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## CLOSE CORPORATIONS AND PRIVATE COMPANIES UNDER AMERICAN AND ENGLISH LAW: PROTECTING MINORITIES

STEPHEN J. LEACOCK\*

Euphemia Donahue, a minority stockholder<sup>1</sup> in The Rodd Electrotype Company of New England, Inc., brought suit against the company, its directors, and Harry C. Rodd, a previous director, officer and the company's controlling shareholder. The plaintiff sought rescission of a July, 1970 transaction, in which the company purchased forty-five shares of its own stock<sup>2</sup> from Harry C. Rodd, at eight hundred dollars (US) per share, totalling thirty-six thousand dollars (US).

In March 1971, Ms. Donahue learned of the purchase for the first time at a special meeting of company stockholders where the president and general manager reported generally on company events of the previous year. The plaintiff voted against a resolution adopting the president's report, and a few weeks later offered her shares to the corporation on the same terms given to Harry C. Rodd. The corporation refused to buy the shares, and Ms. Donahue filed suit.

The Superior Court of Middlesex County, dismissed the suit and Ms. Donahue appealed. The Appeals Court of Massachusetts affirmed, and granted leave for further appeal. Ms. Donahue appealed finally to the Supreme Judicial Court of Massachusetts.<sup>3</sup>

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1. She held twenty percent of the outstanding shares.

2. Purchase by a company of its own shares is perfectly legal and is the norm in the United States. In England, however, Companies Act, 1948, ch. 38 § 54, except as specified, expressly prohibits companies from purchasing their own shares or providing any financial assistance for such purchases. Instone, *Section 54 and All That*, 1980 J. Bus. L. 99.

3. *Donahue v. Rodd Electrotype Company of New England, Inc.*, 367 Mass. 578, 328 N.E.2d 505 (1975) [hereinafter cited as *Donahue*]. Followed in *Cain v. Cain*, 334 N.E.2d 650 (Mass.App.Ct. 1976); *68th Street Apts., Inc. v. Lauricella*, 142 N.J.Super. 546, 362 A.2d 78 (Law Div. 1976), *aff'd*, 150 N.J.Super. 47, 374 A.2d 1222 (App.Div. 1977); *Wilkes v. Spring-side Nursing Home, Inc.*, 370 Mass. 842, 353 N.E.2d 657 (1976); *Tillis v. United Parts, Inc.*,

The court reversed the dismissal, and remanded the case for entry of judgment in favor of the plaintiff.<sup>4</sup> In holding for Ms. Donahue, the court decided that:

[b]ecause of the fundamental resemblance of the close corporation to the partnership, the trust and confidence which are essential to this scale and manner of enterprise, and the inherent danger to minority interests in the close corporation, we hold that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another.<sup>5</sup>

Furthermore, the authorized purchase of Mr. Rodd's shares by the corporation, without providing minority stockholders with an equal opportunity to sell shares to the corporation on the same terms, was held to be a breach of that fiduciary duty.

This case should be viewed as a beachhead of progress in the specific area of fiduciary duties owed among the shareholders in small companies. This decision is potentially useful and should be followed in other jurisdictions in the United States, as well as the courts in the Common Law Commonwealth, but not, however, in England. The approach adopted by the Massachusetts court may be contrasted with the approach of the Chancery Division of the High Court of England in *Clemens v. Clemens Bros. Ltd.*<sup>6</sup>

In *Clemens*, the plaintiff, Miss P.D. Clemens, was a minority

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395 So. 2d 618 (Fla. 1981). Explained in *Zidell v. Zidell, Inc.*, 277 Or. 423, 430, 560 P.2d 1091, 1094 (1977): "We do not believe, however, that the protective approach taken in [*Donahue*] would require the corporation to tailor its policies to favor a minority shareholder at the expense of the majority . . . . That, however, is apparently what plaintiff is seeking in the present case." Rejected in *Clagett v. Hutchinson*, 583 F.2d 1259, 1264 (4th Cir. 1978): "The district court distinguished . . . *Donahue* . . . and held that the Maryland courts would not adopt the [*Donahue*] rule. We agree."

The decision has been viewed with some apparent trepidation because it does not answer the questions that can arise from taking this juridical step. See 89 HAR. L. REV. 423 (1975); 21 VILL. L. REV. 307 (1976). This is, however, predictable because new ideas usually have an initial apprehensive impact. The completed picture often requires years of judicial and academic development to take its final shape.

4. On remand, the Massachusetts Superior Court was directed to either: (1) rescind the purchase transaction between Harry C. Rodd and Rodd Electrotpe Company [hereinafter referred to as R.E.C.] for the forty-five shares; or (2) order R.E.C. to purchase all of Ms. Donahue's forty-five shares in R.E.C. for the same price that it paid Harry C. Rodd. *Donahue*, 367 Mass. at 603, 328 N.E.2d at 521.

5. *Id.* at 592-93, 328 N.E.2d at 515.

6. [1976] 2 ALL.E.R. 268. Noted in 92 LAW Q. REV. 502 (1976). Noted and criticized in 40 MOD. L. REV. 71 (1977), 35 CAMBRIDGE L.J. 235 (1976).

shareholder<sup>7</sup> in a private family company, in which her aunt was the only other shareholder. The articles of association conferred a right of preemption upon the other company shareholders, if any shareholder proposed to transfer company shares. The aunt was one of five company directors, but the plaintiff, however, was not. The directors decided to increase the company's share capital by creating one thousand six hundred fifty ordinary shares with voting rights. Two hundred shares were to be issued to each of the four other directors and the remaining eight hundred fifty were to be placed in trust for long service employees of the company.

When notified by the company secretary of the proposals, and the calling of an extraordinary general meeting for their implementation, the plaintiff, through her solicitor, wrote to her aunt opposing the scheme.<sup>8</sup> Her aunt replied that she supported the plan and was fully aware of its effects.

At the meeting, the plaintiff, through her proxy, proposed an adjournment which her aunt opposed, allowing the three resolutions implementing the plan to pass. Thereupon, the plaintiff brought suit in the Chancery Division of the High Court against the company and her aunt, seeking a declaration that the resolutions were oppressive to the plaintiff and requesting the court to set them aside.

The High Court held that in the circumstances of this case, the aunt's majority votes were subject to equitable principles which prohibited the exercise of her control in a manner unjust to the plaintiff. The effect of the resolutions would be to give complete control to the aunt and the other directors, thereby depriving the plaintiff of her existing rights,<sup>9</sup> and greatly reducing her future prospects of gaining control of the company under article 6 of the company's articles of association.<sup>10</sup> The Court, therefore, ordered

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7. She held forty-five percent of the issued share capital, her aunt held the remaining fifty-five percent. The capital of the company consisted of 200 preference shares (each held 100), and 1800 ordinary shares (the plaintiff held 800, her aunt 1000).

8. The letter pointed out that the plaintiff's shareholding would be reduced to less than twenty-five percent.

9. If the plaintiff's degree of control was reduced from forty-five percent to less than twenty-five percent, she would be deprived of her "negative control", i.e., the voting power to block passage of special or extraordinary resolutions.

10. Because the new shares were issued, the plaintiff would need to purchase more than twenty-five percent of the total company's shares in order to gain control. Whereas before such issue, plaintiff need only have purchased just over five percent of the company's total shares in order to gain control of the company.

that the three resolutions be set aside.

Unlike the Massachusetts Supreme Court, the High Court did not generalize its holding to establish a generic principle applicable to private companies as a whole. Adopting its typical judicial approach, the High Court limited itself to a solution of the problem before it, based upon well established equitable principles. Further, the recent enactment of the Companies Act, 1980,<sup>11</sup> precludes English courts from developing equitable principles applicable to private companies and, hence, from articulating a general principle.

It is, however, readily accepted that many small companies do function in a manner quite similar to partnerships.<sup>12</sup> In addition, it is well established that the primary reasons for incorporation are to allow shareholders to benefit from limited liability<sup>13</sup> and tax advantages, including the accumulation of tax free pension funds.<sup>14</sup> Contrasted with publicly held corporations, there is essentially no public interest in the principles governing small corporations which resemble partnerships. Hence, the interests of the members of these small corporations should predominate. In other words, public interest is neutral with respect to the application or nonapplication of publicly held corporation principles rather than part-

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11. COMPANIES ACT, 1980. See 1 THE COMPANY LAWYER, 135, 190, 233, 280 (1980).

12. Helms v. Duckworth, 249 F.2d 482, 486 (1957) (per Burger, J., now Chief Justice Burger) (court footnotes omitted):

In an intimate business venture such as this, stockholders of a close corporation occupy a position similar to that of joint adventurers and partners. While courts have sometimes declared [that] stockholders 'do not bear toward each other that same relation of trust and confidence which prevails in partnerships', this view ignores the practical realities of the organization and functioning of a small "two-man" corporation organized to carry on a small business enterprise in which the stockholders, directors, and managers are the same persons.

See also Yenidje Tobacco Company, Ltd., [1916] 2 Ch. 426, 432 (per Cozens-Hardy, L.J.): "[I] think the circumstances are such that we ought to apply, if necessary, the analogy of the partnership law . . . to . . . this company. . . ." Comment, 61 IOWA L. REV. 876, 881-882 (1976) (footnotes omitted):

This similitude, the court noted, in the second step of its analysis [of *Donahue*] finds support from three sources, the commentators, the courts, and Congress, all of which have noted that often the close corporation is little more than an "incorporated partnership" in terms of the parties' expectations and the treatment accorded the enterprise by outsiders.

13. PALMER'S COMPANY LAW, ch. 2 (21st ed. 1968); L. GOWER, MODERN COMPANY LAW chs. 2, 3 (3d ed. 1969).

14. Kalish and Lewis, *Professional Corporations Revisited (After the Employee Retirement Income Security Act of 1974)*, 28 TAX LAW. 471 (1975); PALMER'S COMPANY LAW, *supra* note 13, at 843-896; REPORT OF THE COMPANY LAW COMM., CMD. 1749, para. 71 [hereinafter cited as Jenkins Report].

nership principles.<sup>15</sup>

In such a situation, therefore, the court should adopt those principles which best reflect the aspirations of the members of this type of business organization, and which best protect the totality of their interest in such a business organization. The landmark decision in *Donahue v. Rodd Electrottype Company of New England* will prove to be of immeasurable assistance in achieving these objectives.<sup>16</sup>

Of course, applying fiduciary standards to small corporations that have hitherto been applicable to partnerships, is not a panacea.<sup>17</sup> It gives the courts a broad general principle to work with but, specific details will now have to be etched in with great care. As the Massachusetts Court pointed out, there is, primarily, the

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15. MELVIN A. EISENBERG, *THE STRUCTURE OF THE CORPORATION* 18 (1976): "In formulating a normative model of decision making in the closely held corporation, no consideration of public policy appeared applicable except the protection of fair expectations." The articulated *Donahue* fiduciary duty lends assistance to achieving this objective.

16. Justice Wilkins in his concurring opinion agreed that substantially the same fiduciary duty that applies to partners in a partnership applies to shareholders in a close corporation with respect to share transactions of this type, but did not concur in the application of this fiduciary duty to *all matters in a close corporation*. *Donahue*, 367 Mass. at 604, 328 N.E.2d at 521, (Wilkins, J., concurring):

I agree with much of what the Chief Justice says in support of granting relief to the plaintiff. However, I do not join in any implication . . . that, the rule concerning a close corporation's purchase of a controlling stockholder's shares applies to *all operations of the corporation* as they affect minority stockholders. . . . The analogy to partnerships may not be a complete one. (Emphasis added.)

17. Indeed, one writer perceives it as being potentially dangerous: "The confusion thus generated by *Donahue* is potentially dangerous in light of the *extreme fiduciary obligation* it imposes upon close corporation shareholders." (Emphasis added.) Note, 21 VILL. L. REV. 307, 315 (1976). Another does not feel entirely comfortable with it:

These two themes, the inadequacy of prior remedies and corporate citizenship, are developed in the *Donahue* opinion into the principle that shareholders in a close corporation owe each other a duty of "utmost good faith and loyalty." Yet the distinction between this duty and the duty owed by directors and controlling shareholders in corporations generally—to act in "good faith and with inherent fairness"—is *elusive*. The court's exhortation makes it clear that Massachusetts courts can be expected to supervise more carefully at least some business decisions of close corporations; but which decisions those may be cannot readily be determined because of the *abstract nature of the court's announced principle*. (Emphasis added.)

89 HARV. L. REV. 423, 428 (1975) (footnote omitted). See also, Hetherington & Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution To The Remaining Close Corporation Problem*, 63 VA. L. REV. 1, 15 (1977) (footnotes omitted): "Chief Justice Tauro in *Donahue* observed that shareholders in close corporations must deal with each other on the basis of 'the utmost good faith and loyalty' . . . These laudable sentiments seem likely to enhance the protection of minority shareholders only marginally."

problem of defining the close corporation. Two factors predominate. First, the size of the corporation, and second, the manner in which it functions structurally. In other words, when deciding whether or not a concern is a close corporation, a court should be pragmatic, looking at the particular facts and circumstances surrounding the size and operation of each corporation.

In *Donahue*, the court dealt with this problem and after reviewing the authorities, concluded: "We deem a close corporation to be typified by: (1) a small number of stockholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operations of the corporation."<sup>18</sup> The court fully accepted that close corporations "have never been defined precisely,"<sup>19</sup> but quite rightly accepted that "the distinctive nature of the close corporation"<sup>20</sup> is well recognized judicially. Thus, the courts will be able to determine in each individual case whether or not the particular corporation should or should not be deemed a close corporation. It is a classic example of looking to substance<sup>21</sup> rather than form. The distinction should be made between a corporation that functions in a close and commercially intimate manner, much like a partnership, and a corporation that has a relatively small number of shareholders, but does not function in a milieu of mutual obligation and trust.<sup>22</sup>

In the English context, however, the approach of the Chancery Division of the High Court in *Clemens* is to be preferred.<sup>23</sup> In sub-

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18. 367 Mass. at 586, 328 N.E.2d at 511. Comment, 61 Iowa L. Rev. 876, 881 (1976) (footnotes omitted):

The court's definition represents a synthesis of the attributes commonly ascribed by legal writers to the close corporation. This definition of a close corporation suggests that the facts of *Donahue* come within the court's definition of a close corporation as there were only six shareholders, there was no market for the shares and the Rodds had continually held prominent management positions.

19. 367 Mass. at 586, 328 N.E.2d at 511.

20. *Id.*

21. *E.g.*, 68th Street Apts., Inc. v. Lauricella, 142 N.J. Super. at 560, 362 A.2d at 86 (Law Div. 1976) (Gaulkin, J.): "Denominating the principals as partners or co-venturers not only provides an accurate functional description but also appropriately recognizes the mutual rights and obligations which should characterize their relationship."

22. Sufficiently incisive analysis on this basis will obviate the pitfalls apprehended by this passage: "The *Donahue* court described the close corporation as having a 'small number of stockholders'. This description is unfortunately susceptible to an infinite variety of interpretations, and provides Massachusetts corporations with no particular guidelines to determine whether they fall within the purview of the court's definition of a close corporation". Note, 21 VILL. L. REV. 307, 314 (1976). (footnote omitted).

23. There, the High Court set forth a pragmatic test:

stance, the principles applied in *Donahue* as well as in *Clemens* are generically similar. Both approaches are equitable. The difference is that because of the close corporation genus in the United States, the Massachusetts court thought it appropriate to establish a general principle.<sup>24</sup> Indeed, there is a wealth of precedent dealing with the fiduciary principles operating internally in partnerships. This can serve as a guide in developing more well-defined principles for the internal operations of small companies. Now, however, if English courts sought to follow *Donahue*, English law would pose problems similar to those caused by American law vis-à-vis the definition of a close corporation. The troubling question is, however, which companies would be subject to this new set of equitable principles, and which would not.

Under English company law, it might appear at first blush that private companies<sup>25</sup> would be the appropriate category of companies to which these principles should apply. Private companies, however, are no longer limited with respect to the number of shareholders they may have.<sup>26</sup> Thus, under English company law, the number of shareholders will not be a distinguishing feature by which companies may be categorized. Since the enactment of the Companies Act, 1980, there has been a reclassification of companies. In section 1(1), for example, an essential change is that all companies which are not public companies shall be private companies. Thus, some of the companies that would have been public under the prior law, will now fall into the residuary private category. There is therefore no uniform class of companies under English law that will be the approximate equivalent of the American

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I have come to the conclusion that *it would be unwise to try to produce a principle*, since the circumstances of each case are infinitely varied. It would not, I think, assist to say more than that in my judgment Miss Clemens is not entitled as of right to exercise her votes as an ordinary shareholder in any way she pleases. To use the phrase of Lord Wilberforce, that right is 'subject . . . to equitable considerations . . . which may make it unjust . . . to exercise [it] in a particular way' (emphasis added).

[1976] 2 All. E.R. at 282 (Foster, J.) (footnotes omitted). One commentator observed that: "it may be that Foster J. in *Clemens v. Clemens Bros. Ltd.* was pointing a rather unsure finger in [the] direction [of *Donahue*]." 92 LAW Q. REV. 502, 506 (1976).

24. The *Donahue* decision is the genesis of the fiduciary duty owed by each shareholder in a close corporation to the other in such a corporation. New Jersey and Florida are the only other American common law jurisdictions to date that have followed *Donahue*, and Maryland has roundly rejected it. See *supra* note 3.

25. See COMPANIES ACT, 1980, ch. 7, § 1. Under this section some companies that would have been public under prior law will now fall into the private category.

26. *Id.* § 1(1).



close corporation. There is the problem of the private company that is, in fact, not run with the same degree of mutual trust and confidence as a partnership. The same fiduciary duties could not be applied to such companies without stifling their freedom of operation.<sup>27</sup> Arguably, in light of this method of operation, no fiduciary duties should automatically exist among the members of these private companies, if a high degree of mutual trust and confidence does not predominate. The shareholders must then accept this method of operation along with the concomitant greater freedom of discretion allowed the board of directors. Accordingly, the burden of establishing the existence of fiduciary duties would rest upon those alleging their existence.

Private companies will commit a statutory offense by offering their shares or debentures to the public.<sup>28</sup> This provision, however, does not support or even suggest that fiduciary duties can lean on such a slender reed. Consequently, where there is substantial stockholder participation in the management, direction, and operation of a private company,<sup>29</sup> the English courts can evaluate the total picture to determine whether those private companies exhibit characteristics similar to those of close corporations in the American context. The determination would be substantive and fundamental, not superficial. By establishing that those private companies are subject to substantially the same fiduciary principles that govern partnerships internally, courts will not be restricted in performing their problem-solving function vis-à-vis dissimilar private companies.

One commentator has articulated the central issue in *Clemens* as "... whether shareholders are subject to duties which restrict the use of their votes at general meetings."<sup>30</sup> Subsequently, the same commentator accurately summarized general company law prior to *Clemens* as follows: "When voting, the shareholder is fully entitled to take account of his own personal interests and disregard the competing interests of other shareholders."<sup>31</sup> Ultimately, the

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27. The absence of mutual trust and confidence *in fact* would preclude the existence of fiduciary duties *in law*.

28. COMPANIES ACT, 1980, ch. 7, § 15(1).

29. *E.g.*, *H.R. Harmer, Ltd.* [1958] 3 All E.R. 689; *Noted in* 22 MOD. L. REV. 340 (1959); 18 CAMBRIDGE L.J. 37 (1959).

30. 40 MOD. L. REV. 71 (1977).

31. *Id.* at 72 (footnote omitted). He continued, identifying the well established exceptions: "Yet it is equally clear that the courts will intervene to protect a minority's contractual or proprietary rights, where a resolution seeks to expropriate property of the company,

commentator criticized the decision for its application of the commonly applied determinative test.<sup>32</sup> Had this test been applied in *Clemens*, with respect to the usual hypothetical shareholder, the answer might well have been reversed. For example, if the objective of the resolutions was for the benefit of such hypothetical shareholder, the resolutions should have been allowed to stand.

Thus, by asking "[d]id the aunt honestly believe that the scheme would be for the benefit of the plaintiff?"<sup>33</sup> the court departs totally and unequivocally from the hypothetical shareholder standard and adopts a personified shareholder standard. This departure is only rationally justifiable where a fiduciary duty is owed by those who proposed and supported the resolution to such personified shareholder. Thus, for the survival of *Clemens*, the genetic nucleus of *Donahue* must inhere thereto, because without it, the rational force of the *Clemens* decision spontaneously disintegrates. The commentator's criticism is apt and salutary where there is a unitary set of company law fiduciary principles, identically applicable to public and private companies alike. If, however, there is fundamental divergence in this respect between the fiduciary duties owed among shareholders in a specific type of private company in English law, then the criticism is disembodied.

The criticism of *Clemens* is incontrovertible when each shareholder in a private company is subject to identical fiduciary duties (i.e. none). If, however, it is indeed the position in English law that each shareholder in some private companies does owe the other fiduciary obligations, then the criticism would be refutable. The *Clemens* decision would, therefore, be limited to that specific type of private company, by virtue of the fiduciary duties peculiar to those companies.

There are advantages in adopting the *Clemens* fiduciary duty principle. The decision provides the courts with more flexibility in

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or of the minority, or to permit directors to defraud the company—the cases of 'fraud on the minority' " (footnote omitted). *Id.* As he implied, this fact pattern did not come within the "fraud on the minority" exceptions. Mention should be made at this point of a recent case that (if its *obiter dicta* are followed) threatens to reverse the orthodox and heterodox positions on this point: *Prudential Assurance Ltd. v. Newman Industries Ltd.* (No.2) [1980] 2 All. E.R. 841; [1980] 3 W.L.R. 543. *Noted and (its obiter dicta) criticized in* 44 Mod. L. Rev. 202 (1981); 40 CAMBRIDGE L.J. 29 (1981). *Also noted in* 1980 J. BUS. L. 415; 130 NEW L.J. 392 (1980). *See also* Burridge, *Wrongful Rights Issues*, 44 Mod. L. Rev. 40 (1981).

32. The commentator noted that the court looked at "whether the resolution was passed 'bona fide for the benefit of the company as a whole' " *Supra* note 30, at 72.

33. [1976] 2 All. E.R. 268, 281 (emphasis added).

solving the myriad problems resulting from the stress and strain of operating that type of private company. It also complements the provisions of the Companies Act, 1980, which apply specifically to the area of unfair prejudice to stockholders in English companies.

If one considers other possible solutions, one must note that English company law provides the "remedy" of winding up, when company affairs are conducted in a manner oppressive<sup>34</sup> to some of the members of such company. The petitioner, however, must shoulder the burden of proof that the oppression is of such intensity that it is just and equitable to wind up the company.<sup>35</sup> Moreover, after a careful and thoughtful analysis of this remedy in light of its full consideration by the House of Lords in a recent case,<sup>36</sup> one author lamented: "[I]t is regrettable that an aggrieved minority member of a small private company should have to think of winding up as one of his major remedies. Its subtlety as a form of cure for ailing companies is that of a sledge-hammer. . . ."<sup>37</sup> Finally, he concluded: "In the meantime, the only justification for keeping alive the sledge-hammer remedy of section 222(f) in this particular context is that frequently nothing else is available. When other more flexible remedies are subjected to appropriate reform, the sledge-hammer need only be used where euthanasia is utterly essential."<sup>38</sup>

Winding up is still a rather final solution. A corporation may be functioning profitably and its members may be able to continue its profitable operation if a particular dispute is effectively settled. In such situations, to wind up the company might, at best, be the least of several evils, rather than the best solution. Application of the fiduciary duty standard among shareholders in that specific type of private company could quite conceivably provide the framework to generate alternative solutions, from which the court could select the most appropriate.<sup>39</sup>

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34. Oppressive is defined as conduct that is "burdensome, harsh, and wrongful," by Lord Simonds in *Scottish C.W.S. Ltd. v. Meyer*, [1959] A.C. 324, 342, *quoted in* 17 CAMBRIDGE L.J. 152 (1958). See PALMER'S COMPANY LAW, *supra* note 13, at 514.

35. COMPANIES ACT, 1948, 11 & 12 Geo. 6, ch. 38, § 222(f); *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360, *thoroughly discussed in* Chesterman, *The "Just and Equitable" Winding Up of Small Private Companies*, 36 MOD. L. REV. 129 (1973); *noted in* 88 LAW Q. REV. 468; L. GOWER, *supra* note 13, at 596-604.

36. *Ebrahimi v. Westbourne Galleries Ltd.* [1973] A.C. 360.

37. Chesterman, *supra* note 35, at 149-50.

38. *Id.* at 152 (footnote omitted).

39. Such fiduciary duty would, it is submitted, be one of the ". . . more appropriate surgical instruments [available to the courts] when confronted with the typical grievances of

The new "alternative remedy," section 75 of the Companies Act, 1980, provides English courts with statutory power to fashion a remedy. Thus, the legislature has eliminated the most serious obstacle to invoking this remedy which existed under section 210 of the 1948 Act. Under the prior law "The problems posed by the section [tended] to divide themselves into two: (i) the preliminary hurdles to relief; and (ii) the meaning of 'oppression'."<sup>40</sup> However, at least one preliminary hurdle still confronts a petitioner. He must prove that his petition is presented in the capacity of a company member.<sup>41</sup> Admittedly, under the provisions of section 75(9),

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minority members of small private companies." *Id.* at 150.

40. Note, 29 MOD. L. REV. 321 (1966).

41. *Bellador Silk Ltd.*, [1965] 1 All E.R. 667; *Lundie Brothers, Ltd.*, [1965] 2 All E.R. 692. Both noted in 29 MOD. L. REV. 321 (1966). The petitioner must be oppressed in his capacity as shareholder. An oppressed director, debentureholder or other creditor who is also a shareholder is outside the protection of the section if the oppression is not in his capacity as shareholder. L. GOWER, *supra* note 13, at 600-602. The South Carolina provisions could usefully serve as a model for legislative amendment in England. It enacts at S.C. CODE ANN. § 33-21-150 (1976):

Dissolution pursuant to court order.—The courts of this State shall have full power to decree the dissolution of, and to liquidate the assets and business of, a corporation:

(a) In an action filed by a shareholder, when it is established that:

(1) The directors of the corporation are so divided respecting the management of the corporation's business and affairs that the votes required for action by the board of directors cannot be obtained and the shareholders are unable to terminate the division, with the consequence that (A) the corporation is suffering or will suffer irreparable injury, or (B) the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally.

(2) The shareholders are so divided that they have failed, for a period which includes at least two consecutive annual meeting dates, to elect successors to directors whose terms have expired or would have expired upon the qualification of their successors.

(3) The shareholders are so divided respecting the management of the business and affairs of the corporation that (A) the corporation is suffering or will suffer irreparable injury, or (B) the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally.

(4) *The acts of the directors or those in control of the corporation (A) are illegal or fraudulent or dishonest, or (B) are oppressive or unfairly prejudicial either to the corporation or to any shareholder whether in his capacity as a shareholder, director, or officer of the corporation.*

(5) The corporate assets are being misapplied or wasted.

(6) The petitioning shareholder has a right under a provision of the articles of incorporation as permitted by § 33-21-140 to dissolution of the corporation at will or upon the occurrence of any specified event or contingency.

(7) The corporation has abandoned its business and has failed, within a reasonable time, to take steps to dissolve and liquidate its affairs and distribute its assets.

(b) In an action filed by a creditor of the corporation; (1) When the claim of the creditor has been reduced to judgment and execution thereon returned unsatis-

personal representatives and trustees in bankruptcy are empowered to petition as well, but perhaps this does not go far enough. Section 75(2) allows the secretary of state to petition in specified circumstances, and this may provide a circuitous route for persons other than members, or members in a non-member capacity.

Fortunately, the petitioner is no longer required to prove that the situation necessitates the company's winding up on the just and equitable criteria,<sup>42</sup> that winding up the company would unfairly prejudice the rights of some company members, including the petitioner, and that an alternative remedy is available.<sup>43</sup> Sec-

fied and it is established that the corporation is insolvent; or

(2) When the corporation has admitted in writing that the claim of the creditor is due and owing and it is established that the corporation is insolvent.

(c) Upon application by a corporation which has filed a statement of intent to dissolve, as provided in Chapters 1 to 25 of this Title, to have its liquidation continued under the supervision of the court.

(d) When an action has been filed by the Attorney General to dissolve a corporation and it is established that liquidation of its business and affairs should precede the entry of a decree of dissolution.

(e) Proceedings under subsections (a), (b), or (c) of this section shall be brought in the county in which the registered office or the principal office of the corporation is located.

(f) In determining whether dissolution shall be ordered on petition of a shareholder under subsection (a), dissolution shall not be denied solely because it is found that the business of the corporation has been or could be conducted at a profit (emphasis added).

The section was interpreted and applied in *Segall v. Shore*, 269 S.C. 31, 236 S.E.2d 316 (1977). In the view of one commentator: "The South Carolina statute makes several improvements upon the section 210 Model and thus offers effective protection to minorities." Afterman, *Statutory Protection For Oppressed Minority Shareholders: A Model For Reform*, 55 VA. L. REV. 1043, 1075 (1969).

42. COMPANIES ACT, 1948, 11 & 12 Geo. 6, ch. 38, § 210(2)(b), *repealed by* COMPANIES ACT, 1980, ch. 22.

43. See *Scottish C.W.S. v. Meyer*, [1958] 3 W.L.R. 404; *H.R. Harmer, Ltd.*, [1959] 1 W.L.R. 62. The new provisions confer wider powers on the court and compare more favorably with the South Carolina statute which provides:

§ 33-21-155 Discretion of court to grant relief other than dissolution.

(a) In any action filed by a shareholder to dissolve the corporation on the grounds enumerated in § 33-21-150 the court may make such order or grant such relief, other than dissolution, as in its discretion it deems appropriate, including without limitation, an order

(1) Cancelling or altering any provision contained in the articles of incorporation, or any amendment thereof, or in the bylaws of the corporation;

(2) Cancelling, altering or enjoining any resolution or other act of the corporation;

(3) Directing or prohibiting any act of the corporation or of shareholders, directors, officers or other persons party to the action; or

(4) Providing for the purchase at their fair value of shares of any shareholder, either by the corporation or by other shareholders.

(b) Such relief may be granted as an alternative to a decree of dissolution, or

tion 75 of the Companies Act, 1980, has removed these formidable preliminary hurdles.

The new provisions provide relief from "unfairly prejudicial conduct" rather than "oppression" under the prior law. The House of Lord's definition of oppression was difficult to overcome.<sup>44</sup> It required a *course* of conduct; therefore, a single instance of burdensome, harsh, and wrongful conduct did not suffice.<sup>45</sup> One commentator observed that "section 210 provides no criteria for assessing when the affairs of the company are being oppressively conducted . . . ."<sup>46</sup> In practice, the section had not worked well. The recent failures<sup>47</sup> of petitions presented under this section provided

*may be granted whenever the circumstances of the case are such that relief, but not dissolution, would be appropriate* (emphasis added).

In South Carolina, the alternative remedy the petitioner seeks need not necessarily be specifically identified by him. Proof of sufficient grounds for winding up the corporation, in addition to proof that to do so would unfairly prejudice the interests of some members, (including the petitioner), are not conditions precedent to action by the court to grant an alternative remedy. The whole matter rests in the discretion of the court.

44. Indeed, only in *Scottish C.W.S. v. Meyer*, *supra* note 43, and in *H.R. Harmer, Ltd.*, *supra* note 43, was "oppression" proved. In a third case, *Jermyn Street Turkish Baths, Ltd.*, [1970] 1 W.L.R. 1194, the petitioner was initially successful, but the decision was reversed on appeal, [1970] 1 W.L.R. 1042, and petition for leave to appeal to the House of Lords was dismissed. [1971] 1 W.L.R. 1286.

45. The Jenkins Report had recommended that a single occurrence of oppressive conduct should be enough. REPORT OF THE COMPANY LAW COMMITTEE, CMD. 1749, para. 212(b). The English legislature has now enacted this recommendation in section 75, as did the Jamaican legislature earlier in the JAMAICA COMPANIES ACT OF 1965, § 196(6) which provides: "(6) For the purposes of this section the word 'oppressive' shall include any instance of oppression whether constituted by a single act or by a course of conduct." See generally Leacock, *Company Law Reform in Jamaica*, 1975 J. BUS. L. 252.

46. Rajak, *The Oppression of Minority Shareholders*, 35 MOD. L. REV. 156, 162 (1972). Professor Rajak continues:

The tension in the law is created, it is submitted, by the democratic process which *ex hypothesi* implies the existence of a dissenting minority, whose reasons for dissent may be sensible and valid. The lot of the minority is not merely that others have expressed a different view but that it is required to embrace that view. Yet to allow otherwise constitutes the radical step of flouting the majority vote, made all the more grave by the fact that it is taken by a judiciary with a self-professed ignorance in matters of business. It can therefore be appreciated that very strong justification is necessary for oppression *de facto* to be declared to be oppression *de jure*. It is at that point that conduct becomes "harsh, burdensome and wrongful" or contains "an element of lack of probity and fair dealing" or constitutes "a visible departure from the standards of fair dealings and a violation of the conditions of fair play" or in short "oppressive".

*Id.* at 162-63 (footnote omitted).

47. *Bellador Silk Ltd.*, *supra* note 41, *Lundie Brothers, Ltd.*, *supra* note 41; *Five Minute Car Wash Service Ltd.*, [1966] 1 All E.R. 242; *all noted in* 29 MOD. L. REV. 321 (1966). In contrast, in *Wilkes v. Springside Nursing Home, Inc.*, 370 Mass. 842, 353 N.E.2d 657 (1976), the Supreme Judicial Court of Massachusetts applied the *Donahue* fiduciary princi-

fresh proof<sup>48</sup> of its hazardous technical maze.

In contrast, unfairly prejudicial conduct should not be as formidable an obstacle as oppression was under the prior law. If a shareholder can show that he is treated less favorably than another shareholder similarly situated, then, arguably, there is prejudicial conduct. Such conduct is unfair if the petitioner can show that there is no reasonable basis for such treatment, allowing the courts to apply the familiar "reasonable person in the circumstances" test. The change is one of degree rather than genus, and most likely, the conduct in at least some of the recent cases would have met the new standard. In addition, a single instance of unfairly prejudicial conduct would violate the new provisions because they state "or that any actual or proposed *act* or *omission* of the company . . . is or would be so prejudicial."<sup>49</sup> This closes a serious lacuna that existed under the prior provisions.

The new provisions are salutary and long overdue, but they do not obviate the need for the *Clemens* standard. Mutual trust, obligation, and vulnerability are pervasive in small private companies and require relentless and supreme<sup>50</sup> duties beyond those applicable to companies in general (whether private or public). It will be somewhat easier to prove breach of a fiduciary duty of the utmost good faith and loyalty, than to prove that particular conduct is unfairly prejudicial or, *a fortiori*, that the conduct justifies a just and equitable winding up. The *Clemens* decision augments the controlling shareholders' statutory negative obligation<sup>51</sup> by adding a positive obligation.<sup>52</sup>

Alternatively, fiduciary duties owed among shareholders in a private company (or even a public company) could conceivably be

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ple and held that the minority shareholder plaintiff was entitled to damages because majority shareholders in the close corporation had not shown a legitimate business purpose for removing him from the payroll of the corporation, and refusing to re-elect him as a salaried officer and director. The corporation had never paid dividends.

48. As Professor Rajak, *supra* note 47, at 169 stated: "[s]ection 210 was a bold but, it is submitted, unsuccessful attempt to strengthen the position of minority shareholders. The need for a jurisdiction as offered by that section is undoubted, but bold, enlightened and supported initiative is needed to make it a reality."

49. COMPANIES ACT, 1980, ch. 7, § 75(1).

50. *Meinhard v. Salmon*, 249 N.Y. 458, 468, 164 N.E. 545, 548 (1928).

51. An example of a negative statutory obligation is not to conduct the affairs of the company "in a manner which is unfairly prejudicial to the interests of some part of the members." See COMPANIES ACT, 1980, ch. 7, § 75(1).

52. An example of a positive statutory obligation is to act towards the minority shareholders with the utmost good faith, fairness and loyalty.

created by the articles of association.<sup>53</sup> These, when registered with the registrar of companies, bind the company and its shareholders to observe all their provisions as if each had contracted to this effect.<sup>54</sup> Therefore, an article worded: "Every person on becoming a member of this company shall upon becoming such a member owe fiduciary duties of the utmost good faith and loyalty to each and every other member of this company" could, by virtue of the statutory contract created by section 20 of the Companies Act, 1948, achieve for such company the same objective as the *Clemens* and *Donahue* decisions.

This notion is premised upon:

the rather heterodox proposition<sup>55</sup> that a shareholder has not merely particular rights under the Articles of Association, but a *general contractual right to have the articles observed* by the company; and that this right extends to the enforcement by injunction or declaration of "outsider-rights", which the articles purport to bestow upon himself or upon others, provided always that he makes out his case *qua member* and does not appear in the capacity of "outsider". . .<sup>56</sup>

This concept also rests upon orthodox English company law principles on this point,<sup>57</sup> because the fiduciary duty as articulated would be owed to each member *qua member*.

In practice, however, this solution presents a minority shareholder with the insuperable difficulty of persuading sufficient other members to insert such a provision into the articles, either originally, or by amendment.<sup>58</sup> In any event, the *Clemens* decision and the previously discussed provisions of the Companies Act, 1980, have perhaps, eliminated much of the doubt regarding the efficacy of English company law in solving small company conflicts which

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53. Legislation is another possible, but seemingly unlikely method of creating fiduciary duties among shareholders.

54. See COMPANIES ACT, 1948, ch. 7, § 20.

55. The question might now be how far apart are the heterodox proposition and the orthodox principles of company law on this point. It is submitted that the divergence is one of parameters and not of fundamental principle. See *Bamford v. Bamford*, [1969] 1 All E.R. 969; *affirming* [1968] 2 All. E.R. 655; *noted in* 31 Mod. L. Rev. 688 (1968); *Hogg v. Cramphorn Ltd.*, [1966] 3 All E.R. 420; 30 Mod. L. Rev. 77 (1967). See also *Richmond Gate Property Co. Ltd.*, [1964] 3 All E.R. 936; 28 Mod. L. Rev. 347 (1965). Cf. 29 Mod. L. Rev. 608 (1966); Gower, *supra* note 13, at 261-65.

56. Note, 18 CAMBRIDGE L.J. 37, 40 (1959).

57. *Id.*

58. Under COMPANIES ACT, 1948, § 23.



arise.<sup>59</sup>

Arguably, limiting this fiduciary duty exclusively to a particular type of private company may be criticized as being too restrictive. One may ask whether it is conceivable that the court will ever hold that the acts of shareholders of a public company are in breach of equitable principles which will justify court action to provide a remedy for affected shareholders. Most likely, one must answer in the affirmative.

The approach of Judge Foster in *Clemens* is unassailable when such problems arise in public companies.<sup>60</sup> If the public company is sufficiently similar to a private company or close corporation, then in light of the particular facts it is appropriate to apply equitable principles to provide an effective solution to the problem. It would, indeed, be difficult to argue convincingly, that the general principle articulated by the Massachusetts court should be applied to all public companies.<sup>61</sup>

First, shareholders in public companies in both the United States and England usually have access to public markets for the purchase and sale of their securities. Further, in England, there is no statutory offense for making offers or sales of the securities of public companies to the public as there is with respect to private companies.<sup>62</sup> Therefore, shareholders who are negatively affected by internal action in a public company can readily dispose of their shares and thereby avoid further detriment.<sup>63</sup>

Second, a small number of shareholders is not a projected norm for public companies. Indeed, the objective in creating a public company is usually to gain access to capital from the public at

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59. L. GOWER, *supra* note 13, at 596-604.

60. *Donahue*, 367 Mass. at 585, 328 N.E.2d at 511. "[W]e limit the applicability of our holdings to 'close corporations' . . . Whether the holding should apply to other corporations is left for decision in another case, on a proper record." Therefore, the prospect of applying these principles to a non-close corporation in appropriate circumstances, is thus, not ruled out. *Id.*

61. See *Close Corporations—Rights and Duties of Shareholders: Donahue v. Rodd Electrotype Company of New England, Inc.*, 61 CORNELL L. REV. 986, 1016 (1976). See also Comment, *The Standard of Fiduciary Duty in a Close Corporation*, 61 IOWA L. REV. 876, 895-96 (1976).

62. COMPANIES ACT, 1980, ch. 7, § 15(1).

63. The price such shareholders may receive is not always as good as they would prefer, but at least, the possibility for sale is there. Besides, the protection afforded minority shareholders in public companies in both the United States and England, by the "fraud on minority" concept is, reasonably satisfactory. See H. G. HENN, *LAW OF CORPORATIONS* 475-82 (1970); L. GOWER, *supra* note 13, at 564-580, and the cases there cited.

large. Infinity, rather than smallness in the number of members, is the preferred goal.

Third, the coincidence of functions between shareholders, on the one hand, and directors, managers, and operational personnel, on the other, is not the usual situation in a public company. This structure tends to permeate the typical close corporation and certain types of private companies. In public companies, however, there tends to be the opposite situation. Distinct separation between share ownership and management functioning is the norm.

There does exist a more or less standardized model of corporate decision making—what we call the received model—whose general outlines are well known . . . Under [this] model, however, no one acts as agents of the shareholders . . . the officers are agents of the board . . . [which] is conceived to be an independent institution, not directly responsible to shareholders in the matter of an agent.<sup>64</sup>

Hence, with respect to the management of public companies, the shareholders do not operate in a milieu of mutual confidence, trust, and obligation. Essentially, they do not manage the corporation at all. By virtue of detailed provisions in the articles of association and the operation of the proxy machinery by management, shareholders often tend to be quiescent and entirely dependent on the business managers of the corporation. In the United States: “. . . [G]enerally speaking, shareholders in publicly held corporations are not presently entitled to vote on business decisions in any event . . .”<sup>65</sup> and in England: “The modern rule . . . is that under an article in the terms of table A the members in general meeting cannot give directions on how the company’s affairs are to be managed, nor can they overrule any decision come to by the directors in the conduct of its business.”<sup>66</sup> Therefore, the substratum of components on which the *Donahue* fiduciary duty rests is absent in publicly held companies negating any rational basis for an argument which would support its extension to such companies.

Finally, now that the Massachusetts Supreme Court has taken the plunge in the United States, and the *Clemens* court in Eng-

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64. Eisenberg, *The Legal Roles of Shareholders and Management in Modern Corporate Decision Making*, 57 CAL. L. REV. 1, 4-5 (1969). See also R. NADER, M. GREEN, J. SELIGMAN, *Constitutionalizing the Corporation: The Case For Federal Chartering of Giant Corporations*, ch. IV (1976).

65. M. EISENBERG, *THE STRUCTURE OF THE CORPORATION*, 28 (1976).

66. L. GOWER, *supra* note 13, at 132.

land, it will be easier for subsequent courts in both countries to follow suit. Establishing such fundamental principles is not rash, extreme, nor overbroad, despite the significantly dissimilar companies to which these decisions will apply in their respective jurisdictions. Admittedly, this solution may not be the corporate promised land. It fails to decide the fundamental question: should the will of the majority in a close corporation in the United States, and in some private companies in England, sometimes prevail when the minority may suffer? Most likely, the prior prevailing view<sup>67</sup> will continue to dominate. One crucial issue, however, remains unresolved. What degree of suffering must the minority endure before the court will intervene? In other words, how much control can the majority exercise without breaching its fiduciary duty?

Courts will undoubtedly continue to answer this question with the typical response that the majority can exercise an *appropriate degree* of control. As a result of both *Donahue* and *Clemens*, however, courts will engage in stricter scrutiny of majority action. Certainly, penumbral areas must lie ahead. Future courts, however, will be capable of providing the necessary illumination as such areas become apparent. Most likely, judicial osmosis will complete the process of absorption.

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67. Which is *Yes*, if they are pursuing a sufficiently significant legitimate business objective which outweighs (from the complaining shareholder's point of view) the negative impact on the complaining shareholder. In *Donahue* there was no legitimate business objective. The goal of the scheme seemed to be to provide liquidity for the retiring Harry C. Rodd.