[2014] JMCC Comm. 15

IN THE SUPREME COURT OF JUDICATURE

COMMERCIAL DIVISION

CLAIM NO. 2013CD00072

IN THE MATTER OF W.G. NORTHOVER ASSOCIATES LIMITED

IN THE MATTER OF SECTION 213A OF THE COMPANIES ACT 2004

BETWEEN	**BENKLEY NORTHOVER**	**CLAIMANT**
AND	**ERIC NORTHOVER**	**1ST DEFENDANT**
AND	**ROHAN NORTHOVER**	**2ND DEFENDANT**
AND	**GODFREY DIXON**	**3RD DEFENDANT**
AND	**WINSTON G. NORTHOVER ASSOCIATES LIMITED**	**4TH DEFENDANT**

Mr. Conrad George and Mr. Adam Jones instructed by Hart Muirhead Fatta for the Claimant.

Mr. Glenroy Mellish instructed by Glenroy Mellish and Associates for the 1st, 2nd, 3rd Defendants.

4th Defendant unrepresented.

Heard: 21st, 22nd, 23rd and 24th January 2014 and 19th December 2014

COMPANY LAW - PRIVATE COMPANY - DIRECTORS POWER TO ALLOT SHARES - WHETHER SHARE ALLOTMENT BY ONE OF TWO EXISTING DIRECTORS VALID-SHARES ALLOTTED FOR IMPROPER PURPOSE - WHETHER BREACH OF PRE-EMPTION RIGHTS - EFFECT OF IMPROPER ALLOTMENT.

COMPANY LAW-REMEDIES-OPPRESSION REMEDY-MAJORITY SHAREHOLDER CLAIMING UNFAIR PREJUDICE AND OPPRESSION-WHETHER MAJORITY SHAREHOLDER CAN BRING ACTION-WHETHER ACTS COMPLAINED OF AMOUNTED TO OPPRESSION OR UNDUE PREJUDICE-POWERS OF THE COURT TO REMEDY-COMPANIES ACT S 213A.

Edwards J.

INTRODUCTION

[1] "Mother may have, father may have, but God bless the child who has his own". This is a very popular refrain from a popular gospel song. I think it very apt in this particular case. It is a case involving a lucrative private company, the deceased owner and the surviving relatives fighting over not so scarce benefits and spoils. One witness referred to them in documentary evidence as "the feuding Northovers", and unfortunately I cannot say I disagree with that description. This case presents a most unfortunate situation and is a prime example of what can occur when the laws and the rules and regulations governing them are not followed.

[2] The claim was commenced by way of Fixed Date Claim Form filed on May 14, 2013, seeking a declaration that the Claimant, Benkley Northover (Benkley) holds 400 ordinary shares in the 4th Defendant (the company) in addition to the 300 ordinary shares in the company, which it is common ground that he holds on trust pursuant to the will of Winston G Northover (WN), deceased. The Claimant further sought an injunction to restrain the 1st to 3rd Defendants from disrupting the company's operations, which disruption he claimed had oppressed and unfairly prejudiced his interests as a director and shareholder. The Claimant also asked the Court to appoint a board of directors that would properly administer the company's affairs in order to put it in a position to properly conduct its affairs.

[3] The Claimant averred that the 1st, 2nd and 3rd Defendants had acted dishonestly and in a manner that oppressed his interest as a director and shareholder of the company, both in his beneficial capacity and as executor and trustee of the will of WN. He sought an injunction against the three Defendants not only to restrain them from dealing with the company but also to restrain the transfer of shares and the reduction of

shares and for the appointment of directors and officers to the board of the company. The first two Defendants are the children of WN; the Claimant Benkley is his brother. The 3rd Defendant was the Company Secretary and the 4th Defendant is the company founded by WN.

BACKGROUND FACTS

[4] The deceased, WN, was a self-made man. He was a skilled contractor and blaster who built up his company Winston G. Northover and Associates Ltd. from scratch into a multi-million dollar company. The company was formed in 1995 with an authorized share capital of 1000 shares of $1.00 each. It was registered as a Limited Liability Company with 300 shares allotted to WN and 100 originally allotted to a Mr. Errol Elliot, one of his business associates. Those 100 shares held by Mr. Elliot were later transferred to the second son of WN, Rohan Northover (Rohan). However, for the most part, WN ran the company as a one man company.

[5] WN had 14 known children who benefited from the success of the company and a much loved brother. He also could not live forever and so after a short illness he died but not before realizing that the company he founded would flounder for lack of a successor. So what did he do? He called his brother Benkley to his hospital bedside and he made a will. In his will he gave Benkley his 300 shares to hold on trust for his children to share equally. As already noted 100 of the original 400 allotted shares had already been transferred to his son Rohan. If that was all then there would be no problem. Rohan, with his 21 shares out of the 300, would become the majority shareholder in his father's company with the remaining 13 siblings being minority share holders.

[6] However, and this is the crux of the matter, Benkley claimed that WN also invoked 500 of the remaining 600 unalloted and unissued shares out of the authorized share capital of 1000 and gave 400 of them to him. He also gave 100 shares to Benkley's son Norman Northover (Norman) and made him Managing Director. All this

he did from his hospital bed. According to Benkley, WN did not wish for his son Rohan to have controlling interest of his company to the detriment of the remaining children. WN wanted Benkley, and this is Benkley's account, to have control of the company as WN was confident he would run the Company in its best interest and that of his children.

[7] Upon the death of WN several documents were filed with the Registrar of Companies. The 400 shares Benkley claimed he got were registered. He was also registered as a Director. The 300 shares he held as personal representative of the assets of WN in trust was also registered. Eric Northover (Eric), the eldest son of WN was also registered as Director. Then the feud began. The protagonists were many. There were claims and counterclaims against Rohan, Eric, Norman and Benkley. Rohan, although he held 100 shares had previously been fired from the company as Director by his father. After his father's death he nominated his brother Eric to the Board as Director. In the midst of what was fast becoming a family squabble there was the accountant and Company Secretary, the 3rd defendant Godfrey Dixon (Godfrey). Alliances were now being formed. Godfrey appeared to have chosen the side of the two brothers. Benkley sought the support of his sons and outside associates.

[8] When it became clear that the brothers and their uncle could not run the Company in harmony and in its best interest there was an agreement between the brothers and Benkley, that a Mr. Clarke Lowe was to act as an independent Director and Chairman of the Company. The brothers later reneged on this arrangement citing several reasons, the main one being that Mr. Lowe and Benkley were acting against their interest. There were claims and counter claims on both sides. Mr. Lowe and Benkley claimed the company could not move forward with any decision with which the two brothers did not agree and they did not seem to agree with any decision made by Benkley or the independent director.

[9] Benkley claimed the brothers were taking money from the company, entering into contracts in its name without his knowledge and approval and that, with the aid of Godfrey, they were making loans from the company to themselves. He also claimed

that they froze bank accounts to which he had access and opened accounts with company funds to which only they had access. At a meeting of the Directors which was not attended by Eric, the directors voted to make Benkley the Managing Director and his son Kaon Northover as Company Secretary, citing the fact that Godfrey had voluntarily removed himself from that post. They also voted in a Mr. Phillip Duncan as technical director and voted to move the company's offices to his premises, a location vehemently objected to by Rohan and Eric.

[10] The brothers and Godfrey then claimed Benkley was misappropriating funds from the Company and using it for personal gain. Norman had also previously stolen from the company and had been removed by Benkley. Eric and Rohan subsequently caused documents to be filed at the Companies Office purporting to remove Benkley as Director and cancelling his 400 shares. All this led Benkley to the courts to seek redress under section 213A of the Companies Act 2004 and so we come to it.

THE ISSUES

[11] It is my considered opinion that any disposition of this case must involve deliberation on the following issues:

1. Whether the shares to Benkley Northover and Norman Northover were validly allotted;
2. Whether the Claimant as the majority shareholder was oppressed or treated in a manner unfairly prejudicial to him; and if so , what, if any, remedy is available;
3. Whether the Defendants were oppressed or treated in a manner unfairly prejudicial to them; and if so what remedy is available.

Chronology of Events

[12] Based on the manner in which the Company was operated, I think it might be useful to list a chronology of relevant events as they unfolded in the company.

1. December 1995 the company was formed. Winston G. Northover, first Director with authorized share capital of 1000 shares. Issued shares were 300 to Winston G. Northover and 100 to Errol Elliot.

2. Godfrey Dixon appointed Company Secretary, March 10, 1997.

3. December 1, 2001, Rohan Northover appointed Director, by Notice of Change of Directors filed July 1, 2002.

4. December 2010 share registry showed Winston Northover 300 shares, Rohan Northover 100 shares, issued share capital 400 shares.

5. As at December 31, 2011 shareholders and directors were Winston G. Northover and Rohan Northover.

6. March 30, 2012 Rohan Northover removed as director.

7. April 2, 2012, directors listed as Winston Northover and Norman Northover.

8. April 27, 2012, Winston G Northover appoints Norman Northover as Managing Director by letter.

9. April 28, 2012 Winston G Northover dies.

10. Norman Northover, Benkley Northover and Eric Northover registered as directors as of April 29, 2012, Winston having been removed by reason of death.

11. May 1, 2012 request for cheque in amount of $8000 from Ruth Josephs for preparation of documents for Companies Office at request of Winston Northover.

12. May 1, 2012 bill presented for; preparation of Winston Northover's last will and testament, allotment of shares to Benkley Northover, appointment of director, instrument of transfer Winston Northover and blank instrument of transfer Benkley Northover.

13. May 30, 2012, registered directors of the company were Benkley Northover and Eric Northover, Company Secretary Godfrey Dixon.

14. June 12, 2012, allegations were made by Godfrey Dixon that the insurance proceeds from the death of Winston Northover to the benefit of the company was being misappropriated.

15. August 22, 2012, Registrar of Companies records show Norman Northover dismissed as director and Eric and Benkley Northover appointed directors.

16. September 19, 2012, loan from W. G. Northover and Associates of $400,000.00 to United Equipment Limited Company owned and operated by Rohan Northover.

17. September 28, 2012 loan of $340,000.00 to Rohan Northover.

18. December 31, 2012 Estate of Winston G Northover registered as holding 300 shares, Rohan Northover 100 shares.

19. 2012 returns to Registrar of Companies show a change in shareholding with the Estate of Winston G Northover holding 300 shares and Rohan Northover 100 shares.

20. January 28, 2013 meeting of the board of directors. Benkley appointed Managing Director, Godfrey Dixon resigned as Company Secretary, Phillip Duncan appointed technical director, Kaon Northover appointed Company Secretary.

21. January 2013, Report from Clarke Lowe Independent Chairman appointed to W. G. Northover and Associates.

22. February 4, 2013, Eric Northover refuses to co-operate with Benkley Northover as Managing Director and Phillip Duncan as Director.

23. February 5, 2013 Eric Northover files statutory declaration disregarding the appointment of Kaon Northover as Company Secretary.

24. February 11, 2013 Eric Northover files statutory declaration disregarding the appointment of directors.

25. April 22, 2013, Eric Northover files documents purporting to remove Benkley Northover as Director and appointing Mikail Northover and Roy Ferguson as Directors.

26. April 29, 2013, return of allotment under Companies Act records the allotment of 500 shares. Norman Northover 100 shares and Benkley Northover 400 shares.

THE CLAIM

[13] The Claimant claimed for the following relief as contained in his statement of case:

1. A Court Order that:

   (a) Eric Northover shall not:

   (i) hold himself out as being authorised to do any business on behalf of the Company;

   (ii) carry out, or purport to carry out, any business on behalf of the company;

   (iii) hold any discussions with banks, or any other financial institutions, in relation to the Company's affairs, or in any other way be involved in or interfere with the operations of the Company;

   (b) Rohan Northover shall not:

   (i) hold himself out as being authorised to do any business on behalf of the Company;

   (ii) carry out, or purport to carry out, any business on behalf of the Company;

   (iii) hold any discussions with banks, or any other financial institutions, in relation to the Company's affairs, or in any other way be involved in or interfere with the operations of the Company;

Save nothing herein stated shall be taken to affect the rights attaching to his shares in the Company.

   c. That Godfrey Dixon shall not:

   (i) hold himself out as being authorised to do any business on behalf of the Company;

   (ii) carry out, or purport to carry out, any business on behalf of the Company;

   (iii) hold any discussions with banks, or any other financial institutions, in relation to the Company's affairs, or in any

other way be involved in or interfere with the operations of the Company;

d. The following persons be appointed as directors and officers of the Company: Mr. Clarke Lowe, Chairman and Director; Mr. Benkley Northover, Managing Director; Mr. Christopher Northover, Director, and Mr. Kaon Northover, Secretary.

e. The Registrar of Companies shall amend the Registrar to reflect this.

f. Rohan Northover and Benkley Northover shall not, pending resolution of this matter, transfer the shares in the Company currently registered respectively in the names of Rohan Northover (100 shares) and Benkley Northover as Executor of the Estate if Winston G. Northover (300 shares), and shall not exercise the voting rights attaching to such shares save in a manner consistent with this order.

g. It is hereby declared that the shares in the Company are held: 400 shares in the name of Benkley Northover; 300 shares in the name Benkley Northover as trustee of the Estate of Winston G. Northover, 100 shares in the name of Norman Northover; and 100 shares in the name of Rohan Northover; the Registrar of Companies shall amend the Register to reflect this.

h. Costs reserved.

THE AMENDED DEFENCE and COUNTER CLAIM

[14] The 1st, 2nd and 3rd Defendants not to be out done disputed the Claim on the following grounds which I will reproduce here verbatim:

1. The 1st defendant, 2nd defendant and 3rd defendant, (hereinafter together referred to as "these defendants" admits that the claimant holds 300 of the 1000 issued shares in Winston G. Northover and Associates Limited as Executor and Trustee of the Winston G. Northover (deceased), and is also a director of Company. Save as aforesaid, paragraph 1 of the Particulars of Claim is denied. These defendants aver that the 400 beneficial shares were improperly and fraudulently allotted

2. These defendants deny that that the claimant owns any shares in the fourth defendant beneficially or that Norman Northover is the legal or beneficial owner of any shares of the fourth Defendant. These defendants aver that, if as is alleged, Winston G. Northover, deceased, did allot

shares whether to himself or to Benkley Northover, such allotment was in breach of Articles, 7, 8, 29A, 44 and 55 of the Articles of Association and of Sections 38, 61 and 73 of the Companies Act 2004. As a result any such allotment is unlawful, void and of no effect.

Particulars of Breach

(a) There was no properly convened general meeting of the fourth defendant for which notices as required by law were given.

(b) There was no quorum at any meeting that might have been convened by the Directors of the fourth defendant.

(c) There was no consent in writing or sanction of any ordinary resolution passed at a general meeting of the shareholders of the fourth defendant whereby their rights to dividends and voting power were varied.

(d) Any purported transfer of shares by Winston G. Northover, deceased, to Norman Northover is unlawful being in breach of Article 29 (ix).

(e) There was no consideration provided for any shares purportedly allotted to the Claimant. In the alternative, the consideration provided was other than cash and Section 61 of the Companies Act was not complied with.

3. These Defendants admit that the 1st Defendant is a Director of the Company, the 2nd Defendant holds 100 of the 1000 issued shares in the Company, and the 3rd Defendant is the Secretary of the Company Save as aforesaid, paragraph 2 of the Particulars of Claim is denied.

4. Save that these Defendants filed forms at the Registrar of Companies pertaining to Winston G. Northover and associates Limited, paragraph 3 of the Particulars of Claim is denied. These Defendants aver that the Claimant:

(a) dishonestly and without authority filed forms at the Registrar of Companies purporting to appoint board members and to have removed the 3rd defendant as Secretary of the Company;

(b) while acting as Managing Director has misappropriated or unlawfully retained funds from the account of the Company;

c. acted dishonestly to gain control of the Company in an attempt to convert the assets (including cash) to his own and to the detriment of the Company and its shareholders.

5. Additionally, these defendants deny the allegations contained within the Fixed Date claim form that they acted dishonestly in a manner that oppressed the interests of the Claimant as Director and shareholder of the Company.

6. These defendants humbly submit that the order issued by this Honourable Court be dismissed as against the (Sic).

7. These defendants hereby submit that this action should be dismissed against them, with costs.

8. Save as have been specifically admitted, these defendant deny each and every allegation which has been made in the Particulars of Claim as if the same were separately set out herein and traversed.

Amended Counterclaim

These Defendants repeat paragraph 1 to 8 hereof and in addition aver that:

(a) The Claimant has breached the contract of employment of the 3rd defendant by unlawful withholding emoluments.

(b) That the claimant's conduct is oppressive to the 1st and 2nd defendants in that the claimant is seeking to remove the offices of the fourth defendants to an environment which is hostile to the said defendants, they being actual and potential shareholders of the fourth defendant.

The 1st, 2nd, and 3rd defendants further claim against the claimant and seek the following:

9. A Court order ordering that:

(a) Benkley Northover shall not:

(i) retain his position as Director of the Company;

(ii) hold himself out as being authorized to do any business on behalf of the Company;

(iii) carry out or purport to carry out any business on behalf of the Company;

(iv) hold any discussions with banks or any other financial institutions in relation to the Company's affair or in any other way be involves in or interfere with the operations of the Company;

(v.) be a signatory on the company's accounts.

(b) Clarke Lowe shall not:

(i) hold himself out as being authorized to do any business on behalf of the Company;

(ii) carry out or purport to carry out any business on behalf of the Company;

(iii) hold any discussions with banks or any other financial institutions in relation to the Company's affairs or in any other way be involved in or interfere with the operations of the Company;

(c) Kaon Northover shall not:

(i) hold himself out as being authorized to do any business on behalf of the company;

(ii) carry out or purport to carry out any business on behalf of the Company;

(iii) hold any discussions with banks or any other financial institutions in relation to the Company's affairs or in any other way be involved in or interfere with the operations of the Company;

(d) Christopher Northover shall not:

(i) hold himself out as being authorized to do any business on behalf of the Company;

(ii) carry out or purport to carry out any business on behalf of the Company;

(iii) hold any discussions with banks or any other financial institutions in relation to the Company's affairs or in any other way be involved in or interfere with the operations of the Company;

(e) Philip Duncan shall not:

(i) hold himself out as being authorized to do any business on behalf of the company;

(ii) carry out or purport to carry out any business on behalf of the Company;

(iii) hold any discussions with banks or any other financial institutions in relation to the Company's affairs or in any other way be involved in or interfere with the operations of the Company;

(f) The following persons be appointed as directors and officers of the company Mr. Eric Northover, Managing Director; Mr. Tekler Johnson, financial Controller, Mr. Mikhail Northover, Director.

10. A declaration that the following persons will retain their position within the Company: Mr. Eric Northover, Director and Mr. Godfrey Dixon, Secretary.

11. Costs reserved

On the following grounds:

12. These defendants repeat and reply upon the allegations contained in the paragraphs 1 – 8 of the defence and counterclaim.

13. Additionally, despite demands, the claimant failed and/or refused to provide an accounting of the funds removed from the accounts of the Company.

14. By reason of the matters pleaded in paragraph 1 – 4, 9 and 10 above, these defendants aver that the Claimant has breached his fiduciary duty as director of the Company by acting dishonestly and in a manner that oppresses the interests of the Company and by extension its shareholders.

15. Section 213A of the Companies Act

16. It is just to do so.

17. AND THE DEFENDANTS CLAIM:

1. A declaration that the issued shares of the fourth defendant were and remain 400 in number.

2. A declaration that any purported allotment of shares to Benkley Northover and to Norman Northover is unlawful and of no effect.

3. An order restraining the Claimant whether by himself or his agent from relocating the offices of the fourth defendant from 1 Latham Avenue to premises owned and/or controlled by Phillip Duncan or by any other person not approved by the beneficiaries of the estate of Winston G. Northover, deceased.

4. Damages for breach of the contract of employment of the 3rd defendant.

THE INTERIM ORDER

[15] An order was made by Mangatal J (as she then was) on the 16th May 2013 granting injunctions against the 1st, 2nd and 3rd Defendants. These orders were extended to the 21st May 2013 and further extended to June 5, 2013, 23rd September and 4th October 2013. In addition to the extension of the injunction, further orders were made on the application of the Claimant. The court appointed Mr. Clarke Lowe as interim Chairman of the company, Benkley as Managing Director, Mr. Christopher Northover as Director and Mr. Kaon Northover as Company Secretary. It was ordered that the registry of the Registrar of Companies be amended to so reflect. The Claimant undertook to provide the 1st and 2nd Defendants with monthly management accounts of the company, monthly spreadsheets giving details of all receipts and payments by the company and a monthly bank statement of its account. He also undertook to conduct all company transactions through one bank account.

[16] I have made reference to this interim management structure put in place by Mangatal J because it is this order which the Claimant seeks as a permanent remedy. Several affidavits were filed by the parties in this matter and by previous order of the court all were treated as witness statements and were allowed to stand as the parties' evidence in chief at trial.

THE CLAIMANT'S CASE

[17] It may be easier to summarize the case presented by each side very early in this judgment. In short the Claimant contends that in 2012, just before he died, WN allotted 400 of the company's unissued shares to him and 100 to his son Norman. Norman was also made Managing Director. On the death of WN, Benkley became a director, Norman stole from the Company and was fired and Eric was made Managing Director. Soon thereafter there was a disagreement amongst the parties and on December 28, 2012 Clarke Lowe was appointed a Director and independent Chairman. Thereafter, at a meeting of the directors, Benkley was made Managing Director and two other directors were also appointed. It is unclear from the evidence just how Eric became dethroned, other than to infer that there was a successful coup at the directors meeting held January 28, 2013, to which Eric was not in attendance.

[18] The Claimant now alleges that the 1st and 2nd Defendants have:

(a) Dishonestly filed forms at the Registrar of Companies purporting to have removed the Claimant as a Director and to have dispossessed him of his shares;

(b) Used the records at the Registrar of Companies, thus procured, dishonestly to cause banks and other third parties to cease to accept the Claimant as having authority to act on behalf of the Company;

(c) In this way dishonestly seized control of the Company; and having done so;

(d) Used such dishonestly obtained control to convert the Company's assets (including cash) to their own and to the detriment of the Company and ultimately its shareholders, including the Claimant.

THE DEFENDANTS' CASE

[19] The Defendants' case in summary is that the shares to Benkley and Norman were improperly and fraudulently allotted and was in any event in breach of Articles 7, 8, 29A, 44 and 55 of the Articles of Association and s. 38, 61 and 73 of the Companies

Act 2004. As a result any such allotment was unlawful, void and of no effect. The Defendants also contended that:

(a) There was no properly convened general meeting of the Company for which notices as required by law were given.

(b) There was no quorum at any meeting that might have been convened by the Directors of the Company.

(c) There was no consent in writing or sanction of an ordinary resolution passed at a general meeting of the shareholders of the Company whereby their rights to dividends and voting power were varied.

(d) Any purported transfer of shares by W.G. Northover to Norman Northover and Benkley Northover was unlawful being in beach of Article 29 (ix).

(e) There was no consideration provided for any shares purportedly allotted to the Claimant. In the alternative, the consideration provided was other than cash and s. 61 of the Companies Act was not complied with.

[20] The Defendants also contended that the Claimant:

(a) Dishonestly and without authority filed forms at the Registrar of Companies purporting to appoint board members and to have removed the 3rd Defendant as Secretary of the Company;

(b) While acting as Managing Director the Claimant has misappropriated or unlawfully retained funds from the account of the Company;

(c) Acted dishonestly to gain control of the Company in an attempt to convert the assets (including cash) to his own and to the detriment of the Company and its shareholders.

THE SUBMISSIONS

[21] Counsel for the Claimant submitted that section 213A of the Companies Act itself is clear as regards the Claimant's ability to bring a claim under the section. He noted that whereas the English authorities restrict the claim to minority shareholders, the Canadian Act, from which the Companies Act 2004 is patterned, is much wider. He argued that once the Claimant can show undue prejudice or oppression it matters not whether he is a minority or majority shareholder.

[22] He also argued that the pre-emption provisions did not arise as no new shares were issued and the provisions refer only to the issuing of new shares. Counsel stated that pre-emption rights, by virtue of article 44, attached only to new shares. Counsel argued that as the shares allotted were from the original capital of the Company they were not new shares; accordingly, the unissued shares were at the disposal of the directors by virtue of article 15. As the only 2 directors at the time were the deceased and Norman Northover, there was therefore, no legal impediment to the allotment.

[23] Counsel argued that the documents in evidence spoke for themselves. He said the allotments were signed by the Company Secretary along with the cheques for the payment for preparation of the said documents. He noted that the allotment of the shares to Benkley by WN was never an issue between the parties until they started to "fight". He argued that the restriction on allotments was to prevent manipulation of the shares but that no issue of mala-fides arose in this case. He asked that the interlocutory remedies be made final as these have held the company together.

[24] Counsel pointed out that the evidence before the Court demonstrated that the Claimant holds a total of 700 shares; 400 of those shares are held by the Claimant in his own personal capacity, and the remaining 300 shares are held by him on trust, for all of the progeny of the late WN. The shares held on trust were given to the Claimant pursuant to the terms of the last will and testament of WN. Counsel noted that the former Company Secretary had said that he had been the deceased's confidant. His evidence was that he met with the deceased before his death, where the deceased told Ruth Josephs, the accountant, to prepare an allotment of shares to Benkley sufficient to give him a majority so that Norman Northover could not be removed by his children when they received their 300 shares.

[25] Counsel also argued that Godfrey had said in his evidence-in-chief that he had signed the letter of allotment that notified the Registrar of Companies that the

deceased had allotted 300 shares in the Company to the Claimant. Counsel noted that he also confirmed in cross-examination that:

(i) He had signed the cheques to the Registrar of Companies and to Ruth Josephs, the accountant, for fees incurred in respect, *inter alia,* of the said allotment of 400 shares to the Claimant;

(ii) He had not at the time questioned the allotment in any respect;

(iii) Only subsequently, after this dispute arose, did he question the number of shares allotted, saying that 300 as opposed to 400 should have been allotted to the Claimant.

[26] Counsel argued that Godfrey's initial agreement with and execution of the relevant document in connection with the allotment of 400 shares must be taken as evidence of the truth of what happened at the time, in preference to his later position, which may have been influenced by other factors.

[27] Counsel submitted that of the 3 Defendants who gave evidence, only Godfrey was able to give coherent evidence regarding the allotment of the shares to the Claimant. It was further submitted that his confirmation of:

(i) the conversation with the deceased in the course of which Ruth Josephs was instructed to prepare the allotment of sufficient shares to give him and Norman a majority;

(ii) his subsequent filing of the return of allotment showing the allotment of 400 shares to the claimant;

(iii) his signature on the cheques to Ruth Josephs in connection with the allotment; and

(iv) his confirmation that he had not, until sometime later, questioned the number of shares allotted;

cumulatively amounted to overwhelming evidence that the deceased allotted 400 ordinary shares in the Company to the Claimant before he died.

[28] Counsel asked the court to find corroborative evidence in the documents to be found at pages 155–157 of the bundle of Agreed Documents. Those documents were a letter and an invoice (with accompanying cheques for payment thereof) indicating that Ruth Josephs was carrying out the wishes of the deceased. Counsel claimed that page 156 of the Agreed Documents is of specific importance. It is the invoice from Ruth Josephs for services rendered with the following itemization:

> *"1. Preparing Last Will & Testament*
>
> *2. Preparing and filing with the Companies Office of Jamaica;*
> **Appointment of Director, Benkley Northover*
> **Allotment of shares, Benkley & Norman Northover*
>
> *3. Prepare Instruments of Transfer with respect to:*
> **Winston George Northover Shares*
>
> *4. Prepare Blank Instrument of Transfer with respect to:*
> **Benkley William Northover shares"*

On page 157 of the agreed bundle of documents, there are photocopies of two cheques signed by the 3rd Defendant for the payment of these services.

[29] Accordingly, it was submitted that there was no credible challenge on the facts to the Claimant's beneficial entitlement to 400 ordinary shares. It is submitted that the 1st to 3rd Defendants, having filed a joint defence, are bound by Godfrey's confirmation that the Claimant is a beneficial shareholder in the Company. Counsel argued that the Defendants have sought in previous interlocutory hearings to raise two legal arguments against the allotment; first, that such allotment was an improper use of the power to allot shares; and secondly, that it was a breach of the pre-emption rights in the articles of the Company. As regards the first issue, it was submitted that the purpose of the allotment was to maintain a balance in the Company, to ensure that it would not be taken over by the deceased's children, whom he had deliberately not placed in control of the Company. It was not to damage the legitimate interests of any shareholder.

[30] Accordingly, there being overwhelming evidence supporting the allotment of 400 shares to the Claimant in his beneficial capacity and no legal impediment to the allotment, the Claimant was entitled to the declaration sought to the effect that he holds 400 shares in the Company, beneficially, and 300 as trustee.

[31] Counsel submitted that a board of directors had been properly appointed. The 1st, 2nd and 3rd Defendants each admitted in cross-examination that after the deceased's death, the directors were agreed to be Norman Northover, the 1st Defendant Eric and the Claimant Benkley. It was pointed out that it is common ground that, following Norman Northover's dismissal the directors were the Claimant and the 1st Defendant. It is also common ground that disputes ensued, that were attempted to be settled by the appointment of a new board. Counsel pointed out that each of the 1st to 3rd Defendants admitted in cross-examination that the new board consisted of Mr. Clarke Lowe, an independent, the 1st Defendant and the Claimant. The 2nd Defendant's belief that Mr. Lowe was to have been the managing director as opposed to the chairman is indicative of the fact that he acknowledged that Mr. Lowe was a director. Accordingly, it was submitted that the Defendants had admitted that a board of directors was properly in place.

[32] It was submitted that it followed from this that any actions by any of the Defendants designed to obstruct or hinder the effectiveness of such board in the performance of its duties to the Company in a manner that damaged the Company's business, would be oppressive and unfairly prejudicial to those interested in the Company's affairs, including its directors and shareholders.

[33] It was submitted, that the facts set out in the report of Mr. Lowe to the Board and exhibited to his affidavit were not challenged. In his report, Mr. Lowe itemized behaviour on the part of each of the 1st to 3rd Defendants which amounted to conduct oppressive and/or unfairly prejudicial to the interests of the Claimant as

a shareholder and as a director. The Claimant also gave evidence of the oppressive and/or unfairly prejudicial conduct of the 1st to 3rd Defendants, which was also unchallenged.

[34] Counsel argued that on the evidence presented, it was plain that the actions of the Defendants have been oppressive to the interests of the Claimant and that the instance of the obstruction of the relocation of the Company's office was only one example of such conduct. Counsel noted that there were other actions such as the circumstances surrounding what was described as the Discovery Pointe Project. Those circumstances, he said, were laid out in the Report of Clarke Lowe. Mr. Lowe reported that the "tender was submitted by Eric without the knowledge of other personnel in the company." There were shortcomings to the tender, which Mr. Lowe described as being the fault of someone who did not know "what they were doing whilst tendering."

[35] Counsel stated that the actions of the 1st Defendant demonstrated a history of oppressive actions. It was the Claimant's submission that the 2nd Defendant was complicit in all of the oppressive actions. This is demonstrated by the 2nd Defendant loaning the 1st Defendant resources, namely the 2nd Defendant's assistant, Ms. Morgan, to facilitate the running of the Discovery Pointe Project.

[36] It was also the Claimant's submission that the 1st and 2nd Defendants were wholly unsuitable to be in charge of the company. Counsel argued that they had demonstrated a disregard for the decisions of the Board and were determined to run the company in any manner in which they chose to do so, if given the chance. Counsel emphasised that their father, the deceased, had anticipated such behaviour. It was argued further, that the 1st Defendant and 2nd Defendant had shown significant disregard for the jurisdiction of the Court. In his affidavit filed on 31st October, 2013 (p. 32 Bundle of Witness Statements and Affidavits) the 1st Defendant stated at paragraph 5:

> *"... I even now genuinely believe that I was only being stopped from being a Director who assisted with the management of the company and who could communicate with and give instructions to the bank."*

[37] Counsel noted that this sworn evidence given by the 1st Defendant was problematic for a number of reasons. Firstly, counsel argued that if the 1st Defendant believed he was being stopped from communicating and giving instructions to the banks, why did he continue to do so? Secondly, the 1st Defendant claimed that he "genuinely believed" that he was only being stopped from being a director who assisted in the management of the Company; so why then did he and the 2nd Defendant obstruct access to the Company's documents for the Company to be managed by others? Thirdly, and according to counsel, perhaps most crucially, the 1st Defendant contradicted this sworn evidence under cross-examination. Under cross-examination the 1st Defendant stated that he knew exactly what the order meant, but that he decided not to obey it. Counsel submitted that both versions could not be true.

[38] Counsel pointed out that the 1st Defendant continued to disregard the orders of the Court even when the meaning of the orders was made plain by Mangatal J on 4th October, 2013; that the 1st Defendant was present in chambers on that date and Mangatal J expressed in unequivocal terms the meaning of the order the court was granting and the consequences for breaching said order. Counsel submitted that bank records indicate that subsequent to those clear warnings the 1st and 2nd Defendants proceeded to not only engage with the Company's bank accounts, but also to systematically deplete the significant holdings therein. Counsel submitted that documentary evidence bears this out plainly. Counsel's submission was that there have been multiple instances of conduct on the part of each of the 1st to 3rd Defendants that have been oppressive and/or unfairly prejudicial to the interests of the Claimant, and that accordingly, the court has the power under s.213A of the Companies Act to grant the remedies set out therein.

[39] Counsel submitted in the first instance, that the interim orders of Mangatal J. should be made permanent, with liberty to apply. Counsel submitted also that in so far as those orders excluded those who had made it their business to disrupt the company's affairs, and its operations; put in place a stable board to manage its affairs and were given on undertakings to supply financial information to the Defendants, that such undertakings adequately protect their interest, and should be continued. Further, it was argued that such a resolution of the matter would not preclude the 1st and/or 2nd Defendants putting proposals to the board for future co-operation, and sub-contract arrangements, as a means of developing a working relationship between all the parties in the future.

[40] In contrast, counsel for the Defendants argued that the pre-emption rights were breached and that the procedure for allotment of shares was not followed. He argued that there should have been a meeting of the directors and shareholders passing a resolution to issue the shares. Counsel declared that article 105 was breached by WN. He said the share certificates were to be stamped and entry made into the registry of the names of the new owners. He said there was no evidence of a meeting between the two directors. He submitted that no single director can take the decision to issue unallotted shares. In any event, he argued the court should not uphold an imperfect gift. The instrument of transfer must be signed by transferor and transferee and attested and must be registered. Counsel argued that the shares were not in WN possession to give away. He argued that even if they were, they could only go to Benkley by inter vivos transfer or by a new will or by codicil to the old will. Counsel pointed out that there was no evidence of such.

ISSUE1- WERE THE SHARES VALIDLY ALLOTTED TO BENKLEY AND NORMAN NORTHOVER

The Principles Governing Allottment by an Irregularly Constituted Board of Directors, Pre-emption Rights and Allotment for Improper Purposes

[41] For the simple reason that I believe it will greatly simplify the decisions I have to make in this matter, I intend to deal with the allotment of shares to Benkley and Norman first. It will be more convenient to later deal with the issue of whether there was in fact oppressive conduct and or unfair prejudice on either side. By way of introduction, I should also point out that W. G. Northover and Associates is a privately owned limited liability company. It is generally recognized that shareholders in privately owned family companies are deeply involved in its management. These are privately held corporations where shareholders usually know each other and are often familiar with each other. They rarely have outside directors and the shareholders run these companies at all levels. The result of this is that shareholders generally ignore the formalities of good corporate governance. However, even in these, what are largely family owned companies, Company Laws and the provisions in the Articles of Associations of these companies have to be complied with. It does not matter that some members' shares were obtained by way of gift as long as it is valid. However, common understanding amongst shareholders could override the provisions of the Articles of Association if it is proved to exist: see **Benjamin Elysium Investment Pty** Ltd 1960 (3) S.A. 467 (ECD)

[42] The Defendants have raised the issue that the allotment of 500 shares was a breach of the pre-emption rights in the Articles of the Company and that the 500 shares were improperly allotted. The Claimant submitted that the pre-emptive rights in Article 44 of the Articles of Association attaches only to new shares and not to original shares of the Company. Therefore the unissued shares were at the disposal of the Directors which at the time were only two, the deceased WN and the Claimant's son Norman. It was further submitted that the purpose of the allotment was to maintain a balance in the Company, to ensure that it would not be taken over by the deceased children, whom he

had deliberately not placed in control of the Company. It was not to damage the legitimate interests of any shareholder; on the contrary it was to protect all concerned. It was said that no purpose could have been more proper. The Defendants also asserted that the allotment of 400 beneficial shares to Benkley by WN was an improper use of the power to allot shares.

[43] Persons become members of a company by any of the following means:

1. By subscribing to the Memorandum of Association upon registration of the company.

2. By agreeing with the company to take a share and being placed on the registration of members.

3. By taking a transfer of a share and being placed on the register of members.

4. By succeeding to the estate of a deceased or bankrupt member and being placed on the register of members.

5. By allowing one's name to be on the register of members or otherwise holding oneself out as a member.

[44] Benkley could be said to have become a member by virtue of the operation of two, four and five above. So where a person is not an original subscriber, there must be two essential conditions present; either an agreement to become a member and entry on the register or an agreement to take shares by applying for them and having them transferred to one's self. A share is allotted to an investor when it enters into a binding contract to purchase the share in return for payment of the sale price. The investor then acquires the unconditional right to be included in the register of members in respect to those shares. He acquires an equitable title to the share. A share is not formally issued to the investor until the name is actually registered in the company's register of members. At this stage the shareholder acquires the legal title to the share. In this case WN made Norman Managing Director by letter dated April 27, 2012, in it there was no mention of the allotment of shares. However, the allotment was registered by way of return of allotment to the Companies Office. In the case of Benkley no transfer was

made of the 400 shares from WN to him, although, he Benkley, signed a blank transfer to transfer the shares to unnamed person or persons. However, the allotment to him was registered by way of return of allotment to the Companies Office. There being no actual transfer of the shares signed by WN, he and Norman therefore, claims only a beneficial interest in those shares.

Pre-Emption Rights

[45] I will begin first with the issue of whether there was a breach of pre-emption rights by the issue of new shares. All companies are incorporated with an authorised share capital. This fixes the ceiling on the amount of capital the company could raise by the issue of shares without any further formalities. So as in this case where the authorised share capital was 1000 ordinary shares of $1 dollar each, the company was authorised to sell $1000 worth of shares to shareholders, but might, in actual fact, utilize only 400 worth. It is from these that shares are allotted and issued. In the case of W. G. Northover and Associates, of the authorized share capital of 1000 shares, the issued shares were 400 to the first subscribers, WG (300) and Elliot (100). This is also known as the subscribed capital. Until the allotment to Benkley and Norman, no other shares were issued or allotted from the authorised share capital. The authorised share capital is only a notional ceiling on share issues, a ceiling which may be raised by ordinary resolution of the shareholders by voting to create new share capital in addition to the original authorised share capital.

[46] Pre-emption rights are rights of first refusal given to the shareholders of a company to subscribe for any new shares that the company issues in proportion to their existing shareholdings. This allows the balance of control between the respective shareholders to be maintained. The right also prevents the diminution in value of existing shares, which will happen if new shares are issued, especially if issued at a price below their true value. Pre-emption rights may be expressly provided for in the company’s Articles of Association and in the Companies Act. Breach of pre-emption rights provisions however, do not invalidate the new issue but those for whom the right exist are entitled to be compensated under a separate compensation claim. It is also

equally doubtful whether pre-emption rights apply to shares given for non cash consideration or to bonus shares.

[47] Since pre-emption rights or subscription rights are rights given to existing share holders to purchase new issues of the company shares before it is offered elsewhere, the result is that existing shareholders can maintain proportional ownership of the company, if so desired. So, if a corporation offers pre-emptive rights to shares from its authorized, but unissued shares it will offer rights to existing shareholders so that they can maintain their proportionate ownership of the corporation. Authorized share capital includes issued shares and unissued shares. If a corporation wants to raise more money, it will frequently do so by issuing more shares from the authorized share capital which was so far unissued. If it does issue more shares, those are new shares to which pre-emption rights accrue to allow existing shareholders to maintain their proportionate ownership of the company and to prevent dilution of voting rights and dividends rights of the original shareholders.

[48] Authorized share capital only means a company can only issue shares up to that authorized limit. To issue more shares beyond the authorized limit it will have to amend its articles to create new shares and increase the authorized limit. Pre-emption rights may or may not accrue to those new shares created depending on the company's constitution and or the Companies Act. A company's balance sheet can only reflect its issued capital. So the issued capital reflected in the 4th Defendant's annual returns up to 2012 was reflective of the 400 shares. The issue of the additional 500 shares by WN will now affect the Company's balance sheet by a change in the capital figure resulting from the issue of new share capital. Therefore, the unsubscribed shares remain new shares until they are issued according to law and the Articles of Association. The Claimant's contention that pre-emption rights do not apply to the 500 shares issued by WN because they are not new shares is untenable and unsupported by law or commonsense.

[49] The question that arises is whether pre-emption rights accrue to the remaining unsubscribed share capital of 600 shares under the company's constitution. The Articles are the contractual terms which govern the relationship of shareholders with the Company. To answer whether any action by members of the company was lawful or valid we must first question whether the conduct was in keeping with the Articles of Association. To prove the invalidity of the action it must first be proved that there was either a breach of the articles or breach of a fundamental understanding. The articles constitute a contract between company and its members, therefore, unlike other contracts the articles cannot be rectified by the court. Where the articles limit the powers of the company in general meeting it cannot be disregarded by the majority.

[50] Section 61 of the Companies Act provides that;

> (1) If the articles so provide, no shares or a class of rights shares may be issued unless the shares have first been offered to the shareholders of the company holding shares of that class.
>
> (2) The shareholders mentioned in subsection (1) have a pre-emptive right to acquire the offered shares in proportion to their holding at such price and on such terms as those shares are to be offered to others.

[51] The pre-emptive right of a shareholder is thus solely dependent on the provisions of the Articles. Article 29a gives the 2nd Defendant, as an existing shareholder, pre-emption rights over shares being transferred by another shareholder. By virtue of article 29a (ix) an exemption attaches to shares which are being transferred to a stated class of family members, including a brother but not including nephews. So even if the Claimant was correct and the 500 shares were not new shares, pre-emption rights would nevertheless attach to the 100 shares purportedly given to Norman.

[52] Articles 42 – 46 of the Company's Articles of Association speak to the alteration of capital. In particular, Article 42 of the Company's Articles of Association provides that:

> *"The Company may by ordinary resolution increase the capital by the creation of new shares, such increase to be of such aggregate amount and to be divided into shares of such respective amounts as the resolution shall prescribe."*

In this particular case no new shares were created by ordinary resolution to increase the share capital. However the unsubscribed shares remained as new shares from the existing share capital.

[53] Article 44 of the Company's Articles of Association provides that:

> *"Subject to any direction to the contrary that may be given by the Company in general meeting, all new shares shall before issue, be offered to such persons as at the date of the offer are entitled to received notices from the Company in general meetings in proportion as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled..."*

Although the company was formed with authorized share capital of 1000, article 42 provides for an increase in the share capital, by ordinary resolution, to create new shares. Pre-emption rights would apply to those new shares as created. Article 44 of the company's Articles of Association provides for new shares before issue to be offered to existing shareholders. In my view, it matters not whether the new shares are from the unissued authorized share capital of 1000 shares or new shares created by virtue of article 42.

[54] Having determined that pre-emption rights attached to the issue of those 500 unsubscribed shares, I found no evidence that they were first offered to Rohan, as existing shareholder, in proportion to his existing shareholding. There was no evidence that a meeting was held approving, by vote, the issue from the unsubscribed shares, neither was there a vote to issue the shares to anyone other than to the existing shareholders. Article 55 states that no meeting with less than 2 members present is competent to transact the business of the company. There is no evidence of a meeting of both directors or any decision taken by the company in general meeting.

[55] Section 61 (3) of the Companies Act goes on to state that;

> *"Notwithstanding that the articles provide the pre-emptive rights referred to in sub-section (1), the shareholders of the company have no pre-emptive right in respect of shares to be issued by the shareholders of the company-*
>
> *a) For consideration other than cash*
>
> *b) Pursuant to the exercise of conversion privileges, options or rights previously granted by the company."*

[56] Therefore, Rohan had a pre-emptive right to the 500 new shares issued by WN which could only be defeated if section 61(3) (a) and (b) applied. In any event the procedure to be followed is also outlined in section 38 of the Companies Act and there was no evidence that there was any compliance with that section of the Act. Even where the directors and shareholders are the same people the procedure must be followed (see **Chin v Chin** [2007] UKPC 57, where the Privy Council held that the provisions in the articles of a company for meetings to be held to vary shareholdings must be obeyed). The ultimate conclusion resulting from this breach is that Rohan's rights were breached and the allotment to Benkley and Norman was thereby invalidly made.

Duty to Exercise Powers for a Proper Purpose

[57] The Claimant also relied on the powers given to directors in Article 15 of the Company's constitution to allot, dispose of or grant options over the shares to persons as they deem fit. On the face of it this seems to be a wide power but the authorities do show that in addition to the obligation to act bona-fide in the interest of the company, the directors must exercise their powers for a proper purpose and must not act for any collateral (i.e personal or sectional) purposes. It applies to the exercise of the director's power in any given way. The exercise of power to issue and allot shares must not be for any improper purpose eg. to reduce shareholdings or affect the voting rights of an existing majority shareholder adversely; see **Re Cumana Ltd** [1986] BCLC 430; Lord Greene MR in **Re Smith and Fawcett Ltd** [1942] Ch 304(meaning of in the "interest of the company") and **Bishopsgate Investment Management Ltd v Maxwell (No. 2)**

[1993] BCLC 814 (improper transfer of shares for no consideration). Whilst a shareholder has no right in rem to prevent further allotment of shares, the shareholder is entitled to expect the power to allot be exercised lawfully.

[58] To constitute a valid allotment there must be as a general rule, a duly constituted board of directors although it may be subsequently ratified by the duly constituted board. The duty of directors in allotment, as in all matters, is that they are bound to act in good faith in the best interest of the company. Article 15 of the Company's Articles of Association gives the directors of the Company wide powers in relation to the handling of the Company's shares. Article 15 provides that:

> *"The shares shall be under the control of the Directors, who may allot and dispose of or grant options over the same to such persons, on such terms, and in such manner as they think fit..."*

[59] Article 15 makes reference to "Directors" and not "a Director". It also makes reference to "in such manner as they think fit" and not "as "he thinks fit". This suggests that the power to be exercised under this Article, in carrying out the business of the Company, is not a power to be exercised solely by any one director but is to be exercised with the input of all directors. At the time of WN's death there were two directors and they never met and they did not approve or subsequently meet to ratify the decision to allot new shares. There is no evidence that the other director at the time, Norman, even knew that shares were being allotted in his favour.

[60] In carrying out the business of the company Article 105 of the company's Articles of Association makes provision in relation to the meeting of directors. Article 105 provides that:

> *"The Directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. Until otherwise determined two Directors shall constitute a quorum. Questions arising at any meeting shall be decided by a majority of votes..."*
> *(emphasis added)*

[61] It is evident from Article 105 that a single director does not constitute a quorum for a meeting of directors in which the company's business can be properly decided. The circumstance where a sole director can exercise all the powers of directors is provided for in Article 77. Article 77 of the company's Articles of Association provides that:

> *"…In the event that the number of Directors is determined as one, or only one Director is appointed, any provision in these articles relating to a quorum of Directors shall be inapplicable and that Director shall have all the rights and be entitled to exercise all the powers of Directors contained in these articles."*

[62] At the time of the allotment of 400 shares to Benkley and 100 to Norman in April 2012 the Company had two Directors; W.G. Northover and Norman Northover. This is indicated by the Notice of Appointment and Change of Directors dated April 2, 2012. This means that W.G. Northover was not the only appointed director and thus was not entitled under Article 77 to exercise all the powers of directors contained in the Articles. W.G. Northover's sole exercise of power in allotting 400 shares to Benkley Northover and 100 shares to Norman Northover was therefore improper and a breach of the Company's Articles of Association. The allotment of 500 shares by WN was for the purpose of altering the voting power among shareholders within the company. This therefore, also amounted to an improper purpose and an improper use of the power to allot shares.

[63] If authority is required for this conclusion there is a plethora of them. In **Dalby v Bodilly** [2005] BCC 627, Blackbourne J held that the respondents conduct as the only director in allotting himself an additional 900 shares was in clear breach of fiduciary duty in that he was plainly putting his own interest before those of his fellow shareholder. The allotment was not in the interest of the company as a whole. It was unfairly prejudicial conduct. The facts of that case were that D and B, who were unrelated, held 50% share each in the company but B was the sole director and his wife was the company secretary. The relationship between D and B broke down and B allotted to himself the

remaining unissued shares, nil paid, which had the effect of increasing his shareholdings to 95% and diluting D's shareholding to 5%.

[64] In **Howard Smith Ltd. v Ampol Petroleum Ltd**. [1974] AC 821 PC; [1974] 1 All ER 1126, the directors exercised their powers intra vires under a provision in the company's articles identical to article 15. Lord Wilberforce delivering the opinion of their Lordships in the Privy Counci observed that:

> *"So far as authority goes, an issue of shares purely for the purpose of creating voting power has repeatedly been condemned…In the leading Australian case of **Mills v Mills (1938) 60 CLR 150**, it was accepted in the High Court that if the purpose of issuing shares was solely to alter the voting power the issue would be invalid… so it must be unconstitutional for directors to use their fiduciary powers over the shares in the company purely for the purpose of destroying an existing majority, or creating a new majority which did not previously exist."*

[65] In **Re Smith and Fawcett Ltd** it was also held that directors must not exercise powers for any collateral purpose. Not only is it a fiduciary duty but is also part and parcel of the duty to act in good faith. While an allotment or issue of shares can be lawfully made, an existing shareholder is entitled to insist that the power to do so is lawfully exercised. If a power is exercised for some collateral or unlawful purpose, the directors will be held guilty of an abuse of their powers and their action may be set aside. So in **Whitehouse v Carlton Hotel Pty** [1987] 162 CLR 285, Wilson J citing **Howard Smith Ltd. v Ampol Petroleum Ltd.** held that it was not the function of the directors to favour one group of shareholders or one shareholder over the other by exercising their fiduciary power to allot shares for the purpose of diluting the voting power attached to the issued shares held by some other shareholder. Where the shares were issued in the directors self-interests or for the purpose of cementing or maintaining their own management control, it will be held to be invalid.

[66] One example given in Company Law by Alan Digman and John Lowry at pg 302, 4th edition is that of directors who may believe it is in the best interests of the company

to defeat a takeover by allotting shares to shareholders who will reject a takeover bid, but that would not be the proper exercise of the power to allot shares as that power is given to raise capital and not to increase the voting rights of certain shareholders in order to defeat a takeover.

[67] The principle is that the power to issue shares created a fiduciary duty which must only be exercised in order to raise capital for the company and a share allotment for any other purpose was improper: see also **Hogg v Cramphorn** [1967] Ch 254; [1966] 3 ALL ER 420, where the primary motive for the allotment was to forestall a takeover bid and to remain in control, it was held by Buckley J that the allotment was invalid having been made for improper purposes. The fact that the directors thought the takeover would result in the sacking of workers did not make the allotment one in the company's interest. Also in **Piercy v S Mills and Co Ltd** [1920]1 Ch 77, directors allotted shares although the company was not in need of additional capital. It was held that the allotment was done simply and solely for the purpose of retaining control in the hands of existing directors and was therefore invalid. In **Howard Smith v Ampol Petroleum Ltd.** the Privy Council held that the allotment was invalid as it was only made to destroy Ampol's majority shareholding in the company.

[68] The court must be guided by the underlying rationale of the proper purpose doctrine. The approach taken by the court in **Howard Smith v Ampol Petroleum Ltd.** was to

(i) identify the nature and extent of the power;

(ii) identify the range of purposes for which that power might properly be exercised;

(iii) identify the substantial purpose for which it was actually exercised in the particular case;

(v) measure that actual purpose identified in step (iii) against that range of permissible purposes for the exercise of that power as indicated by the articles or ascertained by the court in accordance with step (i).

[69] If the substantial purpose is proper, the exercise of the power will not be invalidated by the presence of some other improper, but insubstantial purpose. However, if the director's opinion is bona fide and shows good managerial judgment the court may conclude that the exercise of the power to allot was, broadly speaking, proper in an all the circumstances. The court will consider whether it was for the benefit of the company as a whole as distinct from maintaining control of the company in the hands of the directors themselves or their friends or a few select family members.

[70] It is clear, therefore, that issuing and allotting shares for improper purposes such as to reduce shareholding will result in the allotment being prohibited by the court. This is subject to the proviso that an act which is within the scope of the expressed or implied powers conferred by the articles and memorandum of the company is not to be held to be outside of the scope of the company's capacity simply because it was entered into for other improper purposes. It is also recognised that whilst the power to issue shares is usually exercised to raise capital, there may be other genuine reasons or occasions when the directors may properly and fairly issue shares: see **Punt v Symons and Co** Ltd [1903] 2 Ch 506.

[71] In this case the Claimant is relying on the powers granted to the directors under article 15 of the Company's Articles of Association. The text of Article 15 is worth repeating. It states:

> *"The shares shall be under the control of the directors who may allot and dispose of or grant options over the same to such persons, on such terms and in such manner as they think fit. Shares may be issued at par or at a premium."*

If this is an absolute power granted to the directors by the Articles then the Claimant would be correct. Shareholders cannot interfere with powers conferred on directors by the articles. See **John Shaw and Sons v Shaw** [1935] 2 KB 113. However, it is clear that this power must be read in conjunction with the other provisions in the Articles especially those granting pre-emption rights to existing shareholders. The uncontroverted evidence given by Benkley himself is that the shares were allotted to his

son Norman and himself to prevent Rohan and Eric from taking over the company. WN also made Norman Managing Director to put the company's affairs in order. There is no evidence that the company's affairs was in any disorder which was not created by WN himself acting in breach of the Articles of the Company.

[72] At the time of the allotment WN was in hospital with an undisclosed illness. What was clear, however, was that he appointed Norman as Managing Director whilst in hospital, the day before he died. At the time there were two directors, himself and Norman. Norman was not at the hospital the day the allotments were made or when he was appointed and was not a party to the decision. No director's meeting was held with a duly constituted board in quorum. To constitute a meeting there must be more than one member present. See Article 105 and **Sharpe v Davies** [1876] 2 QB and **Clemens v Clemens** [1976] 2 All ER 268.

[73] The Claimant on page 4 of his first Affidavit at paragraph 16 and 18(a) stated that:

> *"He (W.G. Northover)…told me that one of his main concerns was to ensure that all of his children were looked after. He (W.G. Northover) feared that there was a likelihood that Eric (Northover) and Rohan (Northover), particularly Rohan (Northover), would take over the Company and the other children would get nothing …then, on the advice and with the assistance of his (W.G. Northover) accountants…he (W.G. Northover) allotted 400 shares to me (Benkley Northover) beneficially, so I (Benkley Northover) would have, along with Norman, a controlling interest in the company."*

[74] The Claimant's Attorney-at-Law in written submissions submitted that:

> *"The purpose of the allotment was to maintain a balance in the Company, to ensure that it would not be taken over by the deceased children, whom he had deliberately not placed in control of the Company. It was not to damage the legitimate interests of any shareholder. On the contrary it was to protect all*

> *concerned. No purpose could have been more proper."*

[75] The Defendants argued, in essence, that the allotment and appointment of Norman Northover was illegal since article 15 refers to directors, there being two directors and the decision having not been made by a duly constituted board, it was improper and could not stand. According to Benkley, WN wanted him to have controlling interest in the company and the accountants were to see to it. According to Benkley's evidence, WN told his accountants that, if he died, his 300 shares were to go to him and he was giving 100 to Norman. After the death of WN, Benkley signed a blank transfer of shares without an indication of how many shares were to be transferred and to whom. This he did in the presence of WN's accountants. The evidence of Godfrey was that Benkley was to hold shares in trust to protect Norman so he could not be removed by WN's beneficiaries and Benkley was to sign a transfer so that if he died the shares would revert to the company.

[76] However, Godfrey, at trial, claimed those were the 300 shares and not the 400 Benkley claimed was allotted to him. Godfrey claimed to only know of the 300 shares given to protect the son but knows of no other allotment to Benkley. However, it is he who made up the return of allotment backdated to two days after WN's death. The return of allotment signed by him however speaks to 400 shares to Benkley. When shown the document he said it was blank when he signed it and he did not fill it out but expected it to reflect 300 shares. Godfrey cannot be relied on in these matters as he had already testified that WN did as he pleased as far as the running of the company was concerned and his role was to carry out the dictates of WN, without question.

[77] So much did WN run the company as a one man show that it was only after his death that Rohan learnt he was no longer a Director. It was at that time that he also discovered that Norman was appointed Managing Director. It is clear that the effect of the allotment was that the Claimant would hold majority shares and thus also have majority voting power. It is also clear that WN's purpose for issuing the 500 shares was

solely to alter the voting power. The allotment of the 500 shares by WN was therefore improper, invalid and in breach of the company's Articles of Association.

[78] Article 27 refers to the transfer of shares and states;

> Instrument of transfer of any share in the company shall be in writing and shall be signed by or on behalf of the transferor and the transferee and duly attested and the transferor shall be deemed to remain the holder of such shares until the name of the transferee is entered in the register in respect thereof.

[79] Article 29 and 29A provides that;

> No member shall be entitled to transfer any share otherwise than in accordance with the following provisions, Except if the terms of the shares held exclude or modify the provisions of this article
>
> (i) Notice to be given to the secretary containing an offer to sell
>
> (ii) Secretary to send to each of the other members a circular inviting offers to purchase
>
> (iii) ......
>
> (iv) ....
>
> (v) ....
>
> (vi) ......
>
> (vii) Beneficiary of a share on death of the owner is bound to offer the same for sale to the members of the company at a fair price.
>
> (ix) any member may sell, give, or devise his shares to a family member or trustee in trust for a family member and the provisions above do not apply.

So the provisions of 29A restricting the transfer of existing shares does not apply to family members. Article 32 provides that on the death of a member only his legal representative will be recognized by the company as having any title to the shares registered to his name.

[80] By virtue of article 77 the first directors are by way of that in the memorandum but thereafter they may be increased or reduced by the company in general meeting. The shareholders in general meeting may act on behalf of the company if no directors are competent to so act. **See Barron v Potter (1914) 1 Ch 895.** If there is only one director he has all the rights and powers contained in the Articles. The Company can only remove a director by ordinary resolution. Every single action of WN was in breach of the articles.

Disposition

[81] The sole exercise of power by WN in the allotment of 500 shares was improper and amounted to a breach of the Company's Articles of Association. By virtue of Article 105 two directors make a quorum. Benkley's evidence was that he was in the hospital room when WG told Ruth Josephs and Miss Davis that "he was giving Norman 100 shares and he 300 (sic) shares and that if he went to America and take the operation and die his 300 shares was to go to him Benkley". He also instructed Miss Josephs, the accountant, to see to it that Benkley had controlling interest in the company.

[82] What WN purported to do in his hospital bed was improper and in breach of articles 44 and 105. Article 15 cannot be relied on by the Claimant to justify WN's actions since article 15 refers to actions taken by the directors, in this case only one director acted to the exclusion of the other. The only article granting power to one director to act is article 77 which could only be invoked where the company had only one director. Even in the case of one director the articles and procedures laid down would have to be followed.

[83] Pre-emption rights accrued to the allotment of the unissued shares from the authorized share capital. Even if the allotment in breach of pre-emption rights was not invalid, the allotment was made for improper purpose and not in the interest of the company and in that respect was void. It was made for the purpose of shifting the balance of power within the company and for no other purpose. It cannot be said that it was in the interest of the company to grant controlling interest to Benkley, who had no

experience in running or managing a successful company such as W.G. Northover and Associates. It is clear he had no managerial capability. To say it was done for altruistic purposes so he could run the company as a benevolent society for the children of WN was also not a proper purpose. The company is a limited liability company to be managed in the interest of profits for the shareholders and creditors. It is not a charity. It is clear that WN also recognised this, which was why he had Benkley sign a blank transfer to return the shares to the company in the event of some undisclosed happenstance.

[84] The allotment purportedly made by WN on his deathbed to Benkley and Norman of 400 and 100 new shares respectively, was made for improper purpose and not in the interests of the company as a whole and is therefore invalid. A director must act within his powers and must act bonafide in the interest of the company. In view of this finding I do not consider it necessary to consider whether the 500 shares formed part of WN's estate or whether it was an imperfect gift by virtue of article 27. The shares are to be returned to the company as part of its authorized unsubscribed share capital.

ISSUE 2- WHETHER THE CLAIMANT HAS BEEN OPPRESSED OR UNDULY PREJUDICED

Section 213A of Companies Act 2004

[85] The Claimant commenced proceedings under section 213A of the Companies Act 2004. The 1st and 2nd Defendants counterclaimed under the said section. Although the 400 shares to Benkley was not validly allotted and the appointment as director was in breach of article 77, section 176 of the Companies Act and article 109 of the Articles of Association served to validate the actions of the directors so appointed. So by virtue of section 212 (3) (c) of the Companies, Act the Claimant qualifies as a complainant under section 213A.

[86] The Companies Act 2004 is in para-materia to the Canadian Act and like the Canadian legislation it provides a broad approach. This section is broad in scope and

more encompassing than its predecessor or the English section 459. Section 213A provides that;

1. A complainant may apply to the Court for an order under this section.
2. If upon an application under subsection (1), the Court is satisfied that in respect of a company of any 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;

   (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 prejudicial to, any shareholder or debenture holder, creditor, director or officer of the company, the Court may make an order to rectify the matters complained of.

3. The Court may in connection with an application under this section make any interim or final order it thinks fit, including an order –

   (a) restraining the conduct complained of;
   (b) appointing a receiver or receiver-manager;
   (c) to regulate a company's affairs by amending its articles or by-laws, or creating or amending a unanimous shareholder agreement;

   (d) directing an issue or exchange of shares or debentures;

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

   (f) directing a company, subject to subsection (4), or any other person to purchase the shares or debentures of a holder thereof;

   (g) directing a company, subject to subsection (4), or any other person to pay to a shareholder or debenture holder any part of the moneys paid by him for his shares or debentures;

   (h) 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) requiring a company, within the time specified by the Court, to produce to the Court or an interested person, financial statements or an accounting in such forms as the Court may determine;

(j) compensating an aggrieved person;

(k) directing rectification of the registers or other records of the company;

(l) liquidating and dissolving the company;

(m) directing an investigation to be made; or

(n) requiring the trial of an issue.

4. A company shall not make a payment to a shareholder under paragraph (f) or (g) of subsection (3) if there are reasonable grounds for believing that –

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

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

[87] Under section 213A, therefore, what is to be determined in respect of the Company are threefold. That is;

a) Whether an act or omission of the company or its affiliates result in oppression or unfair prejudice to any shareholder, debenture holder, creditor, director or officer of the company;

b) Whether the business affairs of a company or its affiliates have been or are being carried on or conducted in a manner oppressive or unfairly prejudicial to that group of persons; and

c) Whether the powers of the directors of the company or its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to the said group of persons.

[88] This may be compared with the much narrower provisions of section 459 of the English Act where it states:

> *"A member of a company may apply to the court by petition for an order under this part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or some part of the members (including at least himself) or that any actual or proposed act or omission of the company (including any act or omission on its behalf) is or would be so prejudicial."*

[89] Section 213A gives the court jurisdiction not only to protect the rights of members under the company's constitution but also their rights, expectations and obligations inter se. In small private company's this will include the expectation to participate in the management of the company. Legitimate expectation is subject to contractual obligations and mutual understandings: see **Re A Company 004377 of 1986 (1987).** However, cases decided under 213A are sparse. However, certainly in respect of how the court would view what may be considered to be unfairly prejudicial, the English, Canadian and Australian cases may be of some use.

Oppression

[90] An oppression remedy is a statutory right usually available to oppressed shareholders. It empowers the shareholders to bring an action against the corporation in which they own shares when the conduct of the company had an effect that is oppressive, unfairly prejudicial or unfairly disregards their interest as shareholders. Conduct considered in the above includes exclusion from management and diversion of Business. Section 213A now provides much wider remedies to a wider group but in considering what may constitute oppression regard may still be had to the English authorities.

[91] According to "Butterworth Shareholder Remedies in Canada" at para.18:21, the oppression remedy is an equitable remedy. It is a broad flexible tool, designed to protect the interest of corporate stakeholders in a variety of corporate circumstances. The remedy is purely a statutory one. Certain elements must be present if the court is to have jurisdiction to invoke the remedy. It must be applied in a way that balances the

protection of corporate stakeholders and the ability of management to conduct business in an efficient manner. See **Brant Investsments Ltd v KeepRite Inc** [1987] 37 B.L.R. 65 Ont. H.C. at p 99; 3 O.R (3d.) 289; [1991] O.J. N0. 683 C.A. In that case Anderson J, at first instance, commented that "the jurisdiction is one which must be exercised with care." I wholeheartedly agree.

[92] Oppressive conduct is defined as one which is burdensome, harsh and wrongful. It marks a "visible departure from standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely". It may arise on an illegal action, appropriation of corporate property, breach of equitable rights, mismanagement and squeeze outs". See judgment of Charles Hari Prashad J in **Joan Devau v Dubulay Holding Limited and others**, St. Lucia High Court SLUHCV 2003/0424 decided September 22, 203 (unreported) quoting from the House of Lords in **Scottish Co-operative Wholesale Society v Meyer** [1959] AC 324.

[93] Oppression may arise from an abuse of corporate power. Typically the oppressor is a majority shareholder who controls the Board. He perpetuates the abuses because he has the balance of power. Oppressive conduct is usually the exercise of dominant power against the will of the weaker corporate stakeholder by some breach of legal or equitable rights. This conduct is not confined to a specific group. In **Re: HR Harmer Ltd [1958] 3 ALL E.R.**, Jenkins L.J. noted that the definition is wide enough to cover oppression by anyone who is taking part in the conduct of the affairs of the company whether de facto or de jure. It can cover actions of directors, a controlling shareholder, a person who de facto has control of the company, a class of shareholders or the conduct of a related company. It concerns the manner in which the affairs of the company are being conducted. The court must ask who was conducting the affairs of the company or who was in control when the events complained of occurred; always bearing in mind that power may be wielded by majority shareholders behind their nominee directors: see **Baltic Real Estate Limited** [1992] BCC 547.

[94] In **Peoples Department Store Inc (Trustee of) v Wise SC Canada** 2004 SCC 68; [2004] 3 SCR 461 at para 41 it was noted that the oppression remedy of Canadian legislation s.241 2(c) granted the broadest rights to complainants of any commonwealth jurisdiction. The Canadian courts approach the issue as one of reasonable expectation. The test the Courts in Canada have adopted is to:

1. Determine whether the evidence supports reasonable expectation asserted by the Claimant that he should be treated in a certain way. If it is established;

2. The court must consider whether the evidence established that the reasonable expectation was violated by conduct amounting to oppression etc.

[95] In Canada, a trial judge hearing a petition under s. 241 will ask two questions (see **BCE Inc v 1976 Debenture Holders** [2008] 3 SCR 560). Firstly, does the evidence support the reasonable expectation asserted by the Claimant and secondly, does the evidence establish that the reasonable expectation was violated by conduct falling within the term oppression or unfair prejudice? The Supreme Court of Canada went on to hold that where conflict of interest arises, it falls to the directors to resolve them in accordance with their duty to act in the best interest of the company. The interest of a stakeholder and the interest of the company may coincide where the legitimate expectation of the stakeholder is that the directors will act in the best interest of the company.

[96] In Canada deference is given to the business judgement of the management of the company. Under the business judgment rule, deference should be accorded to the business decisions of directors acting in good faith in performing the functions they were elected to perform. The Court's remedy must be rectification of the oppressive conduct and nothing else: see also **BCE Inc. v 1976 Debenture Holders (Canada).**

[97] In an application under section 213 A the trial judge is entitled to assess the acts or omission complained of and how they were carried out but may not substitute his or her own business judgment for that of the directors or officers of the company. The Canadian approach to legitimate expectations also commends itself and is easily

adapted to the requirements of the section. Where the court concludes there is oppression the remedies are; removal of directors; see **Pemucher v Crosslink Bridge Group** [2012] ONSC 1954 S.C.J**;** personal liability for compensation against directors; see **Schrielser Foods Inc v Wespacket Inc** [2013] ONSC 338 SCJ**;** repayment to the corporation of funds obtained through self dealing; order requiring shares to be sold at fair market value.

[98] In **Butler v Butler** [1993] 30 J.L.R. 348 decided under section 196 of the previous Companies Act, the court considered whether the managing director of a company was guilty of oppressive conduct where he used funds and other property of the company for his personal benefit and neglected to pay company debts. Carey J is quoted in the head notes as having held that:

(i) the classical definition of what constitutes oppressive conduct is the exercise of authority that was "burdensome, harsh and wrongful" … a single act may amount to oppressive conduct;

(ii) oppressive conduct …is constituted where the conduct is at least unfair or prejudicial to the interests of the member or members of the company on whose behalf the petition is presented; in the instant case the husband admitted that he ran the company for his personal benefit and asserted that the company was formed for his personal benefit and therefore, his conduct constituted oppressive conduct within the meaning of section 196.

[99] **Aaberg v. Pedersen** [1975] 13 J.L.R. 155 at pp. 166-167 cited in **Butler v Butler** the court noted with approval that:

> *"Oppression must, we think, import that the oppressed are being constrained to submit to something which is unfair to them as the result of some overbearing act or attitude on the part of the oppressor."*

[100] This definition of what constitutes oppression is applicable to s. 213A of the Companies Act. This was the attitude of the Court of Appeal in **Cash Plus v Madam A and Another** [2012] JMCA Civ 40, para 62 where Brooks JA approved the definition

given by Carey JA in **Butler v Butler** even though the learned judge in that case was dealing with provisions under the previous Companies Act.

UNFAIR PREJUDICE

[101] Unfair Prejudice was defined by the Jenkins Committee in the Report of the Company Law Committee Cmnd 1749 [1962] in England to be a "visible departure from the standards of fair dealings and a violation of the conditions of fair play on which every shareholder who entrust his money to a company is entitled to rely." It may arise from acts in the past, acts being currently committed or acts which are anticipated. It must relate to conduct of the company's affairs, acts or omissions of the company or acts or omissions on the company's behalf. The question which arises is whether the test for unfair prejudice is an objective or some other subjective test. This is an important consideration because I think it is necessary for the standard to be laid down by the courts. Any contemplation of the correct answer must begin with the sanctity of contract. Fairness must be viewed in context of the commercial relationship. Keeping promises and honouring agreements must be the starting point. The objective test is that of the reasonable bystander or action which equity would regard as contrary to good faith.

[102] The case of **Oneil v Phillips** [1999] UK HL 24 provides a good illustration**.** In that case the respondent P was the sole shareholder and director. O was employed as a labourer in 1983 and was rapidly promoted by P. In 1985 O received 25% of the shares in the company and was made a director. He was also told by P he would take over the Company and receive fifty percent of profits. December 1985 P retired and O became sole director and manager of the Company. Business was good for awhile then declined. In 1991 P used his majority voting rights and appointed himself Managing Director and took back the company. O's entitlement was limited to his salary and dividends on his 25% share. O filed a petition for unfair prejudice. The House of Lords held that P's conduct would have been unfair if he had used his majority voting rights to exclude O from the business. Instead he had simply revised the terms of his remuneration.

What Is Required to Establish Unfair Prejudice

[103] The conduct complained of is usually that of those in control. In some cases majority shareholders may complain of unfair prejudicial conduct. The conduct must affect the petitioner in his capacity as a member must be affected by the conduct complained of. According to the cases, in order to establish that the Claimant has been unfairly prejudiced it is necessary to establish;

1. A breach of contract or a breach of the articles or memorandum of the company
2. A breach of some fundamental understanding in which case equity will intervene.

[104] The latter would be largely compliant with the Canadian view of legitimate expectation. The failure of the majority to hold meetings and to otherwise conduct the affairs of the company as a going concern will be held to be unfairly prejudicial to the interest of the minority. Unfairly prejudicial conduct includes the exclusion from management and mismanagement. Unfair prejudice can also include the actions of the majority to keep a family member in charge of the company who was demonstrably incompetent. Unfairly prejudicial conduct can also mean allegations of mismanagement resulting in economic loss to the company and diversion of funds. In **Dalby v Bodilly** [2005] EWCA 307, Blackbourne J held that the respondent's conduct as the only director in allotting shares to himself was unfairly prejudicial.

[105] In **Re Neath Rugby Ltd Hawkes v Cuddy** [2008] All ER (D) 252 (Nov)**;** [2009] EWCA Civ 291 decided under provisions similar to s. 213A, the court ruled:

> *"In order for a petition pursuant to s 994 of the Act to be well-founded, the petitioner should establish that:*
>
> *(i) the acts or omissions of which he complained consisted of the management of the affairs of the company;*

> *(ii) the conduct of those affairs had caused prejudice to his interests as a member of the company; and*
>
> *(iii) the prejudice was unfair."*

[106] In **Re Legal Costs Negotiators Limited [1999]** 2 BCLC 171, CA the court noted that:

> *"…the statutory requirement is that the conduct should be unfairly prejudicial, and …conduct may be prejudicial without being unfair. As Knox J indicated in Re Baltic Real Estate Ltd (No. 2) [1992] B.C.C. 629 ('No. 2') judgment of 16 June 1992) at p. 636… prejudice will not be unfair to the petitioner's interests where the petitioner had available to him a method of bringing that prejudicial state of affairs to an end."*

[107] In **Re Legal Cost Negotiators Ltd**, four individuals incorporated a company. They were employees and directors. Their relationship broke down and the fourth was dismissed as employee and resigned from the board as director. He then refused to sell his shares to the others. The majority brought action. The court held conduct complained of must relate to the company's affairs. The action of a private individual was not enough when acting in a private capacity. The majority could use their power to prevent any prejudice being inflicted by him on the company. Conduct complained of must relate to the company's affairs.

[108] The case of **Benjamin v Elysium Investment (Pty) Ltd** [1960] (3) S.A 467 raised the issue of whether the oppressor could be one who does not hold the balance of power in the company. In that case, both directors held equal share and also equal power. There was a falling out between them which resulted in a deadlock. One director petitioned for winding up, the second for relief from oppressive conduct by the other. It was the view of the learned judge in that case that the remedy was not only available as a result of oppressive conduct by a member with the power to override a minority vote. The remedy was also available against a shareholder who did not possess the power of control. Of course where control of the company affairs is not vested in the person who

is alleged to have acted oppressively, proof that there is conduct which is oppressive to some members of the company may be a problem.

[109] Shareholders who receive shares as a gift but afterwards work in the business may become entitled to enforce equitable restraints upon the conduct of majority shareholders. The applicant must show detriment in his capacity as member of the company. On the other hand the majority transfer of shares could be unfairly prejudicial. See **Re Smith of Smithfield Ltd** [2003] All ER (D) 325. A member has interest in the value of his shares. In **Re Bovey Hotel Ventures** Ltd (1981) unreported, decided July 31, 1981 and cited in **R A Noble and Sons Clothing Ltd** [1983] BCLC 273 at 290, Slade J noted that;

> "Without prejudice to the generality of the wording of the section, which may cover many other situations, a member of a company will be able to bring himself within the section if he can show that the value of his shareholding in the company has been seriously jeopardised by reason of a course of conduct on the part of those persons who have had de facto control of the company, which has been unfair to the member concerned."

Legitimate Expectations

[110] In quasi partnerships and small private family owned companies, there may exist unfair prejudice in a situation where a member has a legitimate expectation to participate or to continue to participate in the management of a company as long as he holds shares, and there was a failure to fulfil that legitimate expectation. Such an expectation may arise from an understanding or non-legally binding agreement between the members which would cause it to be unfair, unjust or inequitable for the majority to enforce their strict legal rights.

[111] Lord Wilberforce in **Ebrahani v Westbourne Galleries Ltd and Ors.** [1973] A.C. 360 and Lord Hoffman in **Re A Company** (No 00477 of 1986) [1986] BCLC 376 considered the legitimate expectation of the petitioner. A member's interest can encompass the legitimate expectation that he will continue to participate in the

management as a director and so his dismissal from that office and consequent exclusion from the company's management may be unfairly prejudicial to his interest as a member. **In Re A company** it was determined that the court should not segregate the separate capacities of the same individual as shareholder, director and employee. His denial from the board or from employment by the company will affect the real value of his interest in the company expressed by his shareholding.

[112] In **Re A Company No 00477**, Lord Hoffman considered that the language of the English section 459 did not limit the interest of the member to strict legal rights. It could encompass the legitimate expectation that he would continue to participate in management as a director and his dismissal and exclusion from the company's management may be unfairly prejudicial to his interest as a member. In corporations which are quasi partnerships legitimate expectations include an expectation to participate in the management of the company. Legitimate expectation is severely limited in scope when the shares are acquired by way of gift; see **Jackman v Jackets Enterprises Ltd** [1977] 4 BCLR 358. Failure to hold meetings will be held to be unfairly prejudicial (see **Fisher v Cadman** [2005] EWHC 2424 (Ch).

[113] A company is controlled by its constitutional organs, the board or general meeting. The board has day to day controlling function, but the organ that elects the board is the shareholders in general meeting. So that even if there is a single shareholder in a company he makes decisions to elect a board in general meeting, that is, he votes at a general meeting to choose his directors. The directors are therefore appointed by the general meeting.

Conduct of the Company's Affairs

[114] Conduct must relate to the affairs of the company and not to the conduct of an individual shareholder. In **Re Phoneer Ltd** [2002] 2 BCLC 241, per Roger Kaye QC sitting as deputy judge in the High Court held that where a Petitioner withdraws from the management of the company in breach of the undertaking given by him to his co-shareholders and directors, it was a breach of an agreement as to the conduct of the

company's affairs and as such was an act of the company or conduct of the company's affairs.

[115] A petitioner must prove that his interest qua member has been unfairly prejudiced as a result of conduct on the part of the company. The court must ask

a. What is the member's interest?
b. Are those interests being unfairly prejudiced?

[116] Conduct may be unfair but not prejudicial or vice versa. In neither case would a claim qualify. Where would the court look to find the individual's interest? Firstly, it must look to the articles and to the memorandum and to any shareholder agreement. Secondly, it must then look to the constitution or to the company legislation, if any. It would then consider the value of shares. Once conduct is authorized by the company's constitution it cannot be unfair or prejudicial.

[117] In this case the court must ask itself, how did the minority act in relation to the company? The evidence suggests that the minority shareholder Rohan nominated his brother Eric to be a director on the board. Eric then approved loans from the company to Rohan which has not been repaid. Eric entered into contracts unilaterally on behalf of the company and both breached an agreement to appoint an independent third party to the board of directors to break the stalemate into which the board had sunk. (**Re Phoneer Ltd).** They both then refused to allow the company's office to be removed to a another location.

The Allegations of Oppression made by the Claimant

[118] The Claimant alleged that the Defendants dishonestly filed forms at the Registrar of Companies purporting to remove him as a director and to dispossess him of his shares. He alleged that they used the records at the Registrar of Companies to influence the banks and other third parties to cease to accept the Claimant as having any authority to act on behalf of the company. The Claimant also complained that by this means the defendants dishonestly seized control of the Company and used such

dishonestly obtained control to convert the company's assets, including cash, to their own use and to the detriment of the company and ultimately its shareholders, including the Claimant.

[119] In the Report of the independent Chairman Mr. Clarke Lowe and in his affidavit evidence he alleged that the conduct of the 1st and 2nd Defendants resulted in commitments being given at meetings which only lasted until the end of the meetings then they were forgotten. He also alleged that the company had no direction, the chairman had no power and the members had no obligation to carry out the instructions given by the chairman. More specifically it was alleged that;

1. Various things done by Eric and Rohan made it impossible for the company to go forward.

2. Interim orders were made and Eric breached those orders restraining him from interfering in the affairs of the company. Eric ran the Discovery Point project on his own. Eric and Rohan refused to allow the company to move its office and retained company documents thus hampering the company.

3. That Rohan forged Benkley's signature on gas receipts.

4. That monies were divested from the Discovery Point project and was not accounted for.

Are the Acts Complained Of Oppressive and Unfairly Prejudicial?

[120] The Defendants submitted that the resort to the courts is as a result of weak and inept management by the Claimant. They argued that directors of a company should exercise powers of management given under the Articles and the Companies Act or vacate the office of director. This begs the question as to whether the Claimant could have controlled the conduct of the 1st and 2nd Defendants by use of his majority powers. The authorities clearly show that relief is usually granted where the Claimant is otherwise powerless to stop or prevent the conduct complained of: see **Re Legal Costs Negotiators**. Conduct may be excluded through the shareholders in general meeting or through the directors.

[121] If we adopt the definition in the cases, then the conduct must not only be prejudicial but unfairly so. Conduct will not be considered unfairly prejudicial to the claimant where the claimant has it in his own powers the means or the method or the power to stop or prevent it. Carey J in **Butler v Butler** defined oppressive conduct as a situation where shareholders having a dominant power in a company exercise or procure a state of affairs in a manner which cause the oppressed to submit to something unfair to them as a result of some overbearing act or attitude on the part of the oppressor. The defendants submitted that the conduct complained of only required strong management and internal control mechanisms to deal with them. I will therefore, consider the complaints in the form in which they have been made.

Breach of the Interim Orders

[122] There was an allegation that Eric breached the interim order of the court restraining him from interfering with the company. However, after the order of the court the 1st Defendant was no longer a director, therefore any act by him thereafter would not be an act of the company or considered to be conduct of the business affairs of the company. He was neither a shareholder nor a director of the company at the time. His actions were not past actions of a director of the company. Therefore, it being conduct of an individual employee in breach of court order is subject to contempt procedures only where consideration would have to be given to his explanation and apologies.

Interference in the Discovery Point Project.

[123] After the death of WN, Benkley took over the management of the Company. Prior to that, he was employed to the company to service machines and in general maintenance of the service vehicles. At the time of WN's death there were two projects the company was involved in which were near completion. Since his death new projects included the Discovery Point project in which Eric was involved and the Flankers Red Dirt project in which Benkley was involved.

[124] The evidence given by Benkley is that Eric ceased to co-operate with him and started running aspects of the business outside the Company's bank accounts without

his knowledge. Evidence was given that Eric tendered for and won the bid on the Discovery Point project to the detriment of the company and without the authority of the board and was not accounting for the proceeds. However, the report by Clarke Lowe to the Managing Director Benkley indicated that Eric was directed to take over the functions of WN on the Palisadoes Road project and to liaise with Mr. Manborde on the project. In his report Mr. Lowe claimed that Eric lacked the personality or charisma to function in such a capacity. He did not say why. He also claimed the contract was being administered in an unprofessional manner but also failed to state how. As far as the Discovery Point project was concerned the report of Clarke Lowe is that the bid by Eric was defective as the costing was too low and the company was liable to lose money on the project as a result of those flaws in the tender document.

[125] It was also Benkley's evidence that Eric, with the assistance of Mr. Manborde, had diverted away from the Company, US$108,000.00 received from the last certificate on the Palisadoes Project. He claimed to be unaware of what was done with the money, save for the payment of J$2 Million in taxes, and J$3 Million to a Mr. Hosang, to whom the Company had already agreed to pay J$7.5 Million, which was owed to him. He also claimed that Rohan and Eric having stated in his presence that US$108,000.00 received by them from China Harbour had been used to pay J$2.4 million to the Revenue on behalf of the Company in 2013, he obtained printouts from the Revenue as at September 17, 2013 which showed this was not so. All these allegations are unsubstantiated.

[126] The background to all this is that WN ran projects through partnerships with other associates such as Mr. Manborde. In the case of the Palisadoes project there was a signed memorandum of understanding between Mr. Manborde and the company under the signature of Norman as the then Managing Director. This was to facilitate work under contract with China Harbour on the Palisadoes shoreline. The actions of Eric with regard to Palisadoes, was, on the evidence, done under the direction of the board. With regard to the Discovery Point project, it is unclear from the evidence when the project began and who was on the board at the time. Since it appears that that the way in which

projects were conducted was for each party, that is, Eric and Benkley to be in charge of one or the other, then Benkley (in the absence of fraud or misappropriation of funds from the project by Eric) cannot now complain that he is being oppressed or unfairly prejudiced by conduct of which he was a participant. In any event Eric's actions with regard to the project were the actions of an employee and the directors had the power to fire him.

[127] Benkley claimed that the Company had four operational/management problems:

(i) Its finances were paralysed in that Eric and Rohan had convinced the banks that the Company's duly appointed board lacked the authority, and so the mandates on the accounts were questionable;

(ii) The Company had work it had contracted to undertake but could not do so without the use of its accounts;

(iii) Eric and Norman were purporting to carry out work on the Company's behalf and were not accounting for the proceeds;

(iv) The board, and therefore management of the Company, was paralysed and without an immediate, practical solution, the Company would be unable to function, and the shareholders would lose all value.

[128] However, Eric gave evidence that he continued his involvement in the Discovery Point project in his capacity as an employee of the Company. He claimed to have worked for the company on various projects since 2007. He said that he personally communicated with the Claimant regarding the details of the project and that all monies collected from the project had been used to pay the company's creditors as agreed and can be accounted for. He provided a full unchallenged account for the $23,568,856.00 that he received from the project. There is no evidence of any minutes of meetings to decide on the procedure for bidding on contracts or any decision of the board contrary to the actions of Eric in bidding on the project.

[129] The evidence is unclear as to who were the directors at the time of the bid and whether any objection had been taken by any of the then existing directors. It would

appear from the paucity of evidence on this aspect of the case, that it was only when Mr. Lowe came on board and begun criticising the bid, that Benkley saw it fit to object to what Eric was doing. After the death of WN, the evidence is that the company had no income except that from the WN's insurance proceeds. It was imperative that action was taken to secure the viability of the company and its income stream by bidding on projects. The duty of care of a director is to the company itself and the director must act in the best interest of the company. It was not in the best interest of the company to cause it to go into permanent paralysis after the death of WN.; see **Scottish Co-operative Wholesale** and **Re Smiths of Smithfield Ltd.** [2003] All ER (D) 325 (Mar). There has been no oppression or unfair prejudice to the claimant from this conduct.

The Loan to the 2nd Defendant.

[130] Rohan gave evidence that Benkley was aware of the loans made to him. He claimed that he discussed the loans with the Benkley and that he had wished to give him the money from the beneficiary account but he, Rohan, preferred a loan from the company. He said he signed a loan agreement which had terms of repayment. He claimed that he failed to begin repayment because of the unsettled affairs in which the company now finds itself. He also denied that he had any discussions with Benkley about repayment of the loans and denied that he refused to pay back the loan. He claimed to be committed to repaying the sums that he borrowed.

[131] The loans were made to Rohan under the signature of the accountant Mr. Dixon and was therefore ostensibly a loan by the company. The agreements were executed and witnessed on the 28th September 2012. Mr. Dixon as accountant and company secretary was an officer of the company but as such has no power to bind the company or to act as the operating arm of the company for the purposes of his actions being viewed as an act of the company except for administrative purposes only. The loan was given as part of the affairs of the company. Rohan, though a shareholder, was merely the recipient of this loan, he himself was not a director or employee of the company and as minority shareholder had no power to conduct any of the affairs of the company nor could he grant himself any loan from the company. In the circumstances of how the

company was being operated by the directors, Benkley could not claim to be oppressed or unfairly prejudiced by this loan, when he, himself was doling out the insurance funds to select beneficiaries without board approval and had been prepared to give Rohan the funds from the beneficiary account, whatever that is.

[132] The Defendants have submitted that the court should not be used as a mechanism to bring non-cooperating employees under control, even if those employees are shareholders of the company. They have relied on the case of ***Re Legal Costs Negotiators Limited*** where it was held that s. 459 of the English Act was concerned with the company's affairs and not with the affairs of individuals. The section was concerned with acts done by the company or those authorised to act as its organs. Where a Claimant was able to control the conduct which allegedly constituted unfairly prejudicial conduct within the terms of s. 459 the court would normally expect the petitioner to exercise its control to terminate the allegedly unfairly prejudicial conduct. Peter Gibson, LJ on page 195 in reviewing the reasoning of Peter Goldsmith QC (sitting as a deputy judge of the High Court) said that the essence of the powers under s. 459 [similar to s.213A though not the same in wording] is to give a remedy where there is complaint about the way the company's affairs are being conducted through the use (or failure to use) powers in relation to the conduct of the company's affairs provided by its constitution. The deputy judge regarded the section as concerned with the company's affairs rather than the affairs of individuals and to be concerned with acts done by the company or those authorised to act as its organs. He found that the cases showed reluctance by the court to act where the petitioner is able to control the relevant conduct by his own powers and that the cases where relief was granted were concerned with situations in which the petitioner is otherwise powerless to stop that_conduct by powers which he has under the company's constitution. He also held that this was consistent with the section being generally regarded as being for the protection of minorities although the majority could also petition as the provision referred to “any member”. I am completely in agreement with the approach and reasoning of the learned judge.

[133] It appears that the Benkley does in fact have a remedy available to him. At para 19 of his first affidavit he stated his belief that his son Norman Northover, at the time of being a Director,

> *"took funds from the Company's accounts for his personal use. He [Norman Northover] was immediately dismissed by the directors including me [Benkley Northover]…"*

The same remedy that was available in dealing with Norman's misuse of funds is also a remedy available to the Claimant in his complaint against Eric's misuse of funds. The Claimant is able to control the conduct complained of by his personal powers as a director of the company holding majority shares and was not powerless to stop the conduct by exercising powers which he has under the Company's Articles of Association. His inability to exercise this power does not mean he was powerless but is an indictment on the Claimant's own ability to manage the company's affairs.

Forgery of the Claimant's Signature by the 2nd Defendant

[134] The Claimant also complained that Rohan, in order to obtain diesel oil for his personal cars, forged his signature at the petrol station (Johnson's Petroleum, 34 Beechwood Avenue) on two occasions and altered a purchase order which he had previously signed on one occasion. This amounted to a total of $41,200.30. This became apparent to him when he viewed the purchase orders from the petrol station. RN's account is that the Claimant deliberately misrepresented the details regarding the gas station purchase orders and receipts. He alleged that the Claimant had knowledge of and gave permission to amend the purchase orders and receipts.

[135] His account was that he requested petrol from the Claimant and the Claimant agreed and left an unsigned purchase order at the gas station. The petrol could not be supplied on the unsigned purchase order and he called Ms. Pryce at the office and explained to her his dilemma. As result of their discussion he signed the purchase order. He claimed that it was in error that he signed the Claimant's name rather than his own with the notation that it was on behalf of the Claimant. He claimed that there was

no attempt on his part to deceive the Claimant or anyone. He pointed out that it was the Claimant who left the purchase order at the gas station for him to use and that it was normal for him to get petrol from time to time from the account of the Company for the vehicle that he drove.

[136] He admitted that there were alterations in "purchase order No. 0842" signed by the Claimant as the diesel oil was no longer necessary. The purchase order was, instead, used for buying gas oil for the company's Nissan pick-up and to supply gas for vehicles driven by Eric and himself. He asserted that there was nothing secret, unusual or dishonest about it as they both received purchase orders for petrol from the Claimant at various times in the past. The Claimant admitted that Rohan had been allowed by WN to purchase petrol on the company's account and that he had continued the practice after WN's death. He claimed however, that the purchase order book had been accidentally left at the gas station whereupon Rohan took possession of it and signed false orders.

[137] The question is whether this act by the minority shareholder, who was not a director, was an act of the company, or conduct of the business affairs of the company or the exercise of power by a director. In my view the answer in all respect is in the negative. This was the action of a member of the company as a private individual and was not an act of the company. The action of the 2nd Defendant in forging the signature of the Claimant on the purchase order was not the conduct in relation to the company or an act of the company but was an individual unlawful act. The acts complained of by the Claimant do not amount to acts that are unfairly prejudicial or oppressive. Oppressive conduct is constituted where the conduct is unfair and prejudicial to the interests of the Claimant. The Claimant, as a director of the company, had available to him methods of bringing the state of affairs to an end and therefore even if the acts complained of can be considered prejudicial (which I cannot see how they can) the acts could not be considered as being unfair to the Claimant's interest in the company.

Obstructing the Relocation of the Company's Offices.

[138] The Claimant also complained that Eric refused to accept decisions made by the majority of the board, with which he disagreed, and Rohan forcefully supported him. One such instance was the decision to move the company's offices to Mr. Phillip Duncan's Office. The Claimant's evidence is that the board agreed to a request made by Mr. Lowe to remove the offices for administrative purposes. The Claimant alleged that the new location had better technical facilities and was cheaper. He claimed the move was a commercial decision. The Claimant alleged that Rohan and Eric physically obstructed the move and that the action of Eric and Rohan in physically obstructing the move was unfairly prejudicial to him and was oppressive conduct towards him as the majority shareholder and as a director.

[139] A company is a distinct entity from its shareholders and directors. Some of its powers may be conducted by its directors and some by its shareholders in general meeting, according to its articles. If the management of the company is vested in the directors then the powers of management must be carried out by the board of directors and not the shareholders. The board in exercising those powers must act in the interest of the company and exercise their powers for proper purposes. So in managing the affairs of the company, if the directors believe that it is in the interest of the company to remove the company's office, the shareholders cannot usurp that power. The decision however, must be one properly taken by the board.

[140] The decision to move the company's office was taken after a request to do so was made by the chairman. There was no evidence of a properly convened meeting of the board where a decision was taken on the issue. The chairman's report said that the move was at his instructions. However, for the purposes of this application, at the time of the instruction Rohan was a minority shareholder who did not participate in the management of the affairs of the company and was not a director. Eric was a director but was not at the meeting where this instruction was given. If the decision to move is to

be considered as conduct of the affairs of the company, then should such a decision not have been taken by the board at a properly convened board meeting? It seems that the decision was merely a wish by the chairman supported by the Claimant. If it was not conduct of the affairs of the company then there can be no valid complaint to the defendant's objection.

[141] Rohan had no power to conduct the affairs of the company or carry on any act or omission on behalf of the company as required by the section. Whilst he could be a complainant as a shareholder, there can be no complaint against him as a minority shareholder who had no power whatsoever to act on behalf of the company. He could not usurp the powers of the directors since he was in the minority and could not convene neither a general meeting nor an extraordinary meeting of shareholders to wrest powers away from the directors. His actions can in no way be viewed as the actions of the company or the carrying out of the business affairs of the company.

[142] Eric in opposing the move was not exercising powers as director of the company as he was in the minority on the issue and was never consulted or asked to vote on it. As a single director he had no power to prevent the move. Their actions were that of individuals with a grouse and should have been treated accordingly by those with the power to do so. In any event the Claimant has not shown why the failure to move to Phillip Duncan's offices was unfairly prejudicial to him or oppressive but this again only served to show the Claimant's inability to manage the affairs of the company.

[143] Unfair prejudice and oppression can only arise through the use or misuse of power either on the board of directors or through shareholders in general meetings. So minority shareholders can act together in general meetings to conduct the affairs of the company in a manner prejudicial to the majority. However, the actions of a minority shareholder and or an employee without powers may be prejudicial but it is only in the most exceptional circumstances that it is likely to be unfairly prejudicial or oppressive to

the majority which has the power to act and bind the company. The board of directors and the majority shareholder would have available to them the power to exercise various options to remedy the situation without resort to the court. The exercise of brute force and ignorance by the 1st and 2nd Defendants is not the same as the exercise of executive power and authority.

Disagreements over the Appointment of Directors, Intereference with Bank Accounts and Seizing Control of the Company

[144] A return of allotment had been filed under the signature of the 3rd Defendant, Mr. Dixon and Eric, which showed 300 shares held by the Estate of W.G. Northover and 100 shares held by Rohan Northover. The Claimant alleged that the 1st to 3rd Defendants had contrived to deprive him of the 400 shares allotted to him and have removed the 100 shares to Norman, which together with his 400 amounted to a majority of the shareholdings. He also complained that he was advised by the company's bankers that Eric had contacted them and claimed that no director other than himself were properly appointed, and directed the banks to freeze the company's accounts, which they duly did, pending resolution of the matter. The explanation given by the 1st and 2nd Defendants is that the Claimant had attempted to make changes to the bank accounts of the company and as a result Eric had to send written notice to the bankers to prevent the said changes.

Operation of the JMMB Account by Eric

[145] The Claimant complained that the 1st Defendant Eric and the 3rd Defendant Mr. Dixon were operating an account at the Jamaica Money Market Brokers in the Company's name without the knowledge and authority of the Board. He also pointed out that a statement from the financial company showed that Eric secured a loan from them using the company's funds as collateral without his knowledge. There were encashment on that account by Eric totalling $9,164,291.00 and encashment to RN or Melanie Morgan (his assistant) totalling $1, 959,202.00. One encashment was done by Eric four days after the interim order excluding him from the company's affairs was extended.

Neither Eric nor Rohan have given any account of the encashment made. The Claimant claims that their behaviour is very damaging to the company.

[146] He also complained that the 3rd Defendant destroyed the Minutes of the Meeting [December 28, 2012] appointing Mr. Lowe as Director and Chairman and himself as Managing Director. Mr. Lowe's account is that he met with Eric and Benkley in October 23, 2012 and again in December 28, 2012. Mr. Lowe claimed that he was appointed Chairman with the agreement of both Eric and Benkley and that Benkley was appointed Managing Director with the agreement of Eric on December 28, 2012. He was not aware of either Benkley or himself being removed from the board by any proper procedure.

[147] Eric's explanation for removing the Claimant from the records at the Companies Office as director was that the Claimant, acting in concert with his son Kaon Northover (whom the majority had made company secretary to replace the 3rd Defendant) had submitted an application to the Companies Office to effect an unauthorized change to the structure of the company. He claimed that as a result of the Claimant's actions he was forced to file multiple statutory declarations to prevent the unauthorized changes.

[148] However, the filing of documents at the Registrar of Companies by an individual director acting with ostensible authority to remove the Claimant as director and shareholder and thus effecting a freeze on the company's accounts is oppressive and unfairly prejudicial to that Director. In **Re Piccadilly Radio PLC** [1989] 5 BCC 692, it was held that the wrongful registration of new members was unfairly prejudicial. The action of Eric and Mr. Dixon in regard to the JMMB accounts is also unfairly Prejudicial to the Claimant.

The Allegations of Oppression and Unfair Prejudice Made by the Defendants.

[149] The Defendants have averred that:

(a) The Claimant's conduct is oppressive to the 1st and 2nd defendants in that the Claimant is seeking to remove the offices of the 4th defendant to an environment which is hostile to the said Defendants, they being actual and potential shareholders of the Company; and

(b) The Claimant has breached his fiduciary duty as a Director of the company by acting dishonestly and in a manner that oppresses the interest of the Company and by extension its shareholders.

(c) The Claimant has breached the employment contract of the 3rd defendant by unlawfully withholding his emoluments

[150] Rohan alleged that he worked in the company as shareholder and director and only knew of his removal as director after WN died. I find that action by his father was oppressive and unfairly prejudicial to him. He also complained that the company's offices were being removed to a place hostile to him and the other beneficial minority shareholders. He claimed to have been aware that the location proposed was at premises belonging to Mr. Phillip Duncan and that he relationship between Mr. Duncan and some of his brothers and sisters was bad. Therefore, such a move would only exacerbate the tensions between Mr. Duncan and members of the company. He also claimed that the majority of the eventual shareholders believe the company's offices should remain at its present location.

[151] A majority shareholder even if made so by gift, as long as the gift was a valid one, acquires the same powers as if the shares were acquired for good consideration. However, the fact that he is a majority shareholder does not mean he can ignore the procedures laid down in the Articles of Association. The minority is entitled to have the proper procedures followed. By virtue of Article 113 the directors may appoint a Managing Director from one or more of their body. In **Re H R Harmer Ltd** it was held that a majority shareholder had no obligation to choose, as a representative director, the most suitable person for the position. He may appoint his friend whom he expects to

vote a certain way. However, subordination of the wishes of the minority by exercise of voting power of the majority is not itself oppressive. Jenkins J accepted the submission that:

> *"If a person, relying on majority control in a point of voting power dispenses with the proper procedure for producing the result he desires to achieve and simply insists on this or that being done or omitted, his conduct is oppressive because it* deprived the minority of shareholders of their right as members of the company to have its affairs conducted in accordance with its articles of association."

[152] The decision to move the company was not a decision of the duly constituted board and was a business decision affecting the company taken without proper procedure being followed. The court would not normally interfere with business decisions properly taken. A board is expected to act by majority resolution on decisions taken at regularly constituted board meetings. However, if there is a unanimous and informal decision of the board it will be deemed to be a resolution passed at a properly convened meeting. There is no challenge to the 300 shares held by the Claimant beneficially as representative of WN's estate. Therefore, since the Claimant holds the majority of shares as executor of the estate of WN and the minority shareholder had no say in the operation of the company, the decision by the independent director and the majority shareholder in the absence of the minority shareholder's nominee director, to move the company's offices would be oppressive and unfairly prejudicial to the minority.

[153] Rohan also alleged that the Claimant while purporting to act in the best interest of the beneficiaries of WN's estate unlawfully and improperly attempted to transfer to himself 400 shares of the remaining 600 undistributed shares of the company whereby the Claimant would become the majority shareholder. He claimed that the subsequent filing of statutory declarations was to disqualify that allotment. According to Rohan, the Claimant had made every attempt to prevent him from exercising his rights as a shareholder of the company.

[154] The 3rd Defendant Mr. Dixon gave evidence that on or about May 15, 2012 the Claimant with the assistance of Yvonne Davis and Ruth Joseph fraudulently obtained his signature by asking him to sign blank documents purporting to appoint the Claimant as director and allotting 300 shares of the company to the Claimant to be held on trust as a way to secure Norman Northover's position as a director of the company. He claimed that subsequently the said documents were altered to show the total shares allotted as 400 and the effected date as April 30, 2012. I have already determined that the improper allotment of 500 shares of the unissued share capital of the company was unlawful and unfairly prejudicial to the interest of Rohan. I don't need to say more on that.

[155] The Defendants also alleged that the Claimant while purporting to act as Managing Director unilaterally elected members of the Board of Directors in an effort to gain control of the voting rights and assets (including cash) of the company; That the Claimant while acting as Managing Director misappropriated or unlawfully retained funds from the accounts of the company and failed to provide an accounting for the property of the company and the funds taken from the Company's bank account. It was also alleged that the Claimant received insurance payments from WN's death in favour of the company and he has not accounted for sums removed by him from the account in which it was lodged.

[156] At the time of the death of WN, Norman his nephew was the Managing Director. The proceeds from the policy of insurance went to the company with no direction as to how those funds were to be allocated. Benkley became a signatory to the account in which those funds were lodged. He then proceeded to disburse those funds to select beneficiaries in unequal and arbitrary ways. This was done without any decision taken by the board. The money belonged to the company for the benefit of the company and its shareholders. Any unauthorized distribution of those funds is unfairly prejudicial to the 2nd defendant as shareholder and the 1st defendant as a beneficiary to the shares under the will of WN.

[157] Benkley does not seem to be able to function without his son Kaon Northover, who at one point attended meetings of the board in no other capacity than as a so-called assistant to his father until, fortuitously, the position of company secretary became vacant and he was conveniently given this position. In a situation where one son had already misused his position of trust this was bound to only add fuel to the flames. At the meeting on the 28th January 2013, it is unclear if this was a board meeting or a general meeting as the company lawyer was present, Kaon Northover was present and Phillip Duncan was present none of which is a director or shareholder. The minutes indicate that Mr. Duncan noted that it was "imperative" that the Board be properly constituted as it was only informally done before. Nominations then began. Benkley was nominated by Mr. Lowe as Managing Director, seconded by Mr. Duncan who had no standing to do so. It was after that, that he, Mr. Duncan, was then nominated by Mr. Lowe to be technical director, seconded by Benkley. He then nominated Kaon Northover to be company secretary seconded by Benkley and Mr. Duncan. Neither Eric nor Rohan were present at this meeting. It is clear therefore, that what took place on the 28th of January 2013 was improper and was designed to cement control of the company in the hands of Benkley. The exercise was also not only oppressive to Eric and Rohan but in attempting to co-opt Phillip Duncan to the Board was also unfairly prejudicial to them.

[158] The 3rd Defendant, as company secretary and accountant was an officer of the company and is one of the persons who may seek relief under section 213A. As an officer of the company he had limited powers, but could not exercise the powers of a director. He could not therefore, register a transfer without authority from the board, nor could he strike a name off the register without board approval. He was appointed by the directors and his conditions of service were fixed by them. They also had the power to remove him. He was an employee. His conditions of service, remuneration and removal were subject to contract and employment law. However, section 213A lists an officer as one who may petition for relief. Therefore if his removal was unfairly prejudicial or the conduct of the directors in removing him amounted to oppressive conduct he would be

entitled to relief whilst still retaining his right to sue for damages for breach of his employment contract, if he had one.

[159] In this case the minutes of the meeting indicate that Mr. Dixon resigned. I have no evidence to the contrary. There is no evidence that he was forced to resign by the conduct of the Majority. He therefore has no remedy under the section.

The Available Remedies

[160] The remedies provided by the section are wide and varied. On the one hand, the Claimant seeks the removal of the Defendants from the management of the company. On the other hand the Defendants seek the removal of the Claimant from the management of the Company. It is clear to me that Benkley is not capable of managing the company. It is also obvious that his brother did not think he could. Firstly WN made his nephew Managing Director and not Benkley, even though he claimed to have been given the majority shares and was present at his brother's bedside whilst Norman was not. It is clear that WN had no intention to have Benkley participate in the management of the company. He had no prior experience and obviously does not have the capacity or know how to run the company. The Claimant stated that WN did not want his sons to run the company. I do not accept that this is absolutely the truth but even so WN is no more, his shares now belong to his children of which Rohan is the major shareholder. The only reasonable and workable solution is for them to run the company as they deem fit. The 1st and 2nd Defendants have the experience and the competence to do so. Under Benkley's management, the company would be run by his sons and outsiders such as Mr. Lowe and Mr. Phillip Duncan. That clearly cannot be in the interest of the company and was not what WN intended.

Disposition

[161] The court may grant relief in a form not sought or desired by the petitioners: see **Hawks** v **Cuddy** [2009] EWCA Civ 291 and may order the majority to cede control to the minority. Where the conduct of the affairs of the company and especially mismanagement of the company leads to a breakdown of trust and confidence in small

private companies such as the 4th Defendant, resulting in oppression and unfair prejudice to some members, this may be the only solution. See **Re Elgindata Limited** [1991] BCLC 959. In any event, the court having found that the 400 shares allotted to Benkley was an invalid allotment, his only remaining position in the company is as trustee of the 300 shares held by virture of the will of WN. At some point therefore, Benkley must leave the company. Certainly at some point he will no longer be a member once the shares are transferred to the beneficiaries. In those circumstances therefore, the reliefs sought by him are inappropriate and untenable.

[162] The Court hereby makes the following orders and declarations:

1. The interim orders of Magatal J are hereby discharged.

2. The Claimant's petition against the 2nd and 3rd Defendant is dismissed with costs.

3. The Claimant's petition against the first Defendant succeeds in part.

4. The 1st and 2nd Defendants cross petition against the Claimant succeeds with costs.

5. The 3rd Defendant's application for relief under s. 213A is denied.

6. The court declares that the 500 shares given to Benkley (400) and Norman (100) were unlawfully and improperly allotted.

7. The court declares that the shareholdings in WG Northover and Associates remain as 100 ordinary shares held by Rohan Northover, 300 ordinary shares held by Benkley Northover as executor and trustee of the will of W.G Northover.

8. The court orders that the Registry at the Companies Office be rectified to reflect the same.

9. Benkley Northover is removed as director of the company W G. Northover Associates.

10. Clarke Lowe is removed as Director and Chairman of the company WG Northover Associates.

11. Kaon Northover is removed as Company Secretary of W.G. Northover Associates.

12. Rohan Northover is appointed Director of W.G. Northover Associates.

13. Eric Northover is appointed Director of W.G. Northover Associates.

14. Mikael Northover is appointed Director of W. G. Northover Associates.

15. Christopher Northover is appointed Director W.G. Northover Associates

16. The court orders that the registry at the Companies Office be rectified to reflect the same.

17. Benkley Northover is hereby ordered to transfer the shares held by him on behalf of the children of W.G. Northover as executor within 180 days of the date of this order.

18. Costs of this action to be borne by the 4th Defendant.