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Close Corporations: Strict Good Faith Fiduciary Duty Applied to Controlling Stockholders

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CLOSE CORPORATIONS: STRICT GOOD FAITH FIDUCIARY DUTY APPLIED TO CONTROLLING STOCKHOLDERS

Plaintiff, a minority stockholder in a close corporation, alleged that the controlling stockholders had breached their fiduciary duty to him as a minority stockholder when they removed him from the corporation's board of directors and from his position as a corporate officer and employee. The Supreme Judicial Court of Massachusetts *held* that the majority stockholders in a close corporation owe a fiduciary duty of utmost good faith and loyalty in their dealings with minority stockholders, and that the defendants had breached this duty since they had not shown a legitimate business purpose for removing the plaintiff from the corporation's payroll and refusing to reelect him as a salaried officer and director. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657 (Mass. 1976).[1]

Traditional concepts of corporate law divide the ownership and management of a corporation between the stockholders and the board of directors, with each operating independently of the other.[2] The board of directors normally establishes the business policy of the corporation, supervises its management, and, among other particular duties, selects and removes officers and other corporate personnel.[3] Stockholders exercise the rights of ownership through their power to vote and pass upon certain corporate matters at annual stockholder meetings. While in a strict sense the stockholders do not have any managerial duties, significant influence over managerial decisions is exercised by the stockholders through their power to elect the board of directors and their right to approve fundamental corporate matters.[4] This traditional scheme does not contemplate any

1. The court remanded the case for a determination of damages, generally indicating that Wilkes could recover from the other stockholders "ratably, according to the inequitable enrichment of each, the salary he would have received had he remained an officer and director." 353 N.E.2d at 665.

2. Traditionally, shareholders elect the board of directors, who manage the corporation by determining corporate policy and appoint officers to execute such policy. Separation of ownership (in the shareholders) and management (in the board of directors) is inherent in such an approach. H. HENN, LAW OF CORPORATIONS § 188 (2d ed. 1970).

3. *Id.* § 207 at 416.

4. Theoretically, shareholders can exercise control over management decisions through either voting at shareholder meetings or giving of written consent with respect to (a) election and removal of directors; (b) adoption, amendment, and repeal of bylaws; (c) shareholder resolutions, including ratification of board of directors action; and (d) extraordinary corporate matters. *Id.* § 188 at 361. The principal control retained by the shareholders is in the power to elect the board of directors. F. O'NEAL, OPPRESSION OF MINORITY SHAREHOLDERS § 1.02 (1975).

managerial functions on the part of the stockholders involving the day-to-day operational affairs of the corporation.

While the above scheme may be typical of many publicly-held corporations, it does not always apply in cases of closely-held corporations[5] where stockholders frequently take active part in the daily management of the business and commonly hold positions as directors, officers, and employees.[6] In this situation, decisions concerning the operations of the close corporation are not divided in the traditional sense, but result from a complex relationship between the interests of the stockholder as both an owner and manager of the corporation. The merger of ownership and managerial roles, combined with direct personal contact among the stockholders, necessitates a close harmonious working relationship between the stockholders to further their expectations[7] in the ongoing operations of the close corporation. Maintaining this atmosphere of mutual agreement has been crucial to minority stockholders, for if dissension were to arise,[8] the majority or controlling stockholders occupy positions which traditionally have allowed them to disregard corporate objectives while advancing their own interests through minority exploitation[9] or

5. For a collection of definitions of "close corporation," *see* 1 F. O'NEAL, CLOSE CORPORATIONS LAW AND PRACTICE § 1.02 (2d ed. 1971) [hereinafter cited as CLOSE CORPORATIONS]. *Brooks v. Willcuts*, 78 F.2d 270, 273 (8th Cir. 1935), defined a close corporation as "a corporation in which the stock is held in few hands, or in few families, and wherein it is not at all, or only rarely, dealt in by buying or selling." Another court characterized a close corporation by: "(1) a small number of stockholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction, and operation of the corporation." Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 511 (Mass. 1975). *See also* BLACK'S LAW DICTIONARY 410 (4th ed. 1968).

6. For comparison of the closely-held corporation with the publicly-held corporation, *see* H. HENN, *supra* note 2, § 257; F. O'NEAL, *supra* note 4, § 2.02; 1 CLOSE CORPORATIONS, *supra* note 5, § 1.07.

7. The continuance of such a relationship is important because it reflects what is perhaps the fundamental assumption made by those who invest in a close corporation: they expect that during the life of the firm the shareholders will be in substantial agreement as to its operation. Hetherington & Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 VA. L. REV. 1, 2 (1977).

8. The majority of squeeze-out cases are characterized by basic conflicts of interest among the participants in the enterprise, protracted policy disagreements, prolonged and bitter dissension prior to the squeeze play, or demonstrated inability of one or more of the participants to carry a fair share of the responsibility and work. F. O'NEAL, *supra* note 4, § 2.02.

9. As Professors Hetherington and Dooley use the term, "one shareholder exploits another when he uses his position to capture a significant portion of the other's 'share' of the firm's income and profits; the other's share may be defined as

squeeze-out maneuvers.[10]

Although squeeze-out techniques cover a broad spectrum,[11] those which employ management decisions concerning the internal operations of the close corporation, especially employment practices,[12] have in the past been particularly successful. Relying upon the majority rule concept[13] and the business judgment rule,[14] the courts have been reluctant to interfere in

the portion of income and profits the parties would agree, through arms-length negotiation, belonged to that shareholder." *Hetherington & Dooley*, *supra* note 7, at 3-4.

10. By the term "squeeze-out" is meant the use by some of the owners or participants in a business enterprise of strategic positions, inside information, powers of control, or the utilization of some legal device or technique, to eliminate from the enterprise one or more of its owners or participants. F. O'NEAL, *supra* note 4, § 1.01; 2 CLOSE CORPORATIONS, *supra* note 5, § 8.07; F. O'NEAL & J. DERWIN, EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES: "SQUEEZE-OUTS" IN SMALL ENTERPRISES §. 1.01 (1961).

11. Squeeze-out techniques can generally be grouped under such major headings as dividend withholding and high salaries, merger, sale of assets, issuance of stock, stock dividends, bankruptcy and charter amendments. *See* Comment, *Minority Rights and the Corporate "Squeeze" and "Freeze"*, 1959 DUKE L.J. 436. *See also* F. O'NEAL, *supra* note 4, §§ 3.01-6.10.

12. When a person invests in a close corporation he often expects to work for the corporation on a full time basis as either a key employee, an officer, or a director. Often investing a large percentage of his personal resources to acquire an interest in the corporation, the shareholder may also have quit another job to work for the corporation with the expectation of supporting himself by the salary he receives. If deprived of this salary, not only may he have lost his principal means of livelihood, but he may also be denied a fair return on his investment. This results from the common use of withholding dividends as a squeeze-out technique. Even in the absence of such a maneuver, a close corporation, in order to avoid double taxation, usually pays out most of its earnings in the form of salaries rather than as dividends. Faced with such a situation, the minority shareholder may have no other choice than to sell out to the majority at less than a fair price for his stock to salvage at least part of his original investment. F. O'NEAL, *supra* note 4, §§ 1.03, 3.06.

13. "The very foundation principle of a corporation is that the majority of its stockholders have the right to manage its affairs, so long as they keep within their charter rights." Hand v. Dexter, 41 Ga. 454, 461 (1871). *See also* Regenstein v. J. Regenstein Co., 213 Ga. 157, 159, 97 S.E.2d 693, 695 (1957).

As a general proposition, a corporation operates under the principle of majority rule: the holder of a majority of the shares with voting power controls the corporation. F. O'NEAL, *supra* note 4, §§ 1.02, 3.03, 9.04. *See also* H. HENN, *supra* note 2, § 239.

14. The "business judgment" rule sustains corporate transactions and immunizes management from liability where the transaction is within the powers of the corporation and the authority of management, and involves the exercise of due care and compliance with applicable fiduciary duties. H. HENN, *supra* note 2, § 242. The business judgment rule and the courts' reluctance to interfere is founded upon the following ideas: (1) shareholders have selected the directors to manage the

the internal affairs of the corporation and have been hesitant to substitute their judgment for that of corporate management in evaluating the complex considerations necessary to establish business policy or to conduct the affairs of the corporation.[15] Furthermore, the traditional view on employment practices has been that stockholders in a close corporation, in the absence of an agreement to the contrary, are under no duty to elect a minority stockholder to the board of directors, or to retain him in such a position.[16] The stockholders normally elect the board of directors at the annual stockholders meeting, and that board serves for a specified term until a new board is elected.[17] Indeed, depending upon the jurisdiction and the corresponding corporate statute, stockholders can remove directors with or without cause before their terms have expired.[18] Similarly, the directors have also been able to employ or discharge officers and other employees at any time with or without cause, subject only to any contract

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business, and the courts are not justified in substituting their judgment for that of managers selected by the owners of the business; (2) directors' decisions are based on complex business considerations and courts are simply not qualified to make those decisions or to pass on their propriety in the absence of a clear abuse of discretion; and (3) a heavy burden should be placed on complaining shareholders to discourage "strike suits" and frivolous litigation. F. O'NEAL, *supra* note 4, § 9.04.

15. In general courts will not review directors' decisions in selecting corporate officers and employees, fixing salaries, declaring or withholding dividends, authorizing contracts, or otherwise fixing the course of corporate affairs. F. O'NEAL, *supra* note 5, § 3.03. *See e.g.*, Bartow Lumber Co. v. Enwright, 131 Ga. 329, 333, 62 S.E. 233, 235 (1908) ("No principle of law is more firmly fixed in our jurisprudence than the one which declares that the courts will not interfere in matters involving merely the judgment of the majority in exercising control over corporate affairs."); Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 513-14 (Mass. 1975) (courts prefer not to interfere unless there is a plain abuse of discretion or bad faith).

16. Absent a valid shareholders' agreement or employment contract, the minority shareholder cannot force the majority to retain him. F. O'NEAL, *supra* note 4, § 3.06.

17. *See, e.g.*, LA. R.S. 12:81(B)-(C)(Supp. 1968):

> B. [D]irectors, other than the first directors named in the initial report filed . . . shall be elected by the shareholders.
>
> C. The number, classification, qualifications, compensation, terms of office, manner of election, time and place of meeting, and powers and duties of the directors, may . . . be prescribed by the articles or the by-laws . . . .

18. *See, e.g.*, LA. R.S. 12:81(C)(4)(Supp. 1968): "The shareholders, by vote of a majority of the total voting power at any special meeting called for the purpose, may remove from office any one or more of the directors, notwithstanding that his or their terms of office may not have expired . . . ."

At common law, in the absence of a charter or bylaw provision, shareholders could remove a director before the expiration of his term only for cause. F. O'NEAL, *supra* note 4, § 3.06.

rights of the person so removed.[19] While employment contracts provide some protection to the minority stockholder/employee, the remedies are limited since courts usually grant damages rather than specific performance.[20]

When minority stockholders challenge the use of various squeeze-out methods, questions are often raised concerning the rights and obligations owed to them by the controlling stockholders, directors, and officers.[21] While it is generally accepted that directors and officers stand in a fiduciary relationship to the corporation and to all its stockholders,[22] the courts have not been consistent[23] in determining the applicable standard of duty owed by controlling stockholders to the minority. In a number of situations, the courts have found that no duty exists,[24] while under other

19. *See, e.g.*, LA. R.S. 12:82(A)(B) & (E) (Supp. 1968):

(A) The board of directors shall elect a president, a secretary and a treasurer, and may elect one or more vice-presidents . . . .

(B) Such other officers and agents as may be necessary for the business of the corporation may be appointed by the board of directors . . . .

(E) Any officer or agent may be removed by the board of directors with or without cause at any time, without prejudice, however, to the contract rights of the person so removed.

20. *See* F. O'NEAL, *supra* note 4, § 3.06, at 82 n.17.

21. Courts categorize the rights and obligations of the shareholders, directors, and officers of corporations as fiduciary. "A fiduciary or confidential relationship exists where, by reason of friendship, agency, or business association and experience, trust and confidence are reposed by one person in another who, as a result, gains an influence and superiority over him." McCartney v. McCartney, 8 Ill. 2d 494, 134 N.E.2d 789 (1956). "Factors to be taken into consideration are degree of kinship, if any, disparity in age, health, mental condition, education and business experience between the parties, and the extent to which the allegedly servient party entrusted the handling of the business and financial affairs to the other and reposed faith and confidence in him." Cunningham v. Cunningham, 20 Ill. 2d 500, 170 N.E.2d 547 (1960). *See* Pepper v. Litton, 308 U.S. 295, 306 (1939) (a director is a fiduciary; so is a dominant or controlling stockholder or group of stockholders).

22. *See, e.g.*, Cohen v. Beneficial Loan Corp., 337 U.S. 541, 549 (1948); Jones v. H. F. Ahmanson & Co., 1 Cal. 3d 93, 108, 469 P.2d 464, 471, 81 Cal. Rptr. 592, 599 (1969).

See also LA. R.S. 12:91 (Supp. 1968): "Officers and directors shall be deemed to stand in a fiduciary relation to the corporation and its shareholders, and shall discharge the duties of their respective positions in good faith, and with that diligence, care, judgment and skill which ordinarily prudent men would exercise under similar circumstances in like positions."

23. The doctrine of the fiduciary relation is one of the most confused and entangled subjects in corporation law. Geller v. Transamerica Corp., 53 F. Supp. 625, 629 (D. Del. 1943), *aff'd* 151 F.2d 534 (3d Cir. 1945).

24. *See generally* F. O'NEAL, *supra* note 4, § 7.13.

circumstances a fiduciary duty to observe acceptable business ethics[25] and to act in good faith and with fairness[26] toward the minority has been applied. Other courts have not been willing to grant relief unless the actions could be characterized as fraudulent,[27] an abuse of discretion,[28] or in bad faith.[29] The courts have increasingly recognized, however, that the unique relationships existing among stockholders in a close corporation require a higher standard of fiduciary duty.[30] One trend, not yet accepted by all courts, has been to hold stockholders in close corporations to a strict good faith standard[31] similar to that required among partners.[32] This

25. *See* Jacobs, ***Business Ethics and the Law; Obligations of a Corporate Executive***, 28 BUS. LAW. 1063, 1066-67 (1973).

26. As Justice Brandeis once said: "The majority has the right to control, but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself, or its officers and directors." Southern Pac. Co. v. Bogert, 250 U.S. 483, 487-88 (1919). *See also, e.g.*, Mount v. Seagrave Corp., 112 F. Supp. 330 (S.D. Ohio 1953), *aff'd* 212 F.2d 389 (6th Cir. 1954) (a director and dominant or controlling stockholders are fiduciaries); Hyams v. Calumet & Hecla Mining Co., 221 F. 529, 537 (6th Cir. 1915) (majority stockholder occupies a fiduciary relation toward minority stockholders and is charged with a duty of exercising a high degree of good faith, care, and diligence).

27. *See, e.g.*, Bellows v. Porter, 201 F.2d 429, 434 (8th Cir. 1954); Bruce v. E.L. Bruce Co., 40 Del. Ch. 80, 82, 174 A.2d 29, 30 (1961) (no relief absent fraud or a showing that the terms of a proposed merger are so unfair as to shock the conscience of the court).

28. Burke v. Gulf, M. & O. R.R., 324 F. Supp. 1125 (S.D. Ala. 1971) (fraud, excess, or abuse of discretion).

29. Allied Chem. & Dye Corp. v. Steel & Tube Co. of America, 14 Del. 1, 120 A. 486 (Ch. 1923); Gottfried v. Gottfried, 197 Misc. 562, 73 N.Y.S.2d 692 (Sup. Ct. 1947) (bad faith is shown if policy of withholding dividends is dictated by directors' personal interest rather than corporate welfare).

30. *See, e.g.*, Jones v. H. F. Ahmanson & Co., 1 Cal. 3d 93, 460 P.2d 464, 81 Cal. Rptr. 592 (1969); Donahue v. Rodd Electrotype Co., 328 N.E.2d 505 (Mass. 1975). *See generally* 1 CLOSE CORPORATIONS, *supra* note 5, § 1.15; F. O'NEAL, *supra* note 4, § 7.13.

31. The strict good faith standard, analogous to a strict-trust approach, is basically the same as the good faith/inherent fairness standard with one major difference. Under the good faith/inherent fairness standard the courts will examine the conflicts of interest between the parties. If a conflict is found, the burden shifts to the party responsible for the transaction to prove that it was inherently fair and carried out in good faith. If the transaction was not a result of arm's length bargaining, or was not in the best interests of the corporation, the court will void the action. Pepper v. Litton, 308 U.S. 295 (1939); Noe v. Roussel, 310 So. 2d 806 (La. 1975) (good faith/inherent fairness test applied to a liquidator's purchase of property belonging to the corporation being liquidated). Under a strict good faith standard (strict trust approach), there would be no inquiry into the inherent fairness of the transaction. Once a conflict of interests is shown, the transaction would be voidable at the will of the other party. Munson v. Syracuse, G. & C. Ry., 103 N.Y. 58, 73, 8

increased awareness of minority stockholder needs has caused some states to pass close corporation statutes,[33] and has led some courts to grant dissolution[34] of a corporation to provide adequate relief to minority interests.

In the instant case the court found that the majority stockholders had breached a strict good faith fiduciary duty owed to a minority stockholder when they removed him from corporate office and employment without a legitimate business reason. Following a view expressed in earlier decisions, the Supreme Judicial Court of Massachusetts emphasized that "stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another"[35] and that the standard of duty owed by partners was one of "utmost good faith and loyalty."[36] The court recognized the peculiar aspects of close corporations which allow majority stockholders to use various squeeze-out techniques to oppress the minority, and noted that denial of employment was especially effective to frustrate a minority stockholder's purpose for entering the corporate venture and to deny him the contemplated return on his investment.[37] Noting the presence of the above factors, the court pointed out that the corporation in question had never declared a dividend; that the stockholders had a long-standing policy that each would be a director; that employment with the corporation would

N.E. 355, 358 (1886); *see* Comment, *The Standard of Fiduciary Duty in a Close Corporation: Donahue v. Rodd Electrotype*, 6 IOWA L. REV. 876, 890-91 (1976).

32. Helms v. Duckworth, 249 F.2d 482 (D.C. Cir. 1957); Donahue v. Rodd Electrotype Co., 328 N.E.2d 505 (Mass. 1975); Mendelson v. Blatz Brewing Co., 9 Wis. 2d 487, 101 N.W.2d 805 (1960). *But see* Illinois Rockford Corp. v. Kulp, 88 Ill. App. 2d 337, 232 N.E.2d 190 (1967); Ross v. Biggs, 206 Miss. 542, 40 So. 2d 293 (1949).

33. *See, e.g.*, CAL. CORP. CODE §§ 158, 186, 202(a), 204, 300, 418, 421, 706, 1111, 1207, 1800 (Deering 1975). For a detailed discussion, see O'Neal & Magill, *California's New Close Corporations Legislation*, 23 U.C.L.A. L. REV. 1155 (1976).

34. This area is not settled. The holdings depend upon whether or not there are contractual relations between the parties, and whether the particular state has statutory provisions dealing with dissension or director deadlock. For a general discussion of the entire area of dissension, deadlock and dissolution, see 2 CLOSE CORPORATIONS, *supra* note 5, §§ 9.10-.31. For a discussion of how dissolution can be used as a squeeze-out technique, see F. O'NEAL & J. DERWIN, EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES: "SQUEEZE-OUT" IN SMALL ENTERPRISES § 4.09 (1961). For a state statute dealing with corporate involuntary dissolution, see LA. R.S. 12:141, 143 (Supp. 1968).

35. 353 N.E.2d at 661.

36. *Id.*

37. *Id.* at 662.

coincide with stock ownership; and that the plaintiff, like the other stockholders, had invested his capital and time for more than fifteen years expecting to continue to participate in corporate decisions.[38]

Although the court applied the strict fiduciary standard to the actions of the majority, it expressed concern that the unlimited application of this standard might in some cases limit legitimate actions of the controlling stockholders. The court acknowledged that, among other powers,[39] the dismissal of directors with or without cause and the hiring and firing of employees were within the controlling group's broad discretion in establishing business policy, but nevertheless attempted to balance the majority's "selfish ownership" rights against the fiduciary obligation owed to the minority. Using this balancing approach, the court concluded that the proper method of analysis would be to place the initial burden upon the majority stockholders to establish a legitimate business purpose for their actions. Upon a showing of a legitimate purpose, the burden would then shift to the minority stockholder to demonstrate that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interests. Future applications of this approach are uncertain because the court could as easily have found a breach of an implied contract between the parties rather than a breach of a fiduciary duty. The same factors[40] relied upon by the court in determining whether a legitimate business purpose had been shown could also have been used to show a breach of an implied contract. Although the court did not distinguish the two issues, it is suggested that the proper application would be to use the factors in conjunction with the strict good faith fiduciary standard. This approach provides a wider range of available remedies to the minority, whereas the remedies available under an implied contract for personal services are usually limited to damages.[41]

Wilkes is the first American case in which a court has held that the controlling stockholders breached their fiduciary duties when they failed to reelect a minority stockholder as a director of the corporation, and when, acting in their roles as directors, they eliminated the minority stockholder

38. *Id.* at 664.

39. The court also acknowledged that declaring or withholding dividends, deciding whether to merge or consolidate, and establishing the salaries of corporate officers were areas within the broad discretion of the controlling group. *Id.* at 663.

40. The court relied upon the fact that the parties had an understanding on their continued involvement in the management of the corporation and that the plaintiff Wilkes had always performed his part of the bargain, and stood ready to continue to do so if the other parties would let him. *Id.* at 660-61, 663-64. See text at note 38, *supra*.

41. *See* F. O'NEAL, *supra* note 4, § 3.06, at 82 n.17.

from corporate employment. By finding a breach of fiduciary duty in this case, the Massachusetts court indicated a willingness to break with the traditional reluctance of courts to substitute their judgment for that of management in decisions concerning the internal affairs of the corporation.[42] The court, relying heavily upon commentators,[43] recognized the effectiveness of the denial of corporate office and employment as squeeze-out methods[44] and did not hesitate to apply a fiduciary standard of strict good faith to those actions. The importance of this application is not that the court found these practices to be particularly damaging to the minority's interests, but that the court was willing to examine the expectations[45] of the parties when they entered upon the corporate venture. This raises the inference that the court might extend this type of examination in future cases to evaluate the changing and continuing expectations of the parties during the life of the corporation in an attempt to provide adequate remedies for the oppressed minority. While the court in the instant case listed the expectations as factors bearing directly on the type of duty owed by the majority,[46] it did not examine those expectations. Future courts will have to scrutinize the reasonableness of the minority's expectations[47] to

42. The court acknowledged the traditional reluctance of many commentators to countenance interference by courts in those facets of internal corporate operations, such as the selection and retention or dismissal of officers, directors and employees, which involve management decisions subject to the principle of majority control. 353 N.E.2d at 662.

43. *Id.* at 662, 664. See note 12, *supra*.

44. That a large part of the assets of a stockholder in a closely held corporation are tied up in the corporation, and that it was contemplated that respective stockholders would receive their major livelihood from salaries from employment by the corporation, does not entitle a discharged stockholder to require payment of dividends because of hardships resulting from termination of employment. Gottfried v. Gottfried, 197 Misc. 562, 73 N.Y.S.2d 692 (Sup. Ct. 1947). "A minority shareholder cannot compel the corporation's managers to give him employment, no matter how substantial his interest in the company is or how well-qualified he may be for the job he seeks. He cannot force the majority shareholders to elect him a director or the directors to make him an officer, at least not in the absence of a valid shareholders' agreement so providing." F. O'NEAL, *supra* note 4, § 3.06. *See also* note 12, *supra*.

45. 353 N.E.2d at 664.

46. *Id.*

47. Some courts have protected the reasonable expectations. Thomas v. Satfield Co., 363 Mich. 111, 120-22, 108 N.W.2d 907, 912 (1961); Standard Int'l Corp. v. McDonald Printing Co., 13 Ohio Op. 2d 333, 159 N.E.2d 822 (1959). *But see* Gwin v. Thunderbird Motor Hotels, Inc., 216 Ga. 652, 119 S.E.2d 14 (1961); Gonseth v. K & K Oil Co., 439 S.W.2d 18 (Mo. App. 1969).

For an English case where the House of Lords protected the reasonable expectations of a minority shareholder under facts similar to *Wilkes*, see Ebrahimi v. Westbourne Galleries Ltd., [1973] A.C. 360, *rev'g In re* Westbourne Galleries prevent unreasonable expectations or erroneous assumptions of a stockholder's importance to the corporation from unduly hampering the corporation's operations.

Wilkes is given added importance by the court's reaffirmance of the strict good faith fiduciary standard as applied to actions of controlling stockholders/directors in a close corporation. Comparing the controlling group's duty to that owed among partners,[48] the court also expanded the scope of the duty to include those decisions made by the directors/controlling stockholders which, although adversely affecting the minority, have been considered inherently within their discretion.[49] While expanding the scope, the court *seemed* to relax the strict standard[50] by allowing an inquiry into the legitimate business purposes of the majority. Actually, the strict test was not relaxed, since the burden of showing a legitimate business purpose will rest heavily upon the majority.[51] Only a finding of actual misconduct by an "undesirable individual bent on injuring or destroying the corporation"[52] would justify the majority's removing a minority stockholder from his corporate directorship and employment.

The court's decision can be justified when it is recognized that close corporations function along lines substantially different from publicly-held corporations,[53] and that remedies available to minority interests in publicly-held corporations do not provide the necessary relief to the minority interests in close corporations.[54] When dissension arises and minority stockholders want to remove and reinvest their capital elsewhere, they often find it difficult to liquidate their stock.[55] Not only do problems arise

Ltd., [1971] Ch. 799. For an excellent analysis of the case, *see* F. O'NEAL, *supra* note 4, § 7.15.

48. 353 N.E.2d at 661. For the partner's fiduciary duty, see UNIFORM PARTNERSHIP ACT §§ 20-21. The Massachusetts court had previously found that partners owe to one another "utmost good faith and loyalty." DeCotis v. D'Antona, 350 Mass. 165, 168, 214 N.E.2d 21, 23 (1966); Cardullo v. Landau, 329 Mass. 5, 8, 105 N.E.2d 843, 845 (1952).

49. See notes 15 and 42, *supra*.

50. See note 31, *supra*.

51. 353 N.E.2d at 664.

52. *Id.*

53. *See* materials cited in note 6, *supra*.

54. The investor in a publicly-held corporation can simply sell his stock on the open market if he is not satisfied with the return on his investment or if he is displeased with the management's operation of the enterprise. However, the investor in a close corporation is not at liberty to do the same. See note 44, *supra*.

55. As some commentators have suggested, the problem of exploitation of minority stockholders is uniquely related to illiquidity and resists solution by ex ante contractual arrangements or by ex post judicial relief for breach of fiduciary duty. The commentators rejected involuntary dissolution, provisional directors, or

in the valuation of a stock not traded on the open market, but difficulty also arises in finding a buyer willing to invest in a minority interest of a close corporation divided by conflict. With outside buyers unwilling to invest, the majority stockholders will be similarly disinclined to purchase the minority's interest. It has been suggested that the majority has substantial reasons for not purchasing the minority's stock, since that stock operates as a long-term, low interest loan without a maturity date.[56] The majority will be willing to repurchase the stock only at a price less than the cost of obtaining capital elsewhere.[57] Through the use of the majority control concept[58] and the fact that most close corporations do not declare dividends,[59] the minority stockholder could be denied a voice in the management of the firm by removal from the board of directors and be denied a fair return on his investment by dismissal from corporate employment.[60]

The Massachusetts court, by holding the controlling stockholders to a strict good faith duty in all actions affecting minority stockholders, has partially solved a frequent dilemma of minority stockholders. In the instant case the court tempered the strict standard with the business purpose test but nevertheless found that the majority did not have a legitimate business purpose for their actions. Difficulty arises in determining how the court will evaluate the situation where both the majority and the minority have equally feasible and legitimate alternatives for accomplishing the same objective. If the court intends to examine the internal affairs of the corporation before choosing an alternative, it will have to consider such intangible factors as business risk, marketing procedures, competition, and growth potential. If the alternatives involve employment practices, the court will also have to consider personnel management, job performance, motivation, prejudices, and purely personal conflicts.[61] In deference to judicial economy and efficiency, it is suggested that the court will not have the time or the manpower to review the business considera-

direct judicial supervision as too costly and ineffectual to provide an adequate remedy to minority stockholders in attempts to withdraw their investments. Instead, they offered a model statutory provision requiring the majority to repurchase the minority's interest at the request of the latter. Hetherington & Dooley, *supra* note 7, at 6.

56. *Id.*

57. *Id.* at 5-6.

58. See note 13, *supra.*

59. See note 12, *supra.*

60. 1 CLOSE CORPORATIONS, *supra* note 5, § 1.07.

61. For an in-depth analysis of personnel management and the complex relationships that evolve from the working environment of the business enterprise, *see* L. MEGGINSON, PERSONNEL: A BEHAVIORAL APPROACH TO ADMINISTRATION (1967).

tions underlying every decision of the majority stockholders which adversely affects the minority stockholder. Furthermore, if the court did attempt to undertake such an exhaustive review, in many cases the issues would become moot by the time a decision could be reached. While an adjudication may consider how a particular decision *should* have been made in light of changed market conditions, it will not reflect how that decision would have been made on a day-to-day basis. Although injunctive relief will maintain the status quo for a particular corporation, it will not keep the marketplace from changing.

While the court might have overestimated its ability, it is also questionable whether it went far enough in providing adequate relief for the minority stockholder. Using the business purpose test may not provide relief to the minority if the majority has a legitimate business purpose even though that purpose results in a squeeze-out. A better approach, one that will provide adequate relief to the minority while allowing the court to stay within its limits, would be a test based upon the reasonable expectations of the parties.[62] Basing the relief upon the expectations that the parties had when they entered the corporate venture or as those expectations changed over time with the character of the business would reflect more accurately the relationships between the parties. Relief would be based upon expectations which arose when all the parties were in substantial agreement and not upon the relationship when dissension has so distorted the judgments of the parties that some seek judicial relief from the oppressive actions of others. In evaluating the expectations, limits based upon the reasonableness of those expectations could be used. Also, determining what is reasonable or unreasonable would be more consistent with the present role of the judicial system than evaluating business considerations in choosing between equally feasible courses of action.

While nothing can replace adequate planning and foresight to include protective provisions in the corporate charter, by-laws, or in stockholders' agreements, the Massachusetts court has attempted to provide minority stockholders with an equitable remedy against oppressive action by controlling stockholders. Although several questions have yet to be answered,[63] the present case provides support for allowing the minority relief against squeeze-out maneuvers if the majority cannot demonstrate a legitimate business purpose for its actions. The next step will be to evaluate the conflicting claims when legitimate alternative courses of action can be found, and to determine the proper approach to use in reviewing those

62. See notes 45-47, and accompanying text.
63. See notes 40-41 & 61, *supra*, and accompanying text.

alternatives. It is uncertain upon what factors the court will rely in weighing the alternatives if more than one is shown, since, in the instant case, the court found that the majority stockholders had not shown a legitimate business purpose for their actions and thus did not reach the question of less harmful alternative courses of action.

Homer Doster Melton III

DISCLOSURE OF PRESENTENCE REPORTS IN CAPITAL CASES

After petitioner was convicted of first degree murder, a separate hearing was held before the trial jury[1] to determine whether the sentence to be imposed would be the death penalty or life imprisonment. After hearing testimony offered by the defendant, the jury recommended imposition of a life sentence, finding that the mitigating circumstances outweighed those in aggravation of the offense.[2] The trial judge, however, disregarded this recommendation and entered a judgment sentencing the petitioner to death, relying on evidence presented at both stages of the bifurcated proceeding, arguments of counsel and information contained in a presentence report.[3] On appeal to the Florida Supreme Court,[4] petitioner contended that it was error to consider the presentence report in imposing the death penalty. The per curiam decision expressed no opinion on this argument, but instead recited the trial judge's findings and affirmed the sentence,[5] over the dissent of two justices who noted that the record on appeal did not appear to include the confidential portion of the report. The United States Supreme Court, in reversing, ***held*** that petitioner had been deprived of due process of law when the death sentence was imposed, at

1. *See* FLA. STAT. ANN. § 921.141 (West Supp. 1976-77), which requires a sentencing hearing in all capital cases.

2. The statute enumerates the circumstances in aggravation or mitigation of the crime which may be considered in determining the sentence to be imposed. After considering these, the jury must return an advisory verdict, based on whether there are aggravating circumstances and whether there are sufficient mitigating circumstances to outweigh any aggravating circumstances found. The judge is not bound by this advisory verdict. *Id.*

3. Neither petitioner nor his counsel was given a complete copy of the presentence report, nor had such a copy been requested by counsel.

4. Gardner v. State, 313 So. 2d 675 (Fla. 1975).

5. *Id.* at 676-77.