept in mind that an applicant will not be unfairly prejudiced merely because he or she is adversely affected by the decisions of the company or the majority shareholders. The conduct complained of must be ‘detrimental or damaging to the applicant’s rights in a manner which is unjust or inequitable’.<sup>128</sup>

McKinlay JA approached the adjudication of fairness rather differently in *Brant Investments*<sup>129</sup> by examining the process as well as the outcome, in this specific set of facts. In this case there was a holding company with many subsidiaries. The majority shareholders of one of the subsidiaries decided to purchase the assets of the other subsidiary companies in the group. The purchase was to be financed by a share offering to all existing shareholders. The decision required a special resolution which was passed. The minority shareholders of this subsidiary disagreed with the decision and approached the court, claiming that they had been ‘unfairly prejudiced’ by the decision. The court decided that the applicant’s case was unfounded because both the process and the outcome was fair towards the minority shareholders for the following reasons:

The process was fair because:<sup>130</sup>

- i. The decision was made in an arm’s length manner with consideration given to the interests of all shareholders.
- ii. The decision-makers considered all relevant information making use of experts and detailed analysis.
- iii. Alternative possibilities were considered by the decision makers.
- iv. There was a plan to realise the potential benefits of the proposed transaction.
- v. Negotiations that led to the deal involved both parties equally; the terms were not dictated by one party.
- vi. There was an adequate and timely disclosure to all affected protected persons.

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<sup>128</sup> Cheffins *op cit* note 125 at 321. Also note how this definition is reminiscent of the trigger mechanisms chosen for s 252 of the 1973 Act. This begs the question whether the triggers in s252 of the 1973 Act actually all mean the same thing.

<sup>129</sup> *Brant Investments Ltd. v. KeepRite Inc.*, 1991 CanLII 2705 (ON CA).

<sup>130</sup> *Ibid.*

- vii. There was no goal to trigger dissent or achieve greater control over the corporation.

The outcome was fair because:<sup>131</sup>

- i. It was in the best interest of the corporation.
- ii. It did not favour one party to the detriment of another.
- iii. All shareholders in the corporation had an equal burden placed on them or derived equal benefit from the transaction.

This kind of framework may assist courts in determining whether conduct is unfair or not. However, this cannot be made into a closed list without exception. Such a framework would go squarely against the ethos behind section 163 of the 2008 Act. Courts could use this list as a guideline in determining unfairness, even though it still does not really provide one with a definition of the term. It seems that because of this lack of clear definition, the court in *Brant Investments*<sup>132</sup> decided to explain why the conduct was fair, rather than attempting to give an explanation of what constitutes unfair conduct.

From the above discussion it seems that the definition of unfairness is circular. In order to describe the term, other equally broad terms are used such as ‘unjust’ or ‘inequitably detrimental’ or ‘unreasonable’, all of which, themselves, have no clear definition. Because of this uncertainty, the approach followed in *Brant Investments*<sup>133</sup> could prove to be a good starting point. The list would have to be adapted to a South African judicial system, in line with the Constitution<sup>134</sup>, but the possibility does exist that Canadian law can assist in this regard.

(ii) English law

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<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> Constitution of the Republic of South Africa, 1996.

The English remedy had as its forerunner section 210 of the 1948 Companies Act. The previous remedy used oppression as the threshold to determine court intervention. But with the move to the 2006 Companies Act, all signs of the term ‘oppression’ was removed, instead making use of ‘unfairly prejudicial’ conduct. For the member to establish a case of unfair prejudice, the affairs of the company must be conducted in such a way<sup>135</sup> or an act or omission by the company must have an unfairly prejudicial result.<sup>136</sup>

There have been various English cases which, to a certain extent, have concretised situations which would amount to ‘unfairly prejudicial’ behavior on the part of the respondent. These fall, broadly speaking, into two main categories: informal arrangements among members<sup>137</sup> and the balance between dividends and directors’ remuneration,<sup>138</sup> the most litigious category being informal arrangements among members. This is by no means a closed list and because of its broad phrasing, English courts have awarded the remedy to applicants with other examples of unfairly prejudicial conduct. After all as Lord Hoffman stated, ‘parliament...chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable’.<sup>139</sup>

When the English remedy was altered and made considerably broader, courts had to abandon traditional methods used to adjudicate oppression matters and turn their attention to determining what this unfairly prejudicial category included and how to identify it. As noted above, both in South African and Canadian legislation, the definitions of the term are largely circular thus English courts opted for an analogy approach in cases outside the two main categories mentioned before. This use of analogy extends the ambit of certain legislative or other provisions, into areas to which they would not normally apply and protects the courts from accusations of interference in expert areas such as company law.<sup>140</sup> The court, for example, has used the required

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<sup>135</sup> S 994(1)(a) of the 2006 Companies Act.

<sup>136</sup> S 994(1)(b) of the 2006 Companies Act.

<sup>137</sup> Gower and Davies *op cit* note 100 para 20-11.

<sup>138</sup> *Ibid* para 20-17.

<sup>139</sup> *O’Neill supra* note 17 at 966.

<sup>140</sup> Gower and Davies *op cit* note 100 para 20-21.



standards of conduct of directors in a Code related to mergers and takeovers applicable to public companies, to determine whether the director in a private company had acted in a manner that was unfairly prejudicial during the merger with the private company.<sup>141</sup> But once again, the analogy method avoids the explicit defining of the term ‘unfair prejudice’. It seems that the adjudication process has become more of a value judgement than a systematic approach even though courts have warned that this phrasing does not authorise any individual judge from simply ruling according to what he/she thinks is fair.<sup>142</sup>

The prejudice mentioned in section 994 requires unfair prejudice, and not simply prejudice alone.<sup>143</sup> There has been much debate concerning the illegality aspect of the remedy but currently the view of the courts is that this section was enacted to remedy cases where, apart from this section, the actions perpetrated are in no way unlawful. The test is an objective one and thus the motive of the respondent does not play a role in adjudicating the case.<sup>144</sup> However, although the applicant is not required to approach the court with clean hands, any conduct on the part of such applicant, which the court deems severe enough, could result in an unsuccessful case outcome.<sup>145</sup>

Once again, English courts cannot assist in a clear definition of what ‘unfairly prejudicial’ means. Throughout the years certain ‘clear cut’ cases have come to the fore but it has become an analogy exercises in any unclear case. There is, in principle, nothing the matter with using analogies where appropriate to give effect to fairness but this could be overextended if not carefully monitored. A potential combination between the analogy approach and the ‘just and equitable’ threshold may be the best principles that South African courts can import from their English counterparts.

(d) Conclusion

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<sup>141</sup> See as an example *A Company Re* (1986) B.C.L.C. 382.

<sup>142</sup> *O’Neill supra* note 17 at 966.

<sup>143</sup> Gower and Davies *op cit* note 100 para 20-24.

<sup>144</sup> *Ibid.*

<sup>145</sup> As occurred in the domestic case of *Bayly supra* note 122 and also in the English case of *Grace v Biagioli* (2006) 2 B.C.L.C. 70, CA.

Determining unfairness in so many words is a futile exercise. There are simply too many similar or comparable definitions used in various jurisdictions. But perhaps if all are combined into a melting pot of some kind, a broad idea of the concept may come to light. Domestically, unfair prejudice is defined as ‘unreasonable’<sup>146</sup> or exemplifying a ‘lack of fair dealing’.<sup>147</sup> It does not need to be unlawful or even subjectively unfair. Majority rule still exists at the apex of company law in South Africa and decisions by the court must be made accordingly. In Canada, the exercise of adjudicating the fairness of a process as well as an outcome has become a useful way to come to a conclusion while the basic principles used domestically, take effect there too.<sup>148</sup> The test for unfair prejudice is thus still objective and covers both rights and interests of an applicant, as is the case with the new section 163 of the 2008 Act. English courts opt for categories, and in the event that a new set of facts come to their attention, employ analogy and the yardstick of ‘just and equitable’ conduct.<sup>149</sup> Although none of these jurisdictions have exactly the same approach, if courts follow the general rules employed in each, there ought to be enough guidance to come to an appropriate conclusion.

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<sup>146</sup> *Garden Province Investments supra* note 5 at 255.

<sup>147</sup> *Donaldson Investments supra* note 8 at 722.

<sup>148</sup> See the discussion under 3(c)(i).

<sup>149</sup> See the discussion under 3(c)(ii).

## 4 PROTECTION OF INTERESTS

### (a) Introduction

Although in different forms and at different stages of their development, the company law system of all three jurisdictions examined thus far, makes provision for not only the protection of a petitioners legal rights, but also their interests or expectations. Where South African and Canadian legislation guards against the oppression, disregard and unfairly prejudicial treatment of such interests, English company law simply disallows the unfairly prejudicial treatment of interests. This shift from rights to interests is what makes the remedy so unique in each of these countries. It breaks with the traditional duty of the law and creates a system whereby courts can extend their ambit to new degrees, offering the petitioner remedies for a range of different scenarios. It could signal a start of a much more fluid adjudication process to find what is equitable and fair, possibly not only starting and stopping with company law, but eventually moving to other legal fields as well.

### (b) Appearance in English law

#### (i) The roots of the concept in English public law

The concept of legitimate expectations (or as it is sometimes called ‘equitable considerations’<sup>150</sup> or ‘interests’<sup>151</sup>) originally stems from English public law and more specifically, plays a large role in administrative law. In this field, there exists two types of expectations namely: substantive legitimate expectations and procedural legitimate expectations. Substantive expectations are expectations of receiving things, created in the mind of a person because of government action which justifies such an expectation.<sup>152</sup> Procedural expectations stem from procedural rights that an applicant avers he/she has because of the actions of a procedural body giving rise to such an expectation.<sup>153</sup> One

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<sup>150</sup> Contemporary Company Law *op cit* note 50 para 16.1.5.

<sup>151</sup> As used in the relevant legislative remedies mentioned thus far.

<sup>152</sup> English Public Law *op cit* note 18 para 16.34.

<sup>153</sup> *Ibid.*

must, however, distinguish between the concept of a reliance interest and an expectation interest. Using the field of contract law as an example, Barak-Erez explains:

*'The reliance interest relates to the financial loss resulting from actions performed...due to reliance on the contract, whereas the expectation interest relates to the financial loss incurred due to frustration of the expectation to profit from the contract.'*<sup>154</sup>

The expectation interests are what this dissertation is concerned with, irrespective of whether the expectation is/was premised on a reliance of some sort. It must be noted that these two concepts have a close connection in that the reliance interest leads to the expectation interest being formed. But in order for expectations to truly be protected, a preceding reliance interest should not be a prerequisite.<sup>155</sup> The protection of expectations must come in the form of fairness and natural justice.<sup>156</sup>

The concepts of fairness and natural justice are used to justify an applicant relying solely on the representations made by a public body which in turn created certain expectations in the mind of that applicant. The protection of pure expectations is thus generally based on 'moral, non-utilitarian justifications'.<sup>157</sup> So why include this concept in company law? The reason may be that similarly to a natural person having little redress against a powerful public body, so too may a minority shareholder have little chance of success against the majority of shareholders, directors or the company itself. Also, most of the protection cases complained of show an absence of any rights on the part of the applicant, thus, what other reliable defences does such an applicant possess? To incorporate the doctrine of legitimate expectations means that the arms of the court stretch much further than ever in company law.

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<sup>154</sup> Barak-Erez *op cit* note 18 at 586.

<sup>155</sup> *Ibid.*

<sup>156</sup> John Cartwright 'Protecting legitimate expectations and estoppel in English law' (2006) 10.3 *Electronic Journal of Comparative Law* at 6. Also see Cartwright for a noteworthy comparison between legitimate expectations and the law of estoppel. The notion of fairness as an adjudicating factor in the public law context may be a reason for the sudden focus on 'unfairly prejudicial' conduct rather than 'oppressive' conduct in the company law remedy.

<sup>157</sup> Barak-Erez *op cit* note 18 at 588.

(ii) Application of the concept

As previously noted, the doctrine of legitimate expectations has a long standing history in English law and a relatively comfortable position in English company law especially. The most notable case on the topic, and one that set the tone for future cases is *Ebrahimi*.<sup>158</sup> The facts are briefly as follows: The applicant and N were equal shareholders in a company. Each of them also held the position of director. N's son joined the company and was also made a director, with both the applicant and N transferring shares to him. There was a disagreement between the applicant and N which eventually culminated in N and G passing a resolution to remove the applicant as director. Thus, the applicant petitioned the court to order N and G to purchase his shares or in the alternative that the company be wound up. The main allegation of the applicant was that, although the decision by N and G was gone about lawfully, they had an agreement amongst themselves that each would be participate in the management of the business and he was thus unfairly excluded.

Although the eventual appeal case only dealt with whether the company must be wound up, the court made some interesting remarks about a company structure and the expectations of those involved in the company which can all easily be applied to a case of 'oppression' or 'unfair prejudice'. The court noted that although a company is an entity, there exist individuals within a company 'with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure'.<sup>159</sup> The use of the words 'just and equitable' within the winding up provision<sup>160</sup>, allows for the court to use equity as a yardstick to determine an outcome, and because of equity considerations playing a cardinal role, the court can now also engage with:

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<sup>158</sup> *Ebrahimi supra* note 19.

<sup>159</sup> *Ibid* at 500.

<sup>160</sup> S 222(f) of the Companies Act 1948 as it then was.

*‘Considerations...of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.’*<sup>161</sup>

Here the court clearly refers to exactly what the section 994 remedy covers; situations where a petitioner has been dealt with unfairly or unjustly but not necessarily with regards to their strict legal rights. The court goes further when it warns that the circumstances in which this new principle can apply, should not be defined explicitly.<sup>162</sup> The case, lastly, provides situations where the decision to apply ‘equitable considerations’, or legitimate expectations, would most probably be appropriate:

- i. An association formed or continued on the basis of a personal relationship, involving mutual confidence.
- ii. An agreement, or understanding, that all, or some of the shareholders shall participate in the conduct of the business.
- iii. Restriction on the transfer of the members’ interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.<sup>163</sup>

With the judgement in *Ebrahimi*, English company law suddenly made provision for those cases where an applicant had no clear recourse. Legitimate expectations, as they existed in public law, were drawn into the company structure and found a clear space to flourish. Whether the applicant requested a winding up order or a ‘buy-out’ of his/her own shares, equity and fairness became the manner in which the case would be adjudicated. As Lord Wilberforce stated in *Ebrahimi*, ‘the question is, as always, whether

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<sup>161</sup> *Ebrahimi supra* note 19 at 501.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.* One must keep in mind that the case of *Ebrahimi* was essentially based on a partnership analogy. Although the parties in question had started a company together, it remained nothing but a partnership in its essence. This is how the doctrine of legitimate expectations found its first foothold. In subsequent case law, this partnership analogy became less of an essential requirement and more of a factor in determining the applicability of the doctrine.

it is equitable to allow one (or two) to make use of his legal rights to the prejudice of his associate(s).<sup>164</sup>

Some twenty years later, the House of Lords once again delivered an authoritative judgment on the topic of legitimate expectations in the case of *O'Neill*.<sup>165</sup> The case again hinged on the applicant being promised an increased shareholding and an equal sharing of the profits of the company and eventually receiving none of the above. The applicant averred that the affairs of the company were being conducted in a manner unfairly prejudicial to his interests. Lord Hoffman described the concept of legitimate expectations as:

*'A correlative right to which a relationship between the company members may give rise in a case when, on equitable principles, it would be regarded as unfair for a majority to exercise a power conferred upon them by the articles to the prejudice of another member.'*<sup>166</sup>

The court, however, used this case as a chance to also appropriately constrain the role that legitimate expectations could play in company law. When read in isolation, some comments on legitimate expectations may give the impression that they can exist completely independently, created in the mind of the applicant and then forced on the courts who must give effect to them. But, a careful examination of the above excerpt will indicate that this is not the case. Equitable considerations or legitimate expectations are a 'correlative right' that come into being once the principles of equity deem a situation to be unfair or prejudicial.<sup>167</sup> Thus, the expectations are a consequence of the 'equitable restraint' complained of and not the cause of it. If the normal equitable principles do not give rise to a restraint, then expectations, themselves, cannot do so. In the succinct words of Lord Hoffman, once more:

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<sup>164</sup> *Ebrahimi supra* note 19 at 501.

<sup>165</sup> *O'Neill supra* note 17.

<sup>166</sup> *Ibid* at 971.

<sup>167</sup> *Ibid* at 970.

*'It could exist only when equitable principles...would make it unfair for a party to exercise rights under the articles. It is a consequence, not a cause, of the equitable constraint. The concept of legitimate expectations should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application.'*<sup>168</sup>

(c) Appearance in domestic law

As noted above, the domestic remedy makes provision for cases brought on an interest basis as opposed to a rights basis.<sup>169</sup> Domestic courts have held that the phrasing of minority protection remedies, including the use of words such as 'just' and 'equitable', allow the court a wider discretion than merely considering the rights of the applicant.<sup>170</sup>

The most comprehensive judgement on the section 163 of the 2008 Act remedy was delivered in *Visser Citrus* in which Rogers J dealt with the application of a new appearance in company law, that of legitimate expectations and the protection of interests.<sup>171</sup> The facts of the case are briefly as follows: the applicant (*Visser Citrus*) wished to sell its shares in the first respondent (*Goede Hoop Citrus*) to the only interested buyer found, the second respondent, *Mouton Citrus*. The board of directors of the respondent refused such a transfer of shares without providing reasons (as they were entitled to do in terms of the company's memorandum of incorporation). The applicant then approached the court, requesting an order to affect the transfer and an amendment to the provision affording the powers mentioned above to the directors of the board. The applicant invoked section 163 of the 2008 Act, averring that the refusal to transfer the shares as well as the provision in the memorandum of incorporation was unfairly prejudicial, unjust or inequitable to its interests.

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<sup>168</sup> *Ibid* at 971.

<sup>169</sup> S 163(1)(a) – (c) of the 2008 Act.

<sup>170</sup> *McMillan supra* note 10 para 31.

<sup>171</sup> *Visser Citrus supra* note 9. The judgement discusses the general characteristics of the new s 163 as well as some comments on its application, however, for the purposes of this chapter this dissertation is only interested in the comments on the legitimate expectation doctrine, itself.



The judgement highlights that legitimate expectations is probably the clearest category found in English law of conduct that is unfair but not illegal.<sup>172</sup> Legitimate expectations are those informal arrangements among members, likely found in the form of participation in management, dividend policy and remuneration.<sup>173</sup> Whatever form the arrangement takes, it must be proven by fact (again the court indirectly warns against too vague a principle emerging).<sup>174</sup> As Canadian courts have said, legitimate expectations are not the things that an individual shareholder has on his/her own ‘wishlist’<sup>175</sup> and the court in *Visser Citrus* emphasises that point by noting that:

*‘In the absence of ‘something more’, there is no legitimate expectation that the general meeting, and also the board, will not exercise whatever powers they are given by the articles...’*<sup>176</sup>

The court found in favour of the respondent and held that the applicant had not established any legitimate expectation that the board would not exercise its powers as they appear in the memorandum. Furthermore, a decision by any board to exercise the powers conferred upon them, will in very few cases be unfair especially when the board acted *bona fide* and in line with their fiduciary duties.<sup>177</sup> One can assume that the same rule would hold true for the *bona fide* decisions of majority shareholders.<sup>178</sup> Thus, once again, legitimate expectations must be understood as a consequence and not a stand-alone basis for the application of the section 163 of the 2008 Act (and equivalent) remedy.

Another example of how South African courts have interpreted the interest provision can be found in the case of *McMillan*.<sup>179</sup> The basic outline of the case is as follows: the applicant was the trustee of his family trust and approached the court for an order under

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<sup>172</sup> *Ibid* para 62.

<sup>173</sup> *Ibid*.

<sup>174</sup> *Ibid*.

<sup>175</sup> 820099 *Ontario Inc v Harold E Ballard Ltd* (1991) 3 BLR (2d) at 113.

<sup>176</sup> *Visser Citrus supra* note 9 para 62. See also *Saul D Harrison supra* note 17 at 19.

<sup>177</sup> *Visser Citrus supra* note 9 para 96.

<sup>178</sup> Although it would be more difficult to determine whether such a decision was indeed *bona fide* because of the lack of fiduciary duties owed by shareholders. There is thus no concrete set of duties to measure their decisions against.

<sup>179</sup> *McMillan supra* note 10.

the old section 252 of the 1973 Act, requiring the majority shareholders (or a variety of other persons) to purchase the trust's shares in the seventh respondent (Tygerberg Minolta (Pty) Ltd or 'TBM'), at fair value. The case hinged on the applicant averring that he joined TBM on the premise that he would be involved in the daily management of the company.<sup>180</sup> In other words, he had a legitimate expectation that this would be the state of affairs and the fact that it did not come to fruition was the unfairly prejudicial, unjust or inequitable conduct covered by section 252 of the 1973 Act. The case was initiated, more specifically, as a result of the applicant being excluded from such management and removed as a director. The case is thus a good example of the classic situation of legitimate expectations being frustrated.

The court definitely took heed to the applicant's expectations. They ruled in favour of the applicant, stating that:

*'The unfairness lies not in the legally justifiable exclusion of the affected member from the company's management, but in the effect of the exclusion on any such member – who had become a member only on the understanding that he or she would have an actively participative role...'*<sup>181</sup>

Further:

*'The issue of fault should...not negate the right of a so called quasi-partner member to relief under section 252 when such member has been excluded by the other members from the direct participation in the management of the company contemplated when the member's investment in the company was made.'*<sup>182</sup>

The basis on which the member made their capital investment is a crucial part of a section 252 of the 1973 Act (and thus a section 163 of the 2008 Act) claim from the above excerpts. The legitimate expectation that one will be involved in management is an

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<sup>180</sup> There were other issues dealt with in the case but for the purposes of this discussion, this dissertation will focus on this aspect.

<sup>181</sup> *McMillan supra* note 10 para 40.

<sup>182</sup> *Ibid.*

especially well protected example.<sup>183</sup> However, the domestic courts like the English courts make the point that when the applicant is then offered a fair value for their shares or investment, the unfairness disappears and therewith, the legitimate expectations conundrum. The expectations thus merely facilitate the coming into being of the petition.

- (d) Comparative study of Canadian law
- (i) Application by Canadian courts

As noted above, the Canadian remedy places great emphasis on reasonable expectations. Courts approach this remedy by using a basic standard of fairness based on the reasonable expectations of the applicant. This means that the remedy is not broken up into its individual trigger mechanisms, and even if it were, expectations would still form the basis of any adjudication.<sup>184</sup> The doctrine of expectations is of such importance in the Canadian oppression remedies that the court, in the well renowned case of *BCE*, states that ‘these expectations are what the remedy of oppression seeks to uphold’.<sup>185</sup>

The authors Ben-Ishai and Puri embarked on an empirical study of the 71 oppression cases in Canada from 1995 to 2001.<sup>186</sup> During the study some useful observations were made and can be used to gain further insight into the Canadian approach to the remedy, and more specifically, the role that legitimate expectations play in such cases. They observed that courts attached great weight to the monetary reasonable expectations of shareholders (this observation may not necessarily hold true for non-shareholders) and were willing to protect even the non-monetary expectations of applicants.<sup>187</sup> Not only were the monetary expectations of shareholders considered, the results of the study seemed to indicate that courts are in favour of a ‘shareholder supremacy model’ but with a clear shift towards taking non-shareholder stakeholders into account, such as creditors

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<sup>183</sup> See *Barnard supra* note 7 para 46 and *Donaldson Investments supra* note 8 at 722 and further, *Visser Sitrus supra* note 9 para 62.

<sup>184</sup> Ben-Ishai & Puri *op cit* note 86 at 88.

<sup>185</sup> *BCE Inc supra* note 20 para 63.

<sup>186</sup> Ben-Ishai & Puri *op cit* note 86 at 79.

<sup>187</sup> *Ibid* at 83.

and security holders.<sup>188</sup> They, too, are considered to have reasonable expectations in the company that are equally worthy of protection.

The well-known Canadian oppression case of *BCE*<sup>189</sup>, describes the process of adjudicating an oppression claim as a series of two questions:

- i. Does the evidence support the reasonable expectation asserted by the complainant?
- ii. Does the evidence establish that the reasonable expectation was violated by conduct falling within the terms ‘oppression’, ‘unfair prejudice’ or ‘unfair disregard’ of a relevant interest?<sup>190</sup>

The choice of these two questions once again reiterates the principle that Canadian oppression cases are in actual fact wholly based on reasonable expectations. They form the basis against which conduct is measured.

But how to determine the existence of such an expectation? The court in *BCE*<sup>191</sup> agreed that it is a difficult task to create an exhaustive list of scenarios, however, there are some procedural steps that must be taken. The claimant must first identify the expectation on which they rely followed by eliciting proof that the expectation is in fact reasonable.<sup>192</sup> Certain expectations are to be anticipated, for example, the expectation of any shareholder to be treated fairly.<sup>193</sup> With the development of case law on the topic, some factors have emerged that are useful in determining the existence and the reasonability of an expectation. They include:

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<sup>188</sup> *Ibid* at 98. Even without the observations of this study, s 241(2)(c) of the CBCA expressly includes creditors and security holders, the study merely shows that courts are in fact willing to apply this new and perhaps controversial clause.

<sup>189</sup> *BCE Inc supra* note 20.

<sup>190</sup> *Ibid* para 68.

<sup>191</sup> *Ibid*.

<sup>192</sup> *Ibid* para 70.

<sup>193</sup> *Ibid*.

- i. Commercial practice – a departure from normal business practices could give rise to the remedy.
- ii. The nature of the corporation – courts may afford more leniency to directors of small corporations for effecting any frustration of expectations than to the directors of large corporations.
- iii. Relationships – expectations may come from the relationship between the applicant and other corporate entities/persons.
- iv. Past practise – past practices may create expectations among applicants. These practices may, however, change over time and cannot be seen to frustrate expectations if there are sound business reasons to change practise.
- v. Preventative steps – the courts may look at whether there were any reasonable steps to be taken by the applicant to protect himself/herself from any prejudice allegedly suffered.
- vi. Representations and agreements - shareholders agreements can be considered as encompassing the expectations of shareholders. Furthermore, representations made to shareholders may also create expectations.
- vii. Fair resolution of conflicting interests – certain interests cannot be allowed to prevail over others. It all depends on the individual situation and whether the directors acted in a sound business manner when elevating one interest above another.<sup>194</sup>

Once one or more of these factors are present, courts will be more inclined to accept the reasonable expectation basis of a case. But once again, this list is only a guideline and each court must apply its mind to the facts at hand. The list is, fortunately, not too far reaching or unreasonable and the factors therein can be moulded to various situations. The trite principles still apply, being; certain interests are not automatically superior to others, interests must be weighed, decisions must be made in the interest of the company (employing sound business judgement) and fairness must lay the groundwork for processes and decisions.

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<sup>194</sup> *Ibid* paras 72-81, where each factor is discussed in further detail.

From the above discussion it is clear that Canadian courts have paved the way for reasonable expectations to be at the apex of oppression litigation within company law. There are various tools and methods which can prove to be very useful to jurisdictions in which this remedy is still in its infancy. Although the chances for abuse still exist, the example set by Canadian courts is not overly protective or unbalanced. This dissertation assumed that such a strong emphasis on reasonable expectations would cause a situation too greatly in favour of minority stakeholders but this seems to not be the case. Circumspection combined with age old company law principles is still at the order of the day.

(e) Conclusion

South Africa's inclusion of interests into its minority protection mechanisms is nothing novel and in actual fact, other jurisdictions have a long standing history of protecting interests. On a perusal of section 163 of the 2008 Act, interests seem to be one of the many factors included in the mechanism, however, if domestic courts follow the same approach as Canadian and English courts, interests are fundamental to the entire provision. Minority protection mechanisms seem to be geared at protecting those shareholders who have no rights infringement to aver and therefore, establishing a legitimate expectation or reasonable interest is the only manner in which to succeed with a case.

English law in *Ebrahimi*<sup>195</sup> have provided three instances in which legitimate expectations will most probably exist and the domestic case of *McMillan*<sup>196</sup> is a good example of one such situation. Canadian courts, on the other hand, have created two cardinal questions with which to commence an oppression adjudication (both of which focus purely on interests) in *BCE*<sup>197</sup>, and in the same case also gave a comprehensive list of seven factors that indicate the existence of reasonable interests.<sup>198</sup> Although *Visser*

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<sup>195</sup> *Ebrahimi supra* note 19 at 501.

<sup>196</sup> *McMillan supra* note 10.

<sup>197</sup> *BCE Inc supra* note 20 para 68.

<sup>198</sup> *Ibid* paras 72-81.

*Sitrus*<sup>199</sup> did not apply or use these tools, domestic courts may possibly employ them once further oppression cases come to the fore.

What is consistent in all three jurisdictions examined, is the basic standard of fairness used in adjudicating the cases. Cartwright states that in English law, expectations must be protected by means of fairness and the principles of natural justice.<sup>200</sup> Stated differently, equity must be the yardstick by which opposing interests are measured and balanced. Canadian courts approach these cases in much the same way using a basic standard of fairness.<sup>201</sup> In *Visser Sitrus*<sup>202</sup> and *McMillan*<sup>203</sup>, the court took notice of this and also incorporated fairness in each individual judgement, in line with Canadian and English approaches. The problem with interests will always be in the proving of their existence, first, and then further in proving that they are in fact reasonable. Courts will, as stated above, not simply apply a shareholder's own wishes and whims.<sup>204</sup> There must be factual proof of the expectations and this is where the English and Canadian tools (both the questions and the lists of factors) can prove to be very useful in assisting domestic courts.<sup>205</sup>

Shareholders in South Africa may, to a certain extent, be unaware of the power which interests can bring to their individual plights. This is to be expected because of South Africa's relatively short exposure to this manner in which to treat company law disputes. However, once the remedy takes flight, it is a fast developing one, as is clear from other jurisdictions.

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<sup>199</sup> *Visser Sitrus supra* note 9.

<sup>200</sup> Cartwright *op cit* note 156 at 6.

<sup>201</sup> Cheffins *op cit* note 125 at 313.

<sup>202</sup> *Visser Sitrus supra* note 9 para 62.

<sup>203</sup> *McMillan supra* note 10 para 40.

<sup>204</sup> Corporate Law in Canada *op cit* note 72 at 544.

<sup>205</sup> *Visser Sitrus supra* note 9 para 62.

## 5 CONCLUSION AND RECOMMENDATIONS

The inner workings and finer details of the oppression remedy clearly transform this piece of legislation from *prima facie* simple to in actual fact, quite complex. There are various definitions, interpretations and balancing which must take place in order for the outcome of the remedy to be both equitable and fair. Other jurisdictions which this dissertation has examined have a rich history of the remedy and must be consulted by domestic courts in order to develop and bolster the domestic counterpart.

In a South African context, the new section 163 of the 2008 Act has changed considerably from the old section 252 of the 1973 Act. Oppressive conduct has been removed and replaced by broader trigger mechanisms making the remedy much further reaching. Greater redress has been afforded to applicants by way of the protection of interests, which was never catered for before. This shift is in line with foreign jurisdictions who have undergone much the same process. The trigger mechanisms in the Canadian remedy is identical to section 163 of the 2008 Act but the range of potential applicants in this jurisdiction is greatly inclusive. English minority protection has created one, all encompassing, trigger in the form of unfairly prejudicial conduct and only one type of act or omission is specified. In so doing, the English legislature has made their remedy much simpler and more streamlined. This begs the question whether all the different types of triggers and acts are in fact necessary.

Section 163 of the 2008 Act is quite similar to both section 241 of the Canadian Act and section 994 of the English Act on the adjudication basis of fairness. Courts use equitable principles to determine what is fair and the Canadian courts have even offered a way in which to deal with this value judgement; by discussing why a certain set of circumstances are fair. Unfair conduct needn't be conduct which is unlawful and the motive behind the conduct is not of great importance. There is, quite clearly, no clear definition of unfair conduct but by combining the various court interpretations one can come to a broad conclusion; unfair conduct is that which is neither just nor equitable and which is unreasonable in its essence.



What makes this remedy stand apart, not only in South Africa but also abroad, is the legal protection of a relatively non-specific element; that of interests. A concise picture of the term “unfair” was first required because these interests do not come into being by themselves. There must first be an unfair state of affairs from which these interest can then flow. This is a strange anomaly in the legal field which most often concentrates only on established rights (or at least ascertainable rights). But the main concern surrounding this shift in company law was the possibility of abuse. This concern can be discarded as the discussion above shows. Courts in all jurisdictions examined, focus heavily on keeping this new development in check by way of fact specific allegations and the providing of proof on the part of a petitioner. The trite company law principles have remained intact, albeit stretched (but not inappropriately). What is most important to note is that unfairness and interests must exist and operate in sync to ensure a proper application of the minority protection remedy.

The way forward for South African courts encompasses, largely, a borrowing exercise. There is rich foreign precedent surrounding the minority protection remedy and because section 163 of the 2008 Act is so closely phrased to the remedies in these jurisdictions, it would be wise to use their developments in South Africa. In an effort to determine fairness, courts could use selectively, and possibly adapt, the factors in *Wright*<sup>206</sup>. Knowing when to apply legitimate expectations and to what extent is illustrated in *Ebrahimi*<sup>207</sup> and *BCE*<sup>208</sup>. There is a wealth of definitions, interpretations and processes at a domestic court’s disposal.

It cannot be argued that the remedy is unique with a fine line between protection and exploitation but, because of the safety measures put in place in most of the loci classici, it can be both a necessary and valuable tool in company law legislation. With the inception of the modern remedy in English law, it has become a cardinal part of a stakeholder’s (and especially a minority stakeholder’s) arsenal. The focus on equity and fairness, while

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<sup>206</sup> *Wright supra* note 85 para 25.

<sup>207</sup> *Ebrahimi supra* note 19 at 501.

<sup>208</sup> *BCE Inc supra* note 20 paras 72-81.

creating tailor made solutions for minority groups, is the most important lesson that the legal community can learn from this new stride in company law.

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