Hilary Term
[2019] UKPC 15
Privy Council Appeal No 0077 of 2017

JUDGMENT

Galantis (Respondent) *v* Alexiou and another (Appellants) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Reed
Lord Carnwath
Lord Hodge
Lady Black
Lord Lloyd-Jones

JUDGMENT GIVEN ON

8 April 2019

Heard on 18 February 2019

Appellants
Stephen Hofmeyr QC
Anna Gotts
(Instructed by Clyde & Co LLP)

Respondent
Kahlil D Parker
Roberta W Quant
(Instructed by Cedric L Parker & Co)

LORD LLOYD-JONES:

1. This appeal raises an important issue in the company law of The Bahamas, namely the relationship of sections 272 and 280 of the Bahamian Companies Act 1992 ("the 1992 Act").

2. By a written agreement dated 8 July 1998 Mr Zachary James Galantis ("the respondent") sold his shareholding in a Bahamian company BK Holdings Ltd, with its interest in a lease and its inventory of goods, to another Bahamian company, Ali-Cat Designs Ltd ("the company") for B$500,000. At that date the directors of the company were Mr Antony Alexiou ("the first appellant") and Mr Alexander Alexiou ("the second appellant"). The company paid B$300,000 of the purchase price in cash and the parties agreed that the balance would be paid by instalments secured by a promissory note of the same date.

3. By 6 February 1999 the company had paid the respondent B$36,506.34 towards the B$200,000 debt secured by the promissory note. Thereafter, the company refused to make further payments to the respondent pursuant to the promissory note.

4. On 22 October 1999 the respondent issued proceedings in the Supreme Court of The Bahamas ("Supreme Court") against the company claiming B$182,531.70 in respect of the balance due under the promissory note, interest, damages and costs. On 17 February 2005 the respondent obtained judgment in those proceedings for the full amount claimed plus further interest and costs. An appeal by the company to the Court of Appeal of The Bahamas was dismissed on 14 November 2005. The company never paid the judgment debt.

5. In 2007 the appellants were examined under oath before the Assistant Registrar of the Supreme Court as part of the process of enforcing the judgment against the company. During this process the respondent formed the view that the company's failure to pay involved unfair and oppressive conduct on the part of the appellants. In particular, he learned that the business he had sold to the company had been "converted" by the first appellant, in conjunction with Bahama Republic Ltd, a Bahamian company owned and operated by the first appellant, and which was operating a retail store on the company's former business premises.

6. By letter dated 14 August 2008 the Deputy Registrar General informed attorneys acting for the appellants that the company had been removed from the register of companies as of 25 July 2008.

7. On 21 April 2009, the respondent commenced the present proceedings in the Supreme Court against the appellants in their capacity as former directors of the company. The respondent sought relief pursuant to section 280 of the 1992 Act which enables a complainant, as defined in section 278, to apply to the court for an order against a company or a director or officer of that company to restrain oppressive action.

8. On 29 November 2010 the Supreme Court (Hepburn J) ruled that the respondent was a proper person to institute an action under Part IX of the 1992 Act against the appellants as directors of the company.

9. On 30 May 2014 the Supreme Court gave judgment refusing the substantive relief sought by the respondent. Hepburn J was satisfied that the first appellant had acted in his capacity as a director of the company in a manner that was oppressive or unfairly oppressive to and/or that unfairly disregarded the respondent's interests as a creditor of the company. Furthermore, she was satisfied that the second appellant had at the very least acted in his capacity as a director of the company in a manner that unfairly disregarded the respondent's interest as a creditor of the company. However, she held that the respondent was not entitled to relief under section 280 because the proceedings had been commenced after the company had been removed from the register. In such circumstances the oppression was not ongoing.

10. On 4 May 2016 the Court of Appeal allowed the respondent's appeal. It awarded declaratory relief and ordered compensation in the sum of B$182,531.70 (with interest thereon) plus B$35,811.00 (with interest thereon). In its reasons for its decision, delivered on 7 December 2016, the Court of Appeal held that a liability of the appellants under section 280 continued by virtue of section 272.

The statutory provisions

11. The relevant provisions of the 1992 Act provide:

> "Part IV …
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> **81.** (1) Every director and officer of a company in exercising his powers and discharging his duties shall –
>
> > (a) act honestly and in good faith with a view to the best interests of the company; and

(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

(2) The duty imposed by subsection (1) on the directors of a company is owed by them to the company alone; and the duty shall be enforceable in the same way as any other fiduciary duty owed to a company by its directors.

(3) Every director and officer of a company shall comply with this Act and with the articles of the company.

(4) The burden of proving that a director or an officer of the company did not act in accordance with any provision of this section shall lie on the person making the allegation.

...

Part VIII ...

...

271. (1) The Registrar may remove from the register of companies —

(a) a company that fails to submit any return, notice, document or prescribed fee to the Registrar as required by this Act;
(b) a company that is dissolved;
(c) a company that has amalgamated or merged with one or more companies;
(d) a company that refuses to comply with any request or direction given by the Registrar pursuant to this Act;
(e) a company whose registration is revoked or cancelled in accordance with this Act;
(f) a company that has ceased to carry on business.

(2) Where the Registrar is of the opinion that a company is in default with respect to any requirement as to a return, notice, document or prescribed fee, he shall send a notice to that company advising it as to the default and stating that, unless the default is remedied within twenty-one days after the receipt of the notice, the company shall be removed from the register of companies.

(3) After the expiration of the time specified in the notice, the Registrar may remove the company from the register and publish a notice of that fact in the *Gazette*.

(4) Where a company is removed from the register of companies, the Registrar may, upon receipt of an application, before the expiration of twenty years from the publication in the *Gazette* of the notice aforesaid, in the approved form and upon payment of the prescribed fee, restore the company to the register and issue a certificate in the approved form.

272. Where a company is removed from the register of companies pursuant to section 271, the liability of the company and of every director, officer or member of the company shall continue and may be enforced as if the company had not been removed from the register.

273. Where a company is removed from the register of companies pursuant to section 271 the company shall thereupon be dissolved and any property vested in or belonging to any such company shall thereupon vest in the Treasurer for the benefit of The Bahamas and shall not be disposed of without the prior approval of both Houses of Parliament signified by resolution thereof. …

…

Part IX …

…

278. In this Part —

"action" means an action under this Act;

"complainant" means —

(a) a shareholder or debenture holder or a former holder of a share or debenture of a company;
(b) a director or an officer of former director or officer of a company or its affiliates;

(c) any other person, who in the opinion of the court is a proper person to institute an action under this Part.

279. (1) Subject to subsection (2), a complainant may for the purpose of prosecuting, defending or discontinuing an action on behalf of a company apply to the court for leave to bring an action in the name and on behalf of the company or any of its subsidiaries or intervene in any action to which any such company or any of its subsidiaries is a party.

(2) No action may be brought, and no intervention in an action may be made, under subsection (1) unless the court is satisfied that _

(a) the complainant has given reasonable notice to the directors of the company or its subsidiary of his intention to apply to the court under subsection (1) if the directors of the company or its subsidiary do not bring, diligently prosecute or defend, or discontinue, the action;

(b) the complainant is acting in good faith; and

(c) it appears to be in the interests of the company or its subsidiary that the action should be brought, prosecuted, defended or discontinued.

(3) In respect of an action under subsection (1), the court may at any time make any order it deems fit having regard to all the circumstances, including –

(a) an order authorizing the complainant or any other person to control the conduct of the action:

(b) an order giving directions for the conduct of the action; …

280. (1) A complainant may apply to the court for any order against a company or a director or officer of that company to restrain oppressive action.

(2) If upon an application under subsection (1), the court is satisfied that in respect of a company or any of its affiliates —

(a) any act or omission of the company or any of its affiliates effects a result;

(b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or

(c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,

that is oppressive or unfairly oppressive to, or that unfairly disregards the interest of any shareholder or debenture holder, creditor, director or officer of the company, the court may make an order to rectify the matter complained of.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit, including

(a) an order restraining the conduct complained of;
(b) an order appointing a receiver or a receiver-manager,
(c) an order to regulate a company's affairs amending its articles or creating or amending a unanimous shareholder agreement;
(d) an order directing an issue or exchange of shares or debentures;
(e) an order appointing directors in place of, or in addition to, all or any of the directors then in office;
(f) an order directing a company, subject to subsection (4), or any other person, to purchase shares or debentures of a holder thereof;
(g) an order directing a company, subject to subsection (4), or any other person, to pay a shareholder or debenture holder any part of the monies paid by him for his shares or debentures;
(h) an order varying or setting aside a transaction or contract to which a company is a party, and compensating the company or any other party to the transaction or contract;
(i) an order requiring a company, within the time specified by the court, to produce to the court or an interested person financial statements in the form required by section 118 or in such other form as the court determines;
(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of the company;
(l) an order liquidating and dissolving the company;
(m) an order directing the Registrar to make a preliminary investigation into a company; or
(n) an order requiring the trial of any issue.

(4) A company may not make a payment to a shareholder under subsection (3)(f) or (g) if there are reasonable grounds for believing that -

(a) the company is unable or would be unable to pay its liabilities as they become due; or
(b) the realisable value of the company's assets would thereby be less than the aggregate of its liabilities.

(5) Nothing in this section affects an application, by petition, for the winding up of a company under Part VII.

Section 280

12. Section 280 creates a special procedure for the purpose of restraining oppressive action. It permits the court to intercede in the internal affairs of the company in order to rectify the matters complained of. It was first introduced into the law of The Bahamas by the 1992 Act and was based on section 234 of the Canada Business Corporations Act 1974. (The current Canadian provision is section 241 of the Canada Business Corporations Act 1985.) In the absence of any established Bahamian authority on the scope and function of section 280, Canadian authorities on corresponding legislative provisions are instructive. Section 280(1) permits an application to the court for an order against a company or a director or officer of that company to restrain oppressive action. Where there is oppression or unfair disregard of the interest of "any shareholder or debenture holder, creditor, director or officer of the company", subsection (2) empowers the court to make an order rectifying the matter complained of. Subsection (3) provides that in connection with an application the court may make any interim or final order it thinks fit. It then sets out a non-exhaustive list of possible orders including, in section 280(3)(j) "an order compensating an aggrieved person". Whereas in many other jurisdictions statutory provisions for relief against oppression are limited to shareholders, The Bahamas has followed the model of the Canadian legislation in extending such relief to creditors.

13. In *Budd v Gentra Inc* (1998) 43 BLR (2d) 27, the Court of Appeal for Ontario described section 241 of the Canada Business Corporations Act 1985 in the following terms (at para 33):

> "Section 241 provides a statutory means whereby corporate stakeholders may gain redress for corporate conduct which has one of the effects described in s. 241(2). The section serves as a judicial brake against abuse of corporate powers, particularly, but not exclusively, by those in control of a corporation and in a position to force the will of the majority on the minority. Section 241 enables the court to intercede in the affairs and operation of a corporation and to effectively override the decisions of those charged with the responsibility of corporate governance."

and (at para 36):

> "The plaintiff is not alleging that he was wronged by a director or officers acting in his or her personal capacity, but is asserting that the corporation, through the actions of the directors or officers, has acted oppressively and that in the circumstances it is appropriate (i.e. fit) to rectify that oppression by an order against the directors or officers personally."

14. In the present case Hepburn J in the Supreme Court held in a judgment dated 29 November 2010 that the respondent, Mr Galantis, had standing to bring these proceedings as a complainant under section 278. In a further judgment dated 30 May 2014, Hepburn J held that the complainant had a valid expectation that the appellants would honour the company's contractual obligations under the promissory note and that the best interests of the company would have been likely to direct any profit or asset value towards outstanding debt. She held that the first appellant's actions in evading the promissory note and the court order that sought to enforce it, and in opening a rival company while he still owed a duty to the company, were oppressive to the complainant as they rendered empty any remedy he might have secured and did in fact secure against the company based on his strict contractual rights. The company was not wound up, no communication was had with its creditors and the first appellant was indifferent as to its fate. She further held that the second appellant, during his time with the company from 1999, when the company stopped paying the complainant, to when he ceased to be a director in June 2000, unfairly disregarded the complainant's interests as the company's only significant creditor. It was common ground before the Board on this appeal that the complainant had established a case of oppression before the Supreme Court and there was no challenge to these findings.

15. Hepburn J considered, however, that proceedings under section 280 are subject to a requirement of timeliness which arises directly from the section's purpose and is

distinct from any statutory limitation period or the equitable principle of delay. In her view, had the complainant brought his claim before the company was struck off, he would have had an arguable case of oppression against the first appellant and, had he brought the claim before the second appellant left the company, he would have had a potential claim for unfair disregard against him. However, by the time the action was brought the damage had already occurred and was no longer ongoing. She concluded that "because the action was not brought in a timely fashion, the actions complained of are not susceptible to being corrected as there is no longer an existing wrong": para 146.

16. The Board considers that conduct which gives rise to oppression need not be continuing at the time of the application to the court. This is apparent from section 280(2)(b) which contemplates that the business or affairs of the company or its affiliates "are or have been carried on or conducted" in an oppressive manner and from section 280(2)(c) which contemplates that the powers of the directors of the company or its affiliates "are or have been exercised" in an oppressive manner. In each case the use of both the present and perfect tenses is deliberate and clear in its effect. However, the wording of section 280 strongly suggests that it is directed at remedying a current oppressive or unfair state of affairs. There must be existing oppression or unfairness which is susceptible of remedy by the court interceding in the affairs of the company. This procedure is made available "to restrain oppressive action" in the words of section 280(1). This is the hook on which the rest of the section hangs. If the conditions of subsection (2) are satisfied, the court may make an order to rectify the matter complained of. Subsection (3) then confers an open-ended power to make any interim or final order the court thinks fit for this purpose. As a result, the concept of restraining oppressive action under subsection (1) must be given a wide interpretation. However, the whole section is directed at remedying existing wrongs.

17. An order under section 280 should go no further than is necessary to rectify existing oppression. This reading entirely conforms to a consistent line of authority in various Canadian jurisdictions. In *Wilson v Alharayeri* [2017] 1 SCR 1037, a recent decision of the Supreme Court of Canada on section 241 of the Canada Business Corporations Act, the court observed, at para 27:

> "Any order made under s 241(3) exists solely to 'rectify the matters complained of' as provided by s 241(2). The purpose of the oppression remedy is therefore corrective: '... in seeking to redress inequities between private parties', the oppression remedy seeks to 'apply a measure of corrective justice' (JG MacIntosh, 'The Retrospectivity of the Oppression Remedy' (1987) 13 *Can Bus LJ.* 219, at p 225; see also *Naneff v Con-Crete Holdings Ltd.* (1995) 23 OR (3d) 481 (CA) ('*Naneff*'); *820099 Ontario Inc v Harold E Ballard Ltd* (1991) 3 BLR (2d) 113 (Ont CJ (Gen Div)) ('*Ballard*') at p 197). In other words, an order made under s 241(3) should go

> no further than necessary to correct the injustice or unfairness between the parties."

18. Two Quebec decisions on section 234 of the Canada Business Corporations Act 1974 conclude that past incidents may be used to invoke a remedy under that section provided that the oppression or unfairness resulting from such incidents exists when the application is heard (*Sparling v Javelin International Ltd* [1986] RJQ 1073; 37 BLR 265 (SC); *Michalak v Biotech Electronics Ltd* [1986] RJQ 2661; 35 BLR 1 (SC)). In *Sparling* Gomery J put it as follows (at p 1077):

> "The use of both the present and past tenses in subparagraphs (b) and (c) is presumed to be deliberate. Thus, Parliament foresaw the possibility that the court might use past incidents as the basis of its intervention, provided that the oppression or unfairness resulting from such incidents exists when the application is heard.
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> ...
>
> The jurisdiction of the court is limited to the making of orders to rectify the matters complained of. The court does not have jurisdiction to intervene in the management of a company's affairs otherwise. Presumably if it is not possible to rectify oppression and unfairness, no order should issue. And once the order to rectify has been made, the jurisdiction of the court ceases to exist, with the proviso that the court under section 234(3) is given authority to render interim orders, thereby extending its jurisdiction over the period of time necessary to rectify the matters complained of."

Similarly, in *Michalak* Martin J concluded, para 17:

> "The recourse contemplated by the Act is not only comprehensive but one which is susceptible of being exercised efficaciously. It follows that while the inquiry may indeed touch upon circumstances which have occurred in the past or may reach into the past there must nevertheless exist an interest which is presently being oppressed."

19. *Sparling* and *Michalak* were both cited by the Court of Appeal of Manitoba in *Jaska v Jaska* (1996) 141 DLR (4th) 85, where proceedings were brought by a

shareholder and director under section 234 of the Manitoba Corporations Act, another similar provision, alleging oppression on the basis of the wrongful conduct of his joint shareholder and director more than seven years prior to the commencement of the proceedings. Having held that the claim was time barred by the normal six-year limitation period, Scott CJM went on to hold that there was another reason why the claim should not be allowed to proceed many years after the discovery of the allegedly oppressive or unfair conduct. Quite apart from the statutory limitation period or the equitable principle of *laches*, "the element of timeliness arises directly from the scope and purpose of the oppression provisions themselves" (p 13). In his view the remedy was not available at all "where the complainant is not, either at the time of the application or the hearing, being subjected to the conduct complained of" (p 11).

20. In her judgment of 30 May 2014 in the present case, Hepburn J. relied on both *Jaska* and *Michalak* in coming to her conclusion. In her view, the remedy sought was no longer available. The complainant was no longer being subjected to the potential oppression as the company was no longer in existence at the time the application was filed and therefore the conduct complained of was no longer a live issue. While the complainant was a creditor who had still not been paid, the company no longer existed and the directors could no longer be restrained. She added that the complainant should have "enforced his judgment against the defendants for the previous action rather than letting it escalate to the point where the company had not only ceased doing business, but also been struck off the Register" (para 151). As it was, she concluded "somewhat reluctantly" that the complainant is not entitled to the relief sought as the oppression was not ongoing.

21. The Court of Appeal seems to have approached this issue on the basis that oppression must be ongoing when the action is filed. Thus, it stated (at para 15):

> "The crux of the learned judge's decision to reluctantly deny the appellant the relief sought was the erroneous belief that as the company ceased to exist having been struck off the Register of Companies, the oppression was not ongoing at the filing of the 2011 action."

However, it then proceeded to explain that the effect of section 272 was that liability for this oppressive behaviour was not extinguished by the removal of the company from the register. It will be necessary to consider presently the effect of section 272 in this regard in more detail. At this point, however, it is necessary to consider whether, in the particular circumstances of this case and without resort to section 272, oppression can be regarded as continuing at the date of commencement of the proceedings for the purposes of section 280.

22. The conduct which gave rise to oppression in the present case was found by Hepburn J to be the unfair disregard of the complainant's interest shown by the second appellant, which ceased in June 2000 when he ceased to be a director of the company, and the conduct of the first appellant which ceased on the dissolution of the company in July 2008. There can be no question of oppressive conduct on their part after those dates. Nor can they have acted as directors following the dissolution of the company. However, as explained above, it is not necessary for a complainant to establish that the conduct giving rise to oppression continues at the date of commencement of proceedings. Rather, it is necessary that oppression should exist at that date as a state of affairs requiring restraint or remedy. The remedies set out in section 280(3) are means by which an existing state of affairs may be remedied and are clearly focussed on a situation where the company still exists. They are directed at the way in which the company or those concerned with its business must act. The proceedings must, therefore, be timely in the sense that intercession by the court must be capable of correcting an existing wrong. In the present case, however, it is difficult to conclude that the oppression was current when the proceedings were commenced. In the Board's view, to suggest that, notwithstanding the dissolution of the company, oppression continues in perpetuity until such time as the judgment debt may be paid, stretches the concept of oppression too far. It is unrealistic to suggest in the present case that there existed at the time these proceedings were commenced "an interest which is presently being oppressed". Furthermore, at the date of commencement of the proceedings, the company no longer existed and the former directors no longer held office. Intervention by the court in the internal affairs of the company was no longer possible. This was not a situation in which the court was able "to intercede in the affairs and operation of a corporation and to effectively override the decisions of those charged with the responsibility of corporate governance." (*Budd v Gentra*, para 33, see para 13 above).

23. A further point arises here. Under section 280 a complainant may apply to the court for an order "against a company or a director or officer of that company". At the date of the commencement of these proceedings the appellants had ceased to be directors and were former directors. The wording of section 280 should be contrasted in this regard with certain other provisions of the 1992 Act, such as sections 263, 264 and 296, which expressly refer to a "past or present director". It appears, therefore, that under section 280 an order may be made against a present director but not a past director. This supports the view that section 280 is intended to apply to a situation where a company is still functioning and is addressed to oppression which can be remedied by the court's intervention in the affairs of the company.

Section 272

24. The Court of Appeal nevertheless found in section 272 a basis for the application of the section 280 procedure in the present case. It explained that the effect of section 272 was that the removal of a company from the register of companies did not extinguish the liability of the company or its directors and continued (at para 17):

> "The oppressive acts complained of by the appellant are the directors' blatant refusal to honor a debt and to prevent payment of that debt by subsequently removing the company's assets and preventing the appellant, a judgment creditor, from successfully settling his claim. As noted, liability for this oppressive behavior is not extinguished by the removal of the company from the register. To hold that it does would create a backdoor through which a company or its directors can avoid liability; thereby frustrating the purpose of section 280. As such, the learned trial judge was wrong to conclude that the appellant was barred, as a result of the company's removal from the register, from obtaining the relief sought."

25. The Court of Appeal clearly considered that the appellants were under a liability to the respondent at the time of dissolution which liability was capable of being continued by section 272. Was it correct in concluding that the exposure of a director to the possibility that an order pursuant to section 280 may be made against him is a "liability" within section 272 which therefore continues and may be enforced against him notwithstanding the dissolution of the company?

26. Statutory provisions providing for the continuing liability of directors notwithstanding the dissolution of the company have existed in Bahamian law since sections 2 and 6 of the Removal of Defunct Companies Act 1926. On behalf of the appellants, Mr Stephen Hofmeyr QC draws attention to a curious feature of section 272: it provides for the continuing liability of the company itself, whereas section 273 provides for the dissolution of the company. As Mr Hofmeyr points out, this is unsatisfactory because there is no obvious means of reconciling the dissolution of the company with the continuation of its liabilities thereunder. Ordinarily, dissolution would terminate the company's legal personality and hence its existence. (Section 271(4) of the 1992 Act does, however, provide for restoration of a dissolved company to the register.) The Board notes that the Saskatchewan Business Corporations Act 1978 contains a provision in materially identical terms; however, under that statute a company is not dissolved when it is struck off the register. It appears that the 1992 Act in its original form did not provide for the dissolution of a company on its removal from the register but that section 273 was inserted pursuant to the Companies (Amendment) Act 1993 to make the point clear. In doing so, it may be that Parliament failed to appreciate the resulting clash with section 272.

27. Section 271 of the 1992 Act identifies the circumstances in which a company may be removed from the register. In the majority of cases these circumstances lie within the control of the directors. It appears, therefore, that a purpose of section 272 is to ensure that the directors of a company cannot escape their liabilities by causing their company to be removed from the register. As Mr Hofmeyr on behalf of the appellants accepts, section 272 contemplates that actions to enforce such liabilities may be commenced after dissolution of the company and, accordingly, it cannot be the case

that, in general, section 272 applies only when a judgment has been entered or an order made against the company or its directors prior to the removal of the company from the register. A liability may exist at the time of dissolution even if that liability has yet to be declared by a court.

28. Section 272 is, however, concerned with the continuation of liability. It provides that the liability of the company and its directors shall continue and may be enforced as if the company had not been removed from the register. What are preserved, therefore, are liabilities existing upon the date of the removal of the company from the register. Section 272 does not create any liability. The matter was expressed by Swanson J in *Shaw v Hyde* (1921) 61 DLR 666, a decision on a similar provision, section 268 of the British Columbia Companies Act 1911 (at p 670):

> "I am of the opinion that the 'liability, if any, of every director, etc,' which is kept alive despite the dissolution of the company by its being struck off the register is the 'liability' existing at the very time of the dissolution of the company. ... The 'liability' kept alive at the time of 'dissolution' I think, must be clearly some antecedent liability in connection with a 'company' which up to 'dissolution' had a legal existence."

Similarly, in *Shrikishen Dhoot v S D Kamlapurkur* (1965) 35 CompCas 913 AP, the Andhra Pradesh High Court stated in relation to a similar provision in section 247(5) of the Indian Companies Act 7 of 1913:

> "This proviso only means that the existing liability of any director or member prior to the dissolution of the company will continue in spite of the dissolution. If the directors are not personally liable for the plaintiff's claim prior to the dissolution of the company, they will not be liable after the dissolution."

29. In principle, "liability" in section 272 should be given a broad meaning in order to achieve its statutory purpose. In the course of the hearing the Board was referred to a number of examples of defined liabilities existing as a matter of right and referred to in the 1992 Act itself. Thus, for example, section 27(2) provides that in certain circumstances directors are personally liable on bills of exchange. Sections 101 (liability for share issue) and 102 (liability for other acts) provide for the joint and several liability of directors. Such liabilities existing at the date of dissolution would fall within section 272. Similarly, a breach of the duty of care imposed on directors by section 81 would give rise to a liability for this purpose and "liability" in section 272 must be wide enough to include accrued liabilities of the directors at common law, incurred in connection with the affairs of the company.

30. The question for consideration here, however, is whether "liability" within section 272 is broad enough to include a director's exposure to being made subject to an order under section 280.

The nature of remedial orders under section 280

31. In *BCE v 1976 Debentureholders* [2008] 3 SCR 560, a case on section 241 of the Canada Business Corporations Act 1985, the Supreme Court of Canada explained (at paras 45, 58, 59), that, unlike a derivative action which is aimed at enforcing a right of the corporation itself, the oppression remedy focuses on harm to the legal and equitable interests of stakeholders affected by oppressive acts of a corporation or its directors. It is an equitable remedy, seeking to ensure fairness. "It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair" (para 58). What is just and equitable is fact specific and judged by the reasonable expectations of stakeholders in the context and in regard to the relationships at play. The Supreme Court explained (at paras 68, 72, 89) that it involves a dual inquiry. First, does the evidence support the reasonable expectation asserted by the claimant? Secondly, does the evidence establish that the reasonable expectation was violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard"?

32. In considering the nature of the powers conferred on the court by section 280, the Board has also been greatly assisted by the judgment of Côté J, delivering the judgment of the Supreme Court of Canada, in *Wilson v Alharayeri* [2017] 1 SCR 1037, a further decision on section 241 of the Canada Business Corporations Act 1985. Côté J (at paras 47-48) emphasised that, before personal liability can be imposed on a director, not only must the oppressive conduct be properly attributable to him, but the imposition of personal liability must be "fit" in all the circumstances as a means of rectifying the harm done (*Budd v Gentra Inc* (1998) 43 BLR (2d) 27). She then (at paras 49-57) articulated four principles "to serve as guideposts informing the flexible and discretionary approach the courts have adopted to orders under s 241(3)".

33. First, the oppression remedy request must, in itself, be a fair way of dealing with the situation. Here she emphasised that the appropriateness of an order under section 241(3) turns on equitable considerations and in the context of an oppression claim "[i]t would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise (*Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 … at p 379)". She observed, at paras 51, 52:

> "51. … In all cases, the trial judge must determine whether it is fair to hold the director personally liable, having regard to all the circumstances. Bad faith and personal benefit are but two factors that relate to certain circumstances within a larger factual matrix. …

> 52. Further, even where it is appropriate to impose personal liability, this does not necessarily lead to a binary choice between the directors and the corporation. Fairness requires that, where 'relief is justified to correct an oppressive type of situation, the surgery should be done with a scalpel, and not a battle axe' (*Ballard* at para 140). Where there is a personal benefit but no finding of bad faith, fairness may require an order to be fashioned by considering the amount of the personal benefit. In some cases, fairness may entail allocating responsibility partially to the corporation and partially to directors personally. ... [T]he fairness principle is ultimately unamenable to formulaic exposition and must be assessed on a case-by-case basis having regard to all of the circumstances."

34. Secondly, as previously noted at para 17 above, the order must go no further than is necessary to rectify the oppression.

35. Thirdly, the order may serve only to vindicate the reasonable expectations of corporate stakeholders. They may not serve a purely tactical purpose.

> "In particular, the complainant should not be permitted to jump the creditors' queue by seeking relief against a director personally. The scent of tactics may therefore be considered in determining whether or not it is appropriate to impose personal liability on a director under s 241(3)." (*Wilson v Alharayeri*, at para 54)

36. Fourthly, a court should consider the general corporate law context.

> "[D]irector liability cannot be a surrogate for other forms of statutory or common law relief, particularly where such other relief may be more fitting in the circumstances ..." (at para 55).

37. In the Board's view, section 280 confers a remedial discretion of great breadth. A judge acting under this section enjoys a wide discretion not only as to the content of the remedial order but also as to the person or persons against whom any such order should be made. We are not here concerned with a discretionary remedy for an infringement of an established right; nor is a court, when acting under section 280, declaring a liability. Rather, the exercise of discretion is a pre-condition to any liability and Côté J, in the first passage from her judgment in *Wilson v Alharayeri* cited above, was correct to characterise this as the court imposing a liability. An exercise of judgement by a court is a pre-condition to any liability pursuant to section 280. Furthermore, a "liability" within section 272 must be capable of being "enforced". Until

such time as the court exercises its discretion under section 280 this requirement cannot be met. One cannot enforce the possibility that an order will be made in the future.

38. Furthermore, the exercise of discretion as to whether to impose a liability under section 280 is inextricably linked to the particular facts of each case. Hence the need to carry out the required assessment on a case-by-case basis. Just as "the fairness principle is ultimately unamenable to formulaic exposition", so is the exposure of any given person to the possibility of an order against them incapable of definition in advance as a liability for this purpose.

39. Moreover, the court must be alive to the risk of a complainant seeking an unfair tactical advantage. Hence the reference by Côté J to "the scent of tactics". In an insolvency this will require an assessment of the competing interests in the particular factual context. The outcome may depend, for example, on the number of creditors and the court may have to decide whether it is appropriate to allow a remedy against directors under section 280 in favour of one or more creditors, or simply to leave the matter to a pari passu distribution.

40. In these circumstances the Board does not consider that a person exposed to the possibility of being subjected to such a discretionary remedial order under section 280 is properly to be regarded as under a liability for the purposes of section 272.

41. The Board observes that, as noted at para 19 above, one of the alternative rationes decidendi of the decision of the Court of Appeal of Manitoba in *Jaska v Jaska* was that the normal six-year limitation period had expired and that this barred the claim under section 234 of the Manitoba Corporations Act. This would only be possible if a cause of action had accrued and the limitation period had run from that date. On its face, this appears to be inconsistent with the Board's view that section 280 and similar provisions in other jurisdictions do not give rise to a liability until such time as the discretion to grant relief is exercised. The Board considers, however, that this is, with respect, a flaw in the reasoning of the Court of Appeal of Manitoba and that the correct analysis is that section 280 and similar provisions do not create a cause of action as such but a jurisdiction or power in the court which an applicant can invoke with a view to the court's exercising its power to grant him relief. Whereas, in most cases, a claimant is seeking to vindicate his rights against the defendant, a petition under section 280 is not brought to vindicate a right vested in the claimant, but to request the court to grant discretionary relief. If this is correct, there can be no question of a limitation period running before the court has granted relief. Delay in seeking a remedy could, however, be a ground for refusing relief.

42. In the present case, the company having been dissolved in July 2008, proceedings seeking an order to require the directors to compensate the respondent were

not commenced until April 2009 and the first occasion when a court imposed such an order was in May 2016 when the Court of Appeal delivered its judgment. No liability capable of being continued by section 272 had been imposed by the date on which the company was removed from the register.

Conclusion

43. For these reasons, the Board concludes that section 280 has no application to the present case. There was no ongoing oppression capable of being remedied by the intercession of the court in the affairs of the company at the date of commencement of the proceedings. Furthermore, section 272 does not have the effect of continuing any liability of the directors under section 280 because they were not under any such liability when the company was removed from the register.

44. This does not necessarily mean that the respondent was without remedy. It would have been open to him to apply to the court for an order under section 271(4) of the 1992 Act to restore the company to the register. If that had been granted, he could then have applied for permission to bring a derivative action under section 279 in the name of the company alleging breach of fiduciary duty owed by the directors to the company pursuant to section 81. In this way, the company might have recovered funds which could have been used to pay the respondent. However, that course was not followed, and, with some regret, the Board has come to the conclusion that the route which sought to employ sections 272 and 280 was not open to the respondent.

45. Notwithstanding the unmeritorious nature of the appeal, the Board will humbly advise Her Majesty that the appeal should accordingly be allowed. The Board invites submissions as to costs.

APPENDIX

1. Section 241 of the Canada Business Corporations Act 1985 provides:

> "(1) A complainant may apply to a court for an order under this section.
>
> (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> > (a) any act or omission of the corporation or any of its affiliates effects a result,
> >
> > (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
> >
> > (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner
>
> that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.
>
> (3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
>
> > (a) an order restraining the conduct complained of;
> >
> > (b) an order appointing a receiver or receiver-manager;
> >
> > (c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
> >
> > (d) an order directing an issue or exchange of securities;
> >
> > (e) an order appointing directors in place of or in addition to all or any of the directors then in office;
> >
> > (f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
> >
> > (g) an order directing a corporation, subject to subsection (6), or any other person, to pay a security holder any part of the monies that the security holder paid for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 243;

(l) an order liquidating and dissolving the corporation;

(m) an order directing an investigation under Part XIX to be made; and

(n) an order requiring the trial of any issue.

(4) If an order made under this section directs amendment of the articles or by-laws of a corporation,

(a) the directors shall forthwith comply with subsection 191(4); and

(b) no other amendment to the articles or by-laws shall be made without the consent of the court, until a court otherwise orders.

(5) A shareholder is not entitled to dissent under section 190 if an amendment to the articles is effected under this section.

(6) A corporation shall not make a payment to a shareholder under paragraph (3)(f) or (g) if there are reasonable grounds for believing that

(a) the corporation is or would after that payment be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

(7) An applicant under this section may apply in the alternative for an order under section 214."

2. Section 234 of the Business Corporations Act 1974 provided:

"(1) A complainant may apply to a court for an order under this section.

(2) If, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result,

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the moneys paid by him for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 149 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 236;

(l) an order liquidating and dissolving the corporation;

(m) an order directing an investigation under Part XVIII to be made;

(n) an order requiring the trial of any issue.

(4) If an order made under this section directs amendment of the articles or by-laws of a corporation,

(a) the directors shall forthwith comply with subsection 185(4); and

(b) no other amendment to the articles or by-laws shall be made without the consent of the court, until a court otherwise orders.

(5) A shareholder is not entitled to dissent under section 184 if an amendment to the articles is effected under this section.

(6) A corporation shall not make a payment to a shareholder under paragraph (3)(f) or (g) if there are reasonable grounds for believing that

(a) the corporation is or would after that payment be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

(7) An applicant under this section may apply in the alternative for an order under section 207."

3. Section 234 of the Manitoba Corporations Act provides:

"(1) A complainant may apply to a court for an order under this section.

(2) If, upon an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates

(a) any act or omission of the corporation or any of its affiliates effects a result; or

(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner; or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner;

that is oppressive or unfairly prejudicial or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,

(a) an order restraining the conduct complained of;

(b) an order appointing a receiver or receiver-manager;

(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;

(d) an order directing an issue or exchange of securities;

(e) an order appointing directors in place of or in addition to all or any of the directors then in office;

(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;

(g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the moneys paid by him for securities;

(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;

(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 149 or an accounting in such other form as the court may determine;

(j) an order compensating an aggrieved person;

(k) an order directing rectification of the registers or other records of a corporation under section 236;

(l) an order liquidating and dissolving the corporation;

(m) an order directing an investigation under Part XVIII to be made; and

(n) an order requiring the trial of any issue.

(4) If an order made under this section directs amendment of the articles or by-laws of a corporation,

(a) the directors shall forthwith comply with subsection 185(4); and

(b) no other amendment to the articles or by-laws shall be made without the consent of the court, until a court otherwise orders.

(5) A shareholder is not entitled to dissent under section 184 if an amendment to the articles is effected under this section.

(6) A corporation shall not make a payment to a shareholder under clause (3)(f) or (3)(g) if there are reasonable grounds for believing that

(a) the corporation is or would after that payment be unable to pay its liabilities as they become due; or

(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

(7) An applicant under this section may apply in the alternative for an order under section 207."

4. Section 268 of the British Columbia Companies Act 1911 provided:

"(1) Where a company incorporated under any public Act in this Province, or a registered extra-provincial company, has failed for any period of two years after such incorporation or registration to send or file any return notice or document required to be made or filed or sent to the Registrar pursuant to this Act or any former public Act, or the Registrar has reasonable cause to believe that such company or an extra-provincial licensed company is not carrying on business or in operation, he shall send to the company by post a registered letter inquiring whether such company is carrying on business or in operation and notifying it of its default (if any); and

(2) If within one month no reply to such letter is received by the Registrar, or such company fails to fulfil the lawful requirements of the Registrar or notifies the Registrar that it is not carrying on business or in operation, he may, at the expiration of another fourteen days, publish in the Gazette and send to such company a notice that at the expiration of two months from the date of that notice the name of such company mentioned therein will, unless cause is shown to the contrary, be struck off the register, and the company, if one incorporated as aforesaid, will be dissolved.

(3) At the expiration of the time mentioned in such last-mentioned notice, the Registrar shall, unless cause to the contrary is previously shown by such company, strike the name of such company off the register, and shall publish notice thereof in the Gazette for one month, and on such last-mentioned publication the company, being an incorporated company as aforesaid, shall be dissolved; or, being an extra-provincial company, shall be deemed to have ceased to do business in the Province, under its licence or certificate of registration: Provided that the liability (if any) of every director, managing officer, and member of any such company shall continue and may be enforced as if the name of said company had not been struck off the register.

(4) If any such company or a member or creditor thereof feels aggrieved by the name of such company having been struck off the register in pursuance of this section, the company or member or creditor may, before the completion of the last-mentioned publication, apply to the Court; and the Court, if satisfied that the company was at the time of the striking-off carrying on business or in operation and that it is just to do so, may, upon such terms as the Court may see fit to impose, including the payment of any costs and expenses, order the name of the company to be restored to the register, and thereupon the company shall be deemed to have continued in existence as if the name thereof had never been struck off; and the Court may by the order give such directions and make such provisions as seem just for placing the company and all other persons in

the same position, as nearly as may be, as if the name of the company had never been struck off.

(5) A letter or notice authorised or required for the purpose of this section to be sent to any such company may be sent by post addressed to the company at its registered or head office in the Province; or, if no office has been registered, addressed to the care of some director or officer of the company; or, if there be no director or officer of the company whose name and address are known to the Registrar, the letter or notice in identical form may, in the case of a company incorporated as aforesaid, be sent to each of the persons who subscribed the memorandum of association, addressed to him at the address mentioned in the memorandum; and in the case of an extra -provincial company sent to the attorney of such company.

(6) Where a company is being wound up, and the Registrar has reasonable cause to believe either that no liquidator is acting or that the affairs of the company are fully wound up and the returns required to be made by the liquidator have not been made for a period of three consecutive months, after notice by the Registrar demanding the returns has been sent by post to the registered address of the company and to the liquidator at his last-known place of business, the provisions of this section shall apply in like manner as if the Registrar had not within one month after sending the letter first mentioned received any answer thereto."

Section 247(5) of the Indian Companies Act 7 of 1913 provides in relevant part:

"At the expiration of the time mentioned in the notice the registrar may, unless cause to the contrary is previously shown by the company, strike its name off the register, and shall publish notice thereof in the local official Gazette, and, on the publication in the local official Gazette of this notice, the company shall be dissolved : Provided that the liability (if any) of every director and member of the company shall continue and may be enforced as if the company had not been dissolved."