MAJORITY RULE AND MINORITY PROTECTIONS: THEORETICAL FRAMEWORKS AND NATIONAL PRACTICE IN THE SHADOW OF THE EU: THE CASE OF IRELAND

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I. INTRODUCTION

Close corporations deserve separate attention from other company forms. Given that their shares are not publicly traded, there are often close bonds between shareholders and between shareholders and directors (who may overlap), particularly in smaller close corporations where a lack of separation between ownership and control is acute. This closeness is a fertile breeding ground for acrimony, often leading to shareholder disputes. There are circumstances where minority shareholders in a close corporation who are bound by the decisions of the majority may feel that either their interests or those of the company have been unfairly disregarded and that there is a risk of detriment or harm. Decision-making power and dominance may be abused to the detriment of the minority's interests and also to those of the company. Therefore the law steps in to provide mechanisms to guard against the abuse of power by the majority. How this is achieved in Irish law is scrutinised in this chapter.[1]

Although the main concern of company law may be seen as facilitating the corporate form as an avenue for achieving wealth maximisation, other values are also at play. It is fair to say that regulation of company law is shot through with procedures and processes designed to provide for minority shareholder protection while providing for majority decision-making as the norm. This goes back to the foundational legislation on English company law in the nineteenth century and case law from that era on. At the root of this is a concern with fundamental fairness in business relations. As Chander observes, "[v]alues of fairness and equality turn up in the sharp-elbowed world of business, exactly where we might least expect to find them. Despite scholarly commentary to the contrary, the watchwords of corporate law include not only *wealth maximization,* but *also fairness.*"[2]

There is a danger that both majorities and minorities in close corporations may be driven by personality conflicts and may choose to act out of purely personal motives in engaging

[1] Close corporations are usually referred to in Ireland as "private companies".
[2] A. CHANDER, "Minorities, Shareholder and Otherwise", Yale LJ, 2003, Vol. 113, p. 122.

in disputes that are not helpful to the business of the company in turning a profit. In tackling the challenge of resolving disputes between majorities and minorities, a nuanced approach is necessary. As MacIntosh maintains:

> "an efficient regime of rules regarding corporate fundamental changes and the relations between majority and minority shareholders must balance the dangers of majority *and* minority opportunism and facilitate productive fundamental changes while discouraging purely or predominantly redistributive transactions. Fiduciary or quasi-fiduciary duties drawn too one-sidedly in favour of minority shareholders potentially hurt *all* shareholders, by encouraging litigation designed only to redistribute in favour of the minority and by delaying or blocking productive changes in the enterprise."[3]

Recognising this, the task of devising appropriate minority shareholder protection requires a balanced approach that considers the company's interests as well as those majorities and minorities.

In an edited collection such as this, highlighting different national approaches to minority shareholder protection within Europe, it will be evident that, as Chander remarks, "[r]ather than leave minority shareholders to the ruthless efficiency of the marketplace, corporate law steps in"[4] through providing mechanisms for facilitating minority shareholder protection. When it comes to a common law jurisdiction such as Ireland, it is relevant to underscore the particular importance of judicial discretion in forming relevant adjudicatory principles within the overall framework of statutory principles in the Companies Act 2014. Typically in Ireland, as in other common law jurisdictions, the courts have been flexible in dealing with shareholder disputes. This involves the courts "paying heed to shareholder expectations and implicit understandings in cases involving private corporations."[5]

Part II of the chapter provides some contextual background on the relevant company law landscape within which corporate decision-making operates in Ireland. Part III discusses the impact of directors' duties in acting as a control against acting against the company's interests. Building on that, Part IV critically examines the complex bulwark of rules which minority shareholders must navigate if they wish to bring a derivative acting on behalf of the company, focusing particularly on the law surrounding suing where there has been fraud on the minority by the majority. Part V moves to consider the exercise of voting power by shareholders and the extent to which there are duties circumscribing how shareholders exercise their right of participation in corporate affairs in private companies. Part VI outlines some statutory procedural safeguards that exist to protect minority rights in decisions made by majority vote. Part VII then considers contracted for protections, examining pre-emption rights in company constitutions and the use of shareholder agreements to bargain for additional protections for minority shareholders. The challenge of dealing with a breakdown in relationships and corporate deadlock is then examined in Part VIII. Following on from this, the potential for minority shareholders to seek a personal remedy in the case of oppression or disregard of rights is excavated in Part IX, having regard to relevant statutory and case law principles. The ultimate power of

[3] J.G. MACINTOSH, "Minority Shareholder Rights in Canada and England: 1860-1987", *Osgoode Hall Law Journal*, 1989, Vol. 27, Iss. 3, pp. 644-645.
[4] A. CHANDER (fn. 2), p. 123.
[5] J.G. MACINTOSH (fn. 3), p. 642.

shareholders to seek an order for the winding up of the company is looked at in Part X. The question of the potential for European harmonisation in the sphere of minority shareholder protection is then turned to in Part XI. This is a real challenge given that "outcomes to date in relation to actual and attempted intervention in the close corporation sphere have been modest."[6] Some final conclusions are drawn in Part XII.

II. THE IRISH COMPANY LAW LANDSCAPE

1. Sources of law

1.1 *The Companies Act 2014*

When examining conflicts between minorities and majorities in in Irish private companies, the primary source of law is the Companies Act 2014 (as amended). This is a stand-alone piece of reforming and codifying legislation regulating all types of company which replaced a large number of discrete pieces of legislation. It remains the principal source of mandatory and enabling rules for companies and has been amended a number of times. As regards private companies limited by shares, the Companies Act 2014 provides for both mandatory provisions and default provisions which apply to such companies unless there is an opt-out provision in the company's constitution.

As discussed later in this chapter, certain procedural stopgaps laid down in the Companies Act 2014 are designed to protect minority shareholders against abuse at the hands of the majority. In terms of minority shareholder protection, legislative provisions make use of broad-brush terms in order to leave scope for a wide range of conduct to potentially fall within their scope. Judicial discretion in relation to substantive conduct covered and in fashioning an appropriate remedy is a key feature of Irish law on minority shareholder protection. A particular hallmark is the ability for minority shareholders to make an application to court for relief against the effect of a majority decision in certain circumstances.

1.2 *Judicial rulings*

Ireland has judicial rulings both on the interpretation of companies legislation and its application in given cases. There is also a reasonable body of associated case law from the courts in the form of common law doctrines. Furthermore, given the close developmental relationship with British company law, decisions of English courts remain of persuasive effect in the absence of a relevant ruling of an Irish court. At the core of a common law system is the system of precedent that sees courts continuing to apply and refine judicial principles in cases where they arise. This is particularly facilitated by legislative allocation of broad discretion to courts to use their common sense and sense of fairness as well as resort to the accumulated well of legal principles to resolve disputes as they see fit. This allows the law to be dynamic provide that sufficient cases come before the courts to allow gaps in the law to be addressed.

[6] D. AHERN, "Close Corporations: A Common Law World Perspective – The Case of Ireland" in J. VIERA GONZÁLEZ, C. TEICHMANN (eds), *Private Company Law Reform: The Race of Flexibility*, Thomson Reuters, 2015, p. 272.

In many cases the broad discretion available to judges in working around legislative wording helps to add detail to the bare bones of the legislative wording through providing principles over time as cases arises – this is at the heart of the common law tradition - a typical feature of common law design involves a good deal of discretion being afforded to judges to flesh out the meaning and principles to be applied to the principles laid down sparsely within companies legislation, often using equitable principles. This facilitates development of the law on a case by case basis and avoids undue rigidity within the law given the room for flexible interpretation which would not be possible if there were a more detailed provision of very prescriptive rules accompanying legislative principles. Thus a broad drafting style in the Companies Act 2014 permits reflection and fashioning of a judicial response which meets the individual facts of the case before it.

1.3 *Private ordering in a company's constitution*

Unlike earlier companies legislation, the Companies Act 2014 does not provide a menu of model articles for adoption or adaptation by private companies. There are some possibilities for private ordering in a company's constitution in relation to matters concerning the internal affairs of the company. For example, section 155(1) and (2) of the Act provide that it is the board of directors that sets director remuneration unless the company's constitution provides otherwise. Furthermore, unless otherwise agreed, questions arising at directors' meetings are decided by a majority of votes, and where there is an equality of votes, the chairperson shall have a second or casting vote.[7] Likewise, notably it is a default rule that interested directors can, despite their conflict of interest, be counted in establishing a quorum and vote.[8] This position can be varied. As regards shareholder meetings, other than in single member companies, the default rule is that two members of a company present in person or by proxy are required to establish a quorum.[9] A company's constitution usually provides for a majority in shareholder meetings to be decided on a show of hands (one vote per member (shareholder)) or by a poll (one vote per share) in accordance with the statutory default rule.[10]

2. Majorities and minorities within corporate decision-making

2.1 *The potential for conflicts*

Irish company law's organising principle is one of central majority decision-making in private companies by the company organs – the shareholder body and the board of directors. Being classed as within the cohort of 'majority' or 'minority' carries with it different legal implications. The minority is usually bound by the decision of the majority subject to any legal rights made available to them to protect their interests and those of the company. The effect of majoritarian rule is heightened by the common phenomenon of a small coterie of persons being involved in private companies, particularly smaller ones which make up the majority of those on the register, when combined with overlapping personnel in the board and the shareholder body thus concentrating

[7] Section 160(2) of the Companies Act 2014.
[8] Section 163 of the Companies Act 2014.
[9] Section 182(2) of the Companies Act 2014.
[10] Section 188(2) of the Companies Act 2014.

ownership and control. This provides a fertile breeding ground for potential discontent within the minority ranks. As Miller astutely observes:

> "The relaxed corporate structure of the private European limited liability company provides an environment in which opportunistic conduct by majority owners may flourish. The doctrine of majority rule creates the possibility for majority shareholders to make decisions which further their own interests at the expense of the minority owners."[11]

In addition to opportunistic conduct which is problematic and runs directly counter to a company's interests, there may also be simple unhappiness within the minority in relation to the approach of the majority to the direction the company is taking. This of course is the essence of majority decision-making – the minority is bound and mere unhappiness does not necessarily give legal grounds for complaint. Thus a nuanced approach is needed to tackling conflicts which arise so that petty squabbles can be distinguished from more serious dissension and valid grounds for legal dispute. Valid grounds may arise in a dispute where both the interests of the shareholder and the company are aligned or where there has been conduct which constitutes unfair treatment of some shareholders.

2.2 *Decisions of the board of directors*

Ireland, like the United Kingdom, features a unitary board structure for private companies which gives far stronger power to management than is the case in jurisdictions with a supervisory board. The default norm provided for in the Companies Act 2014 is for decision-making by the board based on a simple majority with each member have equal voting rights. A second or casting vote is given to the chairperson.[12] This default rule can be contracted out of in the company's constitution.[13]

Appointments of directors to the board are usually the preserve of the board.[14] Section 144 of the Companies Act 2014 also contemplates the majority being able to make director appointments (by ordinary resolution – in excess of 50 per cent). Irish law does not provide minority shareholders with a right to appoint directors. However, in some cases a right of appointment for a minority shareholder may be negotiated and provided for in a shareholders' agreement or a company's constitution.

2.3 *Decisions of the shareholder body*

Traditionally, Irish law frames the concept of a shareholder around a right of participation in the form of voting rights rather than viewing a shareholding as a proprietary interest in the company. The right of participation is governed by the internal rules of the company's constitution, found in its articles of association. The established definition of a share in a company is that given by Farwell J. in *Borland's Trustee v Steel Brothers & Co. Ltd*:

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[11] S.K. MILLER, "Minority Shareholder Oppression in the Private Company in the European Community: A Comparative Analysis of the German, United Kingdom and French 'Close Corporation Problem'", *Cornell International Law Journal*, 1997, Vol.30, Iss. 2, p. 386.
[12] Section 160(1) of the Companies Act 2014.
[13] Section 157 of the Companies Act 2014.
[14] Section 144 of the Companies Act 2014.

> "A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* in accordance with [the Companies Act]. The contract contained in the articles of association is one of the original incidents of the share."[15]

As regards shareholders, voting occurs either on the basis of a simple majority in the case of ordinary resolutions[16] (more than 50 per cent of votes cast) or a qualified majority[17] (at least 75 per cent of votes cast) in the case of special resolutions. The Companies Act 2014 provides for both unanimous written resolution and majority written resolutions including special resolutions. To ensure that the minority are on notice of these, all members must be notified of the content and these and of such majority written resolutions being passed.

Within the term 'minority shareholder' lies a broad spectrum of shareholders with differing ownership profiles. The strength of their position can vary widely depending on shareholding, share class and associated voting rights, including weighted voting rights. Indeed, a minority shareholder holding 25 per cent will be in a position to block special resolutions including those proposing to change the company's constitution. As such, qualified voting majority requirements such as the 75 per cent required to change a company's constitution are designed to give protection to minorities by increasing the majority required to change the status quo.

III. DIRECTORS' DUTIES

Part 5 of the Companies Act 2014 sets out nine principal duties of directors. The duties are owed to the company as a separate legal entity and not to individual shareholders. These overarching duties help to ensure that directors act in the interests of the company and that there is no abuse of power in terms of creating or enhancing majority rights at the expense of the minority. Some pertinent aspects are explored below. However, it will be evident that there is limited utility to directors' duties as a protective tool for minorities given (a) the fact that they are owed to the company not the shareholder, (b) the subjective manner in which they are often judicially tested and (c) the considerable hurdles that stand in the way of shareholders wishing to litigate them.

1. The duty to act in the best interests of the company

In the English case *of Mutual Life Insurance Company of New York v Rank Organisation Ltd*, Goulding J. referred to "the time honoured rule that the directors' powers are to be exercised in good faith in the interests of the company, and secondly, that they must be exercised fairly as between different shareholders."[18] Looking first at the duty to "act in good faith what the director considers to be the interests of the company" contained in

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[15] [1901] 1 Ch 279, at 288.
[16] Section 191(1) of the Companies Act 2014.
[17] Section 191(2) and (3) of the Companies Act 2014. For a discussion of the implication of super-majority voting rules see B.W. KING, "The Use of Supermajority Voting Rules in Corporate America: Majority Rule, Corporate Legitimacy, and Minority Shareholder Protection", Del J Corp L, 1996, Vol. 21, pp. 895-941.
[18] [1985] BCLC 11, at 21. See also the Irish case of *Kerry Co-operative Creameries Ltd v An Bord Bainne Co-operative Ltd* [1991] ILRM 851.

section 228(1)(a) of the Companies Act 2014, what is striking is that it is subjectively tested. Thus the duty is considered to be complied with on the basis of a director's belief that he or she was acting in the interests of the company.[19] Secondly, it is concerned with the interests of the company as a whole rather than those of constituencies of shareholders or individual minority shareholders' interests. Thus in *Irish Press plc v Ingersoll Publications Ltd*[20] Barron J. indicated that "acting in the interests of shareholders is no more than acting in the interests of all its shareholders."[21] This leads on to an important point in relation to differing treatment of individual classes of shareholders. In the English case of *Re BSB Holdings Ltd (No. 2)*[22] Arden J. noted that "[t]he law does not require the interests of the company to be sacrificed in the particular interests of a group of shareholders."[23] Rather, where a matter will affect different classes of shareholders, the directors must strive to exercise their powers fairly in relation to the different classes of shareholders.[24] This principle is also at work in the Irish High Court case of *Afric Sive Ltd v Oil & Gas Exploration plc*[25] concerned the plaintiff company's exclusion from a rights issue of shares. The rights issue was designed to provide additional capital to the defendant company. It went ahead at a time when Afric Sive had not yet registered a share transfer which would have led to the company being entitled to an allotment letter as registered owner of the shares. Carroll J. stated that "[i]n determining whether there was a lack of bona fides the Court must look at what was said and done and the sequence and timing of events."[26] On the facts, the court was satisfied that the directors had acted in good faith.

2. The duty to act only for purposes allowed by law

Another important duty on directors is to act in accordance with the company's constitution and only for the purposes allowed by law under section 228(1)(c) of the Companies Act 2014. This has particular significance in relation to registration of share transfers and the issue of new shares, both of which have the potential to strengthen or alter the balance between majorities and minorities within a company.

The courts developed a duty on directors to act for proper purposes[27] which has particular application concerning decisions made by directors on approving or declining to register share transfers and in making new share issues which alter the power balance within a company. Of particular concern here is the possibility that decisions made by directors will involve the creation of new or alteration of existing majorities. Usually the courts take at face value the reasons given by directors for their decisions (although directors are also entitled to remain silent as to their motivation). In *Banfi Ltd v Moran*[28] Laffoy J. considered the reasons given by directors for failing to register a transfer to be

[19] *Re Smith and Fawcett Ltd* [1942] 1 All ER 542.
[20] High Court, unreported, Barron J., December 15, 1993.
[21] High Court, unreported, Barron J., December 15, 1993, at p. 7.
[22] [1996] 1 BCLC 155.
[23] [1996] 1 BCLC 155, at 251.
[24] *Mutual Life Insurance Co of New York v Rank Organisation Ltd* [1985] BCLC 11; *Re BSB Holdings Ltd (No. 2)* [1996] 1 BCLC 155.
[25] High Court, unreported, Carroll J., 30 January 1989.
[26] High Court, unreported, Carroll J., 30 January 1989, at p. 1.
[27] *Eclairs Group Ltd v JKX Oil and Gas plc* [2015] UKSC 71, [2016] 1 BCLC 1.
[28] [2007] IEHC 257.

unconvincing as they were designed to prevent a person gaining access to the legal protective mechanisms attached to being a shareholder.

3. Duties owed by directors to individual shareholders?

The general position is that the general duties imposed by the law on directors are owed "to the company and the company alone".[29] However, a line of case law has migrated from New Zealand to the English courts indicating that in some cases of trust and reliance, a fiduciary relationship may be found between a director and shareholders. This principle derives from *Coleman v Myers*[30] where a fiduciary relationship was found in a closely-held family company where shareholders were accustomed to acting on the advice of the defendant director. This can also act as a control on directors who are also shareholders to ensure that they act fairly and in the interests of all shareholders rather than with a view to private profit. There has been judicial acknowledgement of the possibility of such a fiduciary relationship being recognised in Irish law in an appropriate exceptional case[31] but a suitable case has not yet come before the courts.

IV. DERIVATIVE ACTIONS BY MINORITY SHAREHOLDERS

1. The company as primary litigator of wrongs

A cardinal principle that applies in Irish and British company law situates the company as litigator of wrongs to it. The company's constitution will indicate whether the decision to litigate is a decision for the shareholders or the board. In line with the principle of majority rule, if a majority of the relevant company organ takes a decision that it is in the company's interests not to sue in respect of alleged wrongdoing, generally this will binding the minority. There are many legitimate reasons why it might be considered appropriate not to bring an action in respect of a wrong to the company, including the potential for reputational damage to the company through publicity generated and the costs if the action was ultimately unsuccessful. This was judicially elaborated upon by the Irish High Court in *Glynn v Owen*[32] where Finlay Geoghegan J. observed:

> "It is a matter for the majority of the board of directors or shareholders to determine in an appropriate case whether litigation should be commenced by, and in the name of the company against an allegedly wrongdoing director or shareholder or directors or shareholders (at least where the wrongdoers are not in control of the company). Often such decisions will be difficult and a matter of delicate judgment as to whether it is in the interests of a company to commence what may be costly litigation against a director or shareholder, particularly where such a person may also be necessary to the future development and progress of the company.[33]"

[29] Section 227(1) of Companies Act 2014.
[30] [1977] NZLR 225.
[31] *Crindle Investments v Wymes* [1998] 4 IR 567.
[32] [2007] IEHC 328.
[33] [2007] IEHC 328, at p. 29.

In line with this principle of majority rule, it is a long established precept that the courts are reluctant to interfere in the internal management of companies. This is solidified by the rule in *Foss v Harbottle*,[34] which indicates that the company is the proper plaintiff – the proper litigator of wrongs suffered by the company (represented by the majority), not individual shareholders suing in their own right. In the Irish Supreme Court case of *O'Neill v Ryan (No 1)*[35] O'Flaherty J intoned that without the rule in *Foss v Harbottle* "there would be a multiplicity of actions, oppressive litigation and the company would cease to have proper control of its corporate destiny."[36] Thus where a company suffers a wrong it is generally not open to frustrated individual shareholders to institute proceedings on the company's behalf - the majority of the shareholders (or the board of directors) will make the decision on whether to sue. If they decide not to bring an action, a minority shareholder may be unhappy that nothing is being done to seek a remedy for an alleged wrong done to the company. In close corporations, as this author has observed elsewhere,

> "while one may not quibble with the principle of majority decision-making by the company in general meeting (or the board), the danger of self-interested or conflicted decision-making in relation to the decision as to whether to institute proceedings against a director is apparent, particularly where there is an overlap of ownership and control. Therefore, while the proper plaintiff principle is sensible as a general precept, from an enforcement perspective it presents a major stumbling block for disgruntled shareholders where the majority choose not to bring proceedings against an errant director."[37]

As discussed below, the ability of shareholders to bring litigation in the face of opposition by the majority is dependent on being able to qualify for a recognised exception to the rule in *Foss v Harbottle*, thus permitting a derivative action to be brought on the company's behalf and for its benefit.

2. The complex territory of derivative actions

Minority shareholders who believe that a wrong done to the company, perhaps by its directors, needs to be actioned through resort to the courts face an uphill battle. This involves wrestling with the arcane nature of the law in this area and the very rigid set of exceptions carved out by the courts to the majoritarian principle of *Foss v Harbottle*.

If the wrong in question is capable of ratification by a majority of the company's shareholders in general meeting, the minority is not entitled to bring a derivative action in the name of the company and whether or not ratification has in fact occurred is immaterial.[38] There are, however, a few recognised exceptions to the rule in *Foss v Harbottle* which permit minority shareholders to bring derivative actions on behalf of the company but they are restrictive and complex to negotiate. They focus largely on

[34] (1843) 2 Hare 461.
[35] [1993] ILRM 557.
[36] [1993] ILRM 557, at 559, (Finlay C.J. and Egan J. concurring).
[37] D. AHERN, "Directors' Duties: Broadening the Focus Beyond Content to Examine the Accountability Spectrum" *Dublin University Law Journal*, 2011, Vol. 33, p. 125 (footnote omitted).
[38] *MacDougall v Gardiner* [1875] 1 Ch 13.

circumstances where fraud has been committed by the majority who are preventing legal action being taken[39] or where relevant corporate actors have exceeded the company's powers. If proceedings are permitted under an exception to the rule in *Foss v Harbottle* in the form of a derivative action, it is usually possible to apply to court for an indemnity from the company in respect of costs.[40] Minority shareholders may nonetheless be disinclined under the free rider phenomenon to bring a derivative action given that any remedy obtained is a corporate remedy rather than a personal remedy. There is also a very real practical problem for minority shareholders of obtaining enough information upon which to provide suitable evidence for the claim being made.

A preliminary leave stage operates as a filtering mechanism for courts to screen out unsuitable applications by refusing to grant leave to continue the claim.[41] This prevents court time being wasted and company funds being depleted on derivative actions that are not worth pursuing as they do not meet relevant substantive or procedural criteria. In addition, the court retains a broad overall discretion to refuse leave to issue proceedings. For example, leave may be refused where a court does not consider that the derivative is in the company's interests.[42] Lack of support from other shareholders may be taken into account. In *Fanning v Murtagh*[43] in refusing the application Irvine J. noted that the applicant shareholder did not have the support of even one other shareholder of the company's 1,400 shareholders. Lack of support from other minority shareholders may therefore be a warning bell that the action is not in the company's interests.

3. Derivative actions for fraud on the minority

The 'fraud on the minority' exception permits a derivative action to be taken by a minority shareholder on behalf of the company in circumstances where there is wrongdoer control and this control is being wielded to perpetuate injustice on the minority. Unfortunately there are considerable complexities to be navigated by minority shareholders seeking to rely on this exception, many of which seem unjustifiable to contemporary observers. Central to this exception is the threshold concept of wrongdoer control.

3.1 *Wrongdoer control*

Wrongdoer control is understood as meaning that the majority with control of the company have used their majority to block an action being brought in the name of the company.[44] This focuses on the fact that the shareholder is being "improperly prevented from bringing these proceedings on behalf of the company".[45] In effect, this distinguishes ordinary majority rule from abusive majority rule. The minority in question refers to the minority of the members being one or more who wish to sue in the face of majority opposition of the shareholders (or that of the board, if it is the board of directors making the decision on whether or not to litigate).

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[39] This is sometimes regarded as the only true exception to the rule in *Foss v Harbottle*. The other exceptions are *ultra vires* or illegal acts, acts requiring greater than simple majority to ratify and a less solidly established exception based on 'the justice of the case'.

[40] See *Fanning v Murtagh* [2008] IEHC 277; [2009] 1 IR 551, at 567-571; [2009] 1 ILRM 368, at 382-386.

[41] See further *Fanning v Murtagh* [2008] IEHC 277; [2009] 1 IR 551; [2009] 1 ILRM 368.

[42] See *Nurcombe v Nurcombe* [1985] 1 WLR 370; [1984] BCLC 557, at 562; *Barrett v Duckett* [1995] 1 BCLC 243.

[43] [2008] IEHC 277; [2009] 1 IR 551; [2009] 1 ILRM 368.

[44] *Burland v Earle* [1902] AC 83.

[45] *Smith v Croft (No. 2)* [1988] Ch 114, at 186, Knox J.

For these purposes wrongdoer control may encompass control in a formal legal sense as well as *de facto* influence.[46] Recent authoritative clarification of this emerged in the decision of the Irish Supreme Court in *Glynn v Owen*[47] where O'Donnell J. addressed the meaning of 'wrongdoer control'. The question arose as to whether Mr Jonathan Owen and Mr Allan Owen controlled the company and were therefore able to prevent the company from pursuing them for any perceived wrongdoing. O'Donnell J. highlighted that that the concept of control is one whose outer contours are not sharply defined. Rather a more malleable common sense approach is applied. He stated:

> "The concept of control in this context does not have a sharp edge. It is not determined solely by voting power, but can be established where a sufficient number of people vote with the alleged wrongdoers whether by force of habit or otherwise. In large companies with diverse shareholding it may be possible for a shareholder to be in control with much less than 50% of the shares. It is however not necessary to consider the furthest limits of this concept because it is clear that independent judgment by persons alleged to make up the majority is certainly fatal to a conclusion that the company is controlled by the wrongdoers."[48]

This indicates that the existence of a majority in shareholding is not per se to be equated with control in this context of the decision to litigate. The acid test in determining wrongdoer control is whether some factor prevents independent judgment being exercised. In *Glynn* the issue was framed, not as a question of whether or not a party was entitled to participate in a vote, but rather whether shareholders together could be said to form a block such that it would not be necessary to seek a vote "since the outcome would have been pointless".[49] The question is whether the alleged wrongdoers "had, either as a matter of right, agreement, or other arrangement, sufficient votes to form a blocking majority."[50] In *Glynn* the Supreme Court regarded the High Court's finding that one shareholder, Mr Leyland, was acting independently and in the best interests of the company as justifiable. Therefore he was not treated as forming a block with the Owens such as to confer control. Consequently a derivative action based on the fraud on the minority exception was not permitted.

The tenor of *Glynn v Owen* accords with the earlier English case of *Smith v Croft (No. 2)*[51] where Knox J. highlighted that the appropriate question for a court is whether a member is being improperly prevented from bringing proceedings on behalf of the company. If the decision not to litigate is simply an independent expression of will then it is not a case of being improperly prevented. This case established that an action cannot be maintained by a minority shareholder where a majority of the minority (who are independent of the defendants) are not in favour of the litigation. Here the plaintiffs had 14 per cent of the voting rights in the company and the defendants 63 per cent. However, there was a further group of shareholders constituting 21 per cent of voting rights who did not want the litigation to go ahead. Therefore as a majority of the minority were against litigation, this was not a case of improper prevention.

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[46] See *eg Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, at 219; *Smith v Croft (No 2)* [1988] Ch 114, at 186 and *Glynn v Owen* [2012] IESC 15.
[47] *Glynn v Owen* [2012] IESC 15.
[48] [2012] IESC 15, [20].
[49] [2012] IESC 15, [21].
[50] [2012] IESC 15, [21].
[51] [1988] Ch 114.

3.2 What constitutes fraud on the minority?

Fraud for these purposes is interpreted broadly. It seems that fraud in a criminal sense is not required.[52] Instead a broader equitable understanding of fraud is applicable.[53] For example, where the directors have unjustifiably sought to block an action in respect of a breach of directors' duties against the board. Fraud on the minority would occur in the case of a decision not to sue in respect of wrong involving an element of fraud or where powers have been exceeded.[54] Lord Davey in *Burland v Earle* indicated that fraud on the minority would arise "where the majority are endeavouring directly or indirectly to appropriate to themselves money, property, or advantages which belong to the company, or in which the other shareholders are entitled to participate …."[55] Thus any acts of personal appropriation of company funds, property or opportunities would qualify[56] Recent Irish authorities have laid down a requirement of personal benefit at the expense of the company by the wrongdoers.[57] A good example of personal benefit is seen in *Cook v Deeks*,[58] a clear case of fraud on the minority. The directors of a company diverted a lucrative contract away from the company to themselves, in breach of duty. Using their position as a majority shareholder they caused a resolution to be passed approving this action. The plaintiff was a minority shareholder. The Privy Council allowed a derivative action, disregarding the resolution as an example of self-interested voting and an unratifiable appropriation of company property.

The territory of abuses of power is fraught with procedural strictures. In principle *mala fide* abuses of power qualify.[59] Where they are ratifiable they will not qualify as a fraud on the minority.[60] One of the major limitations has been the inability of minority shareholders to bring a derivative action against director controllers for breaches of care, skill and diligence. The position in Irish law corresponds to the common law position that applied in the United Kingdom before the enactment of the UK Companies Act 2006. The Irish High Court in *Glynn v Owen*[61] and *Fanning v Murtagh*[62] clarified that a derivative action for fraud on the minority required personal benefit by the defendant at the expense of the company to be demonstrated. This means that simple negligence does not qualify as an exception to the rule in *Foss v Harbottle*. As Finch notes, "from the viewpoint of shareholder enforcement of duties of skill and care, [this] is disastrous".[63] This limitation was removed in the UK in 2006[64] but unfortunately remains in Ireland

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[52] *Crindle Investments v Wymes* [1998] 4 IR 567.
[53] See *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 WLR 2, at 12, *per* Megarry VC.
[54] *Burland v Earle* [1902] AC 83. It is generally difficult for a court to determine whether a fraud has been committed on the minority until the entire action has been heard: R. KEANE, *Company Law, Tottel* Publishing, 2013, [26.25]. In England this led to a practice of dealing with the matter as a preliminary issue: *Prudential Assurance Co v Newman Industries Ltd* [1982] Ch 209; [1982] 1 All ER 354. See also *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 WLR 2.
[55] [1902] AC 83, at 93.
[56] *Menier v Hooper's Telegraph Works* (1874) LR 9 Ch App 350; *Burland v Earle* [1902] AC 83.
[57] *Glynn v Owen* [2007] IEHC 328; *Fanning v Murtagh* [2008] IEHC 277; [2009] 1 IR 551; [2009] 1 ILRM 368.
[58] [1916] 1 AC 554.
[59] See *Cook v Deeks* [1916] 1 AC 554.
[60] *Burland v Earle* [1902] AC 83, at 93, *per* Lord Davey.
[61] [2007] IEHC 328.
[62] [2008] IEHC 277; [2009] 1 IR 551; [2009] 1 ILRM 368.
[63] V. FINCH, "Company Directors: Who Cares about Skill and Care?", MLR, 1992, Vol. 55, Iss. 2, p. 187.
[64] Section 260(3) of the UK Companies Act 2006 makes it clear that all breaches of duty are covered.

given the failure to reform the law on derivative actions. Litigation on behalf of the company in respect of extreme carelessness by its controllers thus remains solely in the gift of the majority.

4. Derivative actions based on appeals to fairness and justice

For a relatively long time it seemed that the courts might in certain circumstances be able to have recourse to a broad discretionary 'justice of the case' exception to the rule in *Foss v Harbottle*. This originated in pronouncements of the English courts.[65] The potential for such an exception in Ireland was first voiced in *Moylan v Irish Whiting Manufacturers Ltd*[66] where Hamilton J. expressed the *obiter* view that the Constitution of the State justified an exception "when the justice of the case demands it."[67] The status of such a whimsical, catch-all exception was always shaky as it was not given solid foundations by the courts. Thus in the Supreme Court in *Crindle Investments Ltd v Wymes* Keane J. made a passing reference to "the less securely based fifth exception."[68] Later cases evinced a judicial unwillingness to embrace this an exception when relied upon in argument.[69]

The tide turned further in *Glynn v Owen*[70] where Finlay Geoghegan J. in the High Court emphasised that a very strong case would need to be made out for a court to permit this exception to be used as a gateway to a derivative action:

> "I respectfully agree that the formulation of the rule in the earlier cases makes clear that it should not be applied in such a way as to lead to injustice. Nevertheless, the entitlement of a shareholder to pursue by way of derivative action a claim for and on behalf of a company is an exception to an 'elementary principle'…. As such it should not be broadly or liberally applied. A very strong case would have to be made out. It would also have to be consistent with the principles underlying the rule in *Foss v Harbottle* and the exceptions to it. These include the reluctance of the courts to interfere in the management of a company."[71]

When the case reached the Supreme Court,[72] the Court commented on the plaintiffs' attempt to rely on the justice of the case exception to the rule in *Foss v Harbottle*. The argument advanced had not been strongly made and O'Donnell J. stated that "[a]ssuming for present purposes that such a jurisdiction exists, it would require some compelling facts."[73] He went on to add that "[t]he development of more sophisticated shareholders agreements and the development of a specific statutory remedy for oppression by a

[65] *Russell v Wakefield Watertanks Ltd* (1878) LR 20 Eq 475; *Heyting v Dupont* [1964] 1 WLR 843; [1964] 2 All ER 273.
[66] High Court, 14 April 1980; [1963-1999] Ir Co Law Rep 280.
[67] High Court, 14 April 1980; [1963-1999] Ir Co Law Rep 280, at 287.
[68] [1998] 2 ILRM 275, at 290.
[69] *Keaney v Sullivan* [2007] IEHC 8; *Glynn v Owen* [2007] IEHC 328; *Fanning v Murtagh* [2008] IEHC 277; [2009] 1 IR 551; [2009] 1 ILRM 368.
[70] [2007] IEHC 328.
[71] [2007] IEHC 328, at 10-11.
[72] [2012] IESC 15.
[73] [2012] IESC 15, [22].

majority, have reduced the need for a wide-ranging exception to the rule."[74] These comments at Supreme Court level in *Glynn v Owen* may well sound the death knell for what had remained a nascent rather than fully-fledged exception.[75] Thus minority shareholders in Ireland do not have a solid basis for relying upon appeals to justice and fairness in seeking leave to bring a derivative action for a remedy for perceived corporate wrongs.

5. Conclusions on derivative actions by minority shareholders

Unfortunately the common law derivative action was not reformed by the major overhaul of Irish company law in the Companies Act 2014. As such it lags behind the state of the law in a number of other jurisdictions which transferred the derivative action to statute and in some cases opened up its availability through casting aside some of its more anachronistic restrictions.[76] For example, in the UK, it is now possible to bring a derivative claim for a breach of directors' duties for negligence.[77] In effect, the UK reforms remove the problem of determining the meaning of "fraud" and there is no longer a requirement to demonstrate the existence of wrongdoer control.

Given the practical and legal hurdles which present when an aggrieved minority shareholder would like to bring an action in the company's name, derivative actions are extremely rare in Ireland, as is company law litigation by close corporations against insiders. Of course shareholders acting together may on occasion exercise their statutory right to remove a director from office based on a resolution passed by a simple majority if that can be obtained.[78] For individual minority shareholders, pursuing a personal remedy for oppression (explored later in this chapter) is a more attractive option where they feel unfairly treated at a personal level, particularly where there has been a breakdown in relationships within a small, closely-held company. While derivative actions can be useful in addressing expropriation by the majority and these actions are usually required to be funded by the company, a potential downside for a shareholder is that they cannot provide a personal remedy to a shareholder and any compensation recovered will go the company itself.

V. JUDICIALLY DEVELOPED CONSTRAINTS ON EXERCISE OF VOTING POWER BY SHAREHOLDERS

[74] [2012] IESC 15, [22].
[75] See also *Connolly v Seskin Properties Ltd* [2012] IEHC 332.
[76] In the United Kingdom see Companies Act 2006, Part 11. See further D. LIGHTMAN, "The Companies Act 2006: a Nutshell Guide to the Changes to the Derivative Claim", *Civil Justice Quarterly*, 2007, Vol. 26, Iss. 1, pp.37-39.
[77] Section 260(3) of the UK Companies Act 2006.
[78] Section 146(1) of the Companies Act 2014. See *McGilligan v O'Grady* [1999] 1 IR 346; B. DUNLEAVY, "The Power of Shareholders to Remove Directors under Section 182 of the Companies Act, 1963", *The Bar Review*, 1999, Vol. 4, Iss. 5, pp. 265-269.

1. No general fiduciary duty on shareholders

Irish law permits shareholders to be selfish – ordinarily they may vote as they please as they are not subject to fiduciary constraints or other duties to act in the interest of the company as a whole. This means that, subject to any other legal constraints, majority shareholders may act in a way which is injurious to minority shareholders. This position was outlined by Jonathan Parker J. in *Re Astec (BSR) plc* where he observed:

> "the right of a shareholder to vote his shares is a right of property which the shareholder is free to exercise in what he regards as his own best interests. He is not obliged to cast his vote in what others may regard as the best interest of the general body of shareholders or in the best interests of the company as an entity in its own right."[79]

2. Constraints on alterations to company constitution

Special considerations arise in relation to decisions put to the shareholder body in relation to alteration of the constitution. This requires a special resolution with a majority of 75 per cent of votes cast in favour.[80] When it comes to voting on proposed changes to a company's constitution, some judicially prescribed boundaries do exist. At the beginning of the twentieth century, it was judicially intimated that shareholders are expected to act "bona fide for the benefit of the company as a whole".[81] This is tested objectively.[82] Therefore shareholders should not act for purely personal motives. By distinction, where the company's interests are not at play in the decision being voting upon *eg* where the matter concerns the distribution of dividends or the power to sell shares, a hypothetical member test applies.[83]

The landmark Privy Council ruling in *Citco Banking NV v Pusser's Ltd*[84] helped to create clarity on these points. It concerned a minority objection by Citco to the amendment of a company's articles whose effect was to give one shareholder a controlling majority. This was achieved by means of creation of a new class of B shares carrying 50 votes per share followed by a share conversion of the class A shares held by the chairman of the company to class B shares. It was argued that the alteration was not made bona fide for the benefit of the company as a whole but rather to give the chairman indisputable control of the company. In *Citco,* it was appropriate to ask whether vesting voting control in this one individual was in the interests of the company as a whole. Lord Hoffmann, delivering the advice of the Privy Council, intimated that the test of whether the amendment to the constitution would be "bona fide for the benefit of the company as a whole" would not apply to amendments which regulated the rights of shareholders rather than matters relating to the interests of the company such as the distribution of dividends or the power to dispose of shares. In those cases the alternative hypothetical member test would apply.

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[79] [1999] BCC 59, at 83.
[80] Section 32 and section 191(1) and (2) of the Companies Act 2014.
[81] *Allen v Gold Reef West Africa Ltd* [1900] 1 Ch 656, at 671, *per* Lindley MR.
[82] *Re Charterhouse Capital Ltd* [2015] BCC 574, at [90].
[83] *Greenhalgh v Arderne Cinemas* [1951] Ch 286, *Citco Banking NV v Pusser's Ltd* [2007] UKPC 13, [2007] BCC 205; *Staray Capital Ltd* [2017] UKPC 43.
[84] [2007] UKPC 13, [2007] BCC 205. See further R. WILLIAMS, "Bona Fide in the Interest of Certainty" CLJ, 2017, Vol. 66, Iss. 3, pp. 500-503.

This involved asking whether the amendment was, "in the honest opinion of those who voted in favour, for the benefit of a hypothetical member."[85] The hypothetical member test derives from *Greenhalgh v Arderne Cinemas*.[86]

Hollington has nonetheless criticised the law as "an unsatisfactory fudge" given the lack of clarity on the difference between the company's interests and members' interests.[87] Furthermore, although case law in this domain underpins the principle that amendment of a company's constitution should not entail oppression or unfairness to the position of a minority shareholder, in reality it can be a real challenge to successfully establish a lack of good faith[88] such as would lead to an alteration to the company's articles being rolled back by a court.

VI. STATUTORY PROCEDURAL SAFEGUARDS FOR MINORITY RIGHTS

Certain statutory provisions which are concerned in ensuring fairness and balance in majority decision-making illustrate that all minority protections do not require to be contracted for and that certain baseline protections are available, often with a judicial supervisory role being allocated to the courts. This adjudicatory positions contrasts with the generally hands-off position taken by the courts in relation to internal corporate decision-making. As Chander puts it, "[t]he key distinction is that, while majoritarian devices in corporate governance require nonintervention on the part of legislators and judges, minority protection devices require active vigilance. Corporate law springs into action - becomes nontrivial on behalf of minority shareholders." [89] Some key mechanisms that are given mandatory law status in legislation are highlighted below.

1. Power to convene an EGM

Usually extraordinary general meetings (EGMs) are convened by directors. However, section 178 of the Companies Act 2014 permits shareholders in possession of 10 per cent of the paid up voting capital in a company to requisition the directors to convene a general meeting of the shareholders. If the directors fail to do so, the relevant shareholders can do so. There is a useful procedure under section 179 of the Companies Act 2014 which makes provision for an application to court to enable a meeting to be called. This section 179 statutory power of 10 per cent of shareholders to apply to court for an order to compel the attendance of other shareholders and directors provides a valuable mechanism to assist minority shareholders, particularly as in appropriate cases, the court can provide judicial assistance by directing that directors and majority shareholders must attend. However, the UK equivalent provision has been judicially described as "a procedural section not designed to affect substantive voting rights or to shift the balance of power".[90] There has not been a great deal of litigation on this in Ireland but the potential for judicial assistance

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[85] [2007] UKPC 13, [2007] BCC 205, [18].
[86] [1951] Ch 286.
[87] R. HOLLINGTON, *Hollington on Shareholders' Rights*, 8th ed, Sweet & Maxwell, 2017, p. 105.
[88] R. HOLLINGTON (fn. 87), p. 105.
[89] A. CHANDER (fn. 4), pp. 126-127.
[90] *Ross v Telford* [1998] 1 BCLC 82.

to call an EGM remains a useful tool for minority shareholders to consider with a view to getting decision-making within a company back on track.

2. Statutory mechanisms enabling court to hear minority objections

A right for dissenting shareholders to apply to the court for judicial relief is provided in a number of scenarios where there may be a concern about respect for minority rights. Situations where these arise include the re-registration of a private company as another company form; when an alteration of a company's constitution affects individual member rights or class rights;[91] and where there is a compulsory acquisition of shares.[92]

VII. CONTRACTED FOR PROTECTIONS

1. Pre-emption Rights in Company Constitutions

1.1 *The policy behind restrictions on transfer*

Historically one of the defining features of the Irish private company has been restrictions on share transfer. Consequently, it is important to consult a company's constitution (and any operative shareholders' agreement)[93] for restrictions upon transfer before contracting to sell shares. It is possible to limit the extent to which shares are transferable so long as they remain alienable. That said, the lack of an open market for shares in close corporations frequently "leaves shareholders wishing to leave the company in the cold."[94]

Pre-emption provisions typically prevent a share being transferred unless it is first ascertained whether an existing member of the company is willing to purchase it. The aim is to restrict membership to an insider class such that an outsider will only be able to become a member if no existing member is willing to buy the shares. This principle was expressed by Lord Reid in *Lyle & Scott Ltd v Scott's Trustees*[95] when he said, "[t]he purpose of the article is plain: to prevent sales of shares to strangers so long as other members of the appellant company are willing to buy them ..."[96] On occasion pre-emption rights will be provided for in an agreement rather than in a company's articles. In such cases the court will interpret the effect of the words used in the agreement provided that it is satisfied that a binding agreement exists.[97]

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[91] Section 89(1) of the Companies Act 2014.
[92] Section 459(5) of the Companies Act 2014.
[93] In private companies it is common for provisions relating to restrictions on transfer such as pre-emption provisions and an associated share valuation mechanism to be included in shareholders' agreements.
[94] M. WYCKAERT, "Dispute Resolution in the Closed Corporation: the Dutch Example, the Belgian Success" in A.J. VIERA GONZÁLEZ, C. TEICHMANN (eds), *Private Companies in Europe: The Societas Unius Personae (SUP) and the Recent Developments in the EU Member States*, Thomson Reuters, 2016, p. 314.
[95] [1959] 2 All ER 661.
[96] [1959] 2 All ER 661, at 667.
[97] See *Holland v McGill* [1963-1993] Ir Co Law Rep 173 (no binding pre-emption agreement); *McAuliffe v Lithographic Group Ltd* Supreme Court 2 November 1993, [1963-1993] Ir Co Law Rep 193 (interpretation of clause in share purchase agreement).

As pre-emption rights are associated with the intrinsic nature of the private company, attempts to attack the validity of pre-emption rights in articles of association have been unsuccessful.[98] In *Attorney-General for Ireland v Jameson*[99] Kenny J. stated:

> "The articles of association of the Company are in a great measure identical with, or similar to, those in common use where it is desired by the promoters of a company to keep its shares in the hands of a limited class of persons, and to prevent the intrusion, so far as possible, of members of the general public in the management of its affairs."[100]

Judicial understanding is again evident in the following observation of Judge Peter Prescott Q.C. in *Re Claygreen Ltd; Romer-Ormiston v Claygreen Ltd*:

> "Many companies do not allow their shares to be traded freely. This may be quite understandable, seeing that the members of a small private company may not wish to be forced into a relationship with a shareholder of whom they know nothing, or one they do know but do not approve of.[101]

Although the policy behind pre-emption provisions is widely accepted, at the same time in counter-balance to this are the property rights of a shareholder. The right of transfer as a fundamental right associated with share ownership will not be regarded as taken away unless this is the clear import of the articles. This is on the basis that "the right to hold on to a share is as much a part of the right of property constituted by a share as the right to transfer it."[102]

1.2 *Form of pre-emption rights*

A company's articles may give a right of pre-emption to existing members of the company, both in the case of an inter vivos transfer and in the case of transmission upon death of a shareholder. In some cases the articles of a company will provide for a compulsory transfer to be triggered by a director's resignation or the cessation of a director's employment.[103] Depending on the wording, pre-emption restrictions may be regarded as limited to transfers of the legal interest. In general, passing an equitable interest in shares will not be treated as a breach of pre-emption rights.[104] There may therefore be no impediment to a declaration of trust in respect of the beneficial interest in favour of an outsider.[105] However, conversely, the articles may specifically state that transfers of the beneficial interest in a share are within the scope of a pre-emption provision. In other instances the articles may expressly prohibit the separation of the legal and the beneficial interest in shares.[106]

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[98] See *eg Re Attorney-General for Ireland v Jameson* [1904] 2 IR 644, [1905] 2 IR 218; *Hurst v Crampton Bros (Coopers) Ltd* [2002] EWHC 1375 (Ch), [2003] 1 BCLC 304.
[99] [1904] 2 IR 644.
[100] [1904] 2 IR 644, at 665.
[101] [2005] EWHC 2032 (Ch), [2006] 1 BCLC 715, at [23].
[102] *Martyn Rose Ltd v AKG Group* [2003] EWCA Civ 375, [2003] 2 BCLC 102, [44], *per* Arden LJ.
[103] See *eg Doughty v Hanson & Co Ltd* [2007] EWHC 2212.
[104] *Safeguard Industrial Investments Ltd v National Westminster Bank Ltd* [1982] 1 All ER 449.
[105] *Re Attorney-General for Ireland v Jameson* [1904] 2 IR 644, at 668.
[106] See eg *Re Claygreen Ltd; Romer-Ormiston v Claygreen Ltd* [2005] EWHC 2032 (Ch), [2006] 1 BCLC 715.

1.3 *Share valuation*

In terms of share valuation in relation to the purchase of shares pursuant to pre-emption rights, use of words such as "fair value" or "open market value" without further definition can give rise to uncertainty, but if the matter of valuation is left to an independent expert valuer, it will be a matter for their discretion as to the appropriate method of valuation. Shares in a private company may be valued in a number of ways: an earnings basis, an assets basis, a discounted cash-flow basis or some combination of these approaches. In *Rayfield v Hands*[107] the company's articles provided that "[n]o shares in the company shall be transferred to a person not a member of the company so long as any member of the company may be willing to purchase such shares at a fair value."[108]

A mechanism will often be provided for fixing a purchase price, for example, based on a share valuation carried out by the company's auditors. A mutual valuer is under a duty to act fairly and impartially, failing which their valuation may be invalidated.[109] The general rule is that a non-speaking valuation (one to which no reasons are attached) made by an expert cannot be impugned. A speaking valuation (one given with accompanying reasons for arriving at the valuation) made by an expert may be challenged by a party to a contract of sale on the grounds that it has been made on a fundamentally erroneous basis.[110]

1.4 *Effect of transfers in breach of pre-emption provisions*

The standing of a share transfer executed in breach of pre-emption provisions depends on whether it has been registered or not. If a member attempts to transfer shares in breach of the pre-emption provisions in a company's articles, the directors are entitled to refuse to register it and they would have no power to authorise the registration of a transfer which was to their knowledge in breach of pre-emption provisions.[111] The effect of entering into a legally binding agreement to sell shares in breach of pre-emption provisions in a company's articles is to pass the beneficial but not the legal interest in those shares.[112] While it is possible to pass a beneficial interest upon the entry into a contract,[113] legal title to the shares can in any event only be passed upon registration.[114]

2. Shareholders' agreements

It is common commercial practice for members of private limited companies to enter into

[107] [1960] Ch 1.
[108] *Gillatt v Sky Television Ltd* [2000] 2 BCLC 103, at 112. On share valuations see J. NELDER, "Share Valuation – Some Computational Aspects", *Tolley's Practical Tax Newsletter*, 2003, Vol. 24, Iss. 26, pp. 205-206.
[109] *Macro v Thompson (No.3)* [1997] 2 BCLC 36; *Barnett v Rose* [2011] EWHC 2906 (Ch).
[110] *Dean v Prince* [1953] 2 All ER 636; *Burgess v Purchase & Sons (Farms) Ltd* [1983] 2 All ER 4.
[111] *Tett v Phoenix Property and Investment Co Ltd* [1986] BCLC 149, at 162, 167; *Re Claygreen Ltd; Romer-Ormiston v Claygreen Ltd* [2005] EWHC 2032 (Ch), [2006] 1 BCLC 715, [46].
[112] *Hawks v McArthur* [1951] 1 All ER 22; *Lee and Co (Dublin) Ltd v Egan Wholesale Ltd* High Court, unreported, Kenny J., April 27, 1978; *Walls v P.J. Walls Holdings Ltd* [2007] IESC 41; [2008] 1 IR 732, [2008] 1 ILRM 1.
[113] *Re Hafner; Olhausen v Powderly* [1943] IR 426, at 426, 453ff; *Hawks v McArthur* [1951] 1 All ER 22; *Lee and Co (Dublin) Ltd v Egan Wholesale Ltd* High Court, unreported, Kenny J., April 27, 1978; *Walls Properties Ltd v PJ Walls Holdings Ltd* [2007] IESC 41; [2008] 1 IR 732.
[114] *Re Piccadilly Radio plc* [1989] BCLC 683; ; *Walls Properties Ltd v PJ Walls Holdings Ltd* [2007] IESC 41; [2008] 1 IR 732.

a shareholders' agreement with a view to providing for circumstances in a manner over and above the company's articles. Shareholders' agreements can provide a useful opportunity for minority shareholders to obtain additional protections and rights which would not be available to them under the general law. As such, they can provide powerful mechanisms for minorities in preventing and dealing with conflicts and ensuring their rights and interests are respected. It is difficult to gauge the extent to which shareholders contract for protection in Ireland given the lack of a mandatory registration requirement. It certainly may be the case that contractual provisions reduce the need for judicial interventions.[115] A key advantage of a shareholders' agreement is that it is in nature of a private contractual arrangement rather than a public document filed in the Companies Registration Office.

2.1 *Provisions to protect shareholder interests*

2.1.1 *Best endeavours clause*

A catch-all 'best endeavours' clause is helpful in mandating shareholders to act with the utmost integrity and good faith in their dealings with and on behalf of the company. This helps to get over the lack of such a duty at law.

2.1.2 *Right to appoint a director*

Minority shareholders in private companies with a certain size of shareholding may be able to ensure the insertion of a provision in a shareholders' agreement granting them a right to appoint a director.

2.1.3 *Right to information*

The rights of shareholders to information are fairly limited under the Companies Act 2014. Therefore a shareholders agreement can usefully provide clarity on additional information rights for non-director shareholders. This may include a right to financial statements as well as management accounts, cash-flow projections, budgets and forecasts. Sometimes a shareholder is provided with a wide-ranging right to be able to demand "such information in relation to the conduct of the company's business as they may reasonably request".

2.1.4 *Right to a dividend*

The general position at law is that there is no right to a dividend. The recommendation of an annual or interim dividend remains a matter for the discretion of the directors who may recommend a dividend to the shareholders and the company may then declare a dividend by passing an ordinary resolution.[116] This position is enshrined by s.124 of the Companies Act 2014. Given the lack of a right to a dividend, there is really no opportunity to challenge non-payment of a dividend unless bad faith can be made out. However, shareholders' interests in this domain may be considerably bolstered by means of including a provision in a shareholders' agreement to the effect that a specified proportion

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[115] S.K. MILLER, "A New Direction for LLC Research in a Contractarian Legal Environment", S Cal L Rev, 2003, Vol. 76, pp. 351-432 (discussion in a United States context).

[116] *Ryanair Ltd v Aer Lingus Group plc* [2011] IEHC 170.

of profits must be returned each year to shareholders as a dividend. The operation of such a provision may be deferred in the early years of a company's operation to allow it to bed down using retained profits.

2.1.5 Rights on sale of the company

A provision for drag along rights permits the majority shareholder(s) to force minority shareholders to participate where the majority have chosen to sell the company to an outside purchaser by means of share sale. Tag along rights ensure that minority shareholders can tag along on the same terms as the majority in relation to the sale of their shares to an outside purchaser.

2.1.6 *Consent and veto powers*

Provisions in a shareholders' agreement often make inroads into the broad general powers of management delegated by the shareholder body to the board of directors. In order to protect minority shareholders in cases of conflicts with the majority, consent provisions may be built into a shareholders' agreement allowing minority shareholders' objections to certain strategic decisions to be meaningfully adhered to. Such rights may be granted to named shareholders or shareholders holding a specified percentage of the company. The type of matters covered in this way by means of contractual agreement vary greatly. They would include the following:

- Issue of shares or securities convertible into shares (e.g. options/warrants);
- Redemption or repurchase of shares or other return of share capital to shareholders;
- Amendment of the share capital structure;
- Disposal of a material part of the business of the company or of material trading assets;
- Secured and unsecured borrowing above a specified level;
- Making a material change in the business of the company;
- Incurring capital expenditure above specified limits;
- Provision of loans and giving of guarantees and indemnities;
- Paying executive remuneration in excess of an agreed ceiling.[117]

Shareholders' agreements will generally only be treated as overriding a company's constitution where the intention is very clear and no ambiguity exists.[118] In some cases it may be considered that the company's constitution incorporate a shareholders' agreement by reference where the company's constitution makes express reference to a shareholders' agreement.[119] Alternatively this may be implied.[120] Where a shareholders' agreement incorporates the provisions of an article, it will be possible to enforce that

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[117] E. SCULLY, "Shareholders' Agreements – A Practical Analysis", LK Shields, 13 December 2017 https://www.lkshields.ie/news-insights/publication/shareholders-agreements-a-practical-analysis.
[118] *Hayes v Kelleher* [2015] IEHC 509.
[119] See further A. MARSDEN, "Does a Shareholders' Agreement Require Filing with the Registrar of Companies?" Co Law, 1994, Vol. 15, Iss. 1, pp.19-21.
[120] *Burke v Independent Colleges* [2010] IEHC 412, High Court, unreported, Laffoy J., at [2.5].

provision in contract.[121] As a contract, a shareholders' agreement may only be varied on the consent of all parties. Breach of a shareholders' agreement is a matter of contract and does not, of itself, ground an oppression petition under section 212 of the Companies Act 2014.[122]

The leading case on shareholders' agreements is the decision of the House of Lords in *Russell v Northern Bank Corpn Ltd*.[123] It concerned a shareholders' agreement which provided that the company's share capital was not to be increased without the written consent of the parties to the agreement who were the original shareholders and the company and that the agreement took precedence over the company's articles. Lord Jauncey observed:

> "… while a provision in a company's articles which restricts its statutory power to alter those articles is invalid an agreement dehors the articles between shareholders as to how they shall exercise their voting rights on a resolution to alter the articles is not necessarily so."[124]

This involved accepting that shareholders "may lawfully agree inter se to exercise their voting rights in a manner which, if it were dictated by the articles, and were thereby binding on the company, would be unlawful."[125] The House of Lords viewed the agreement by the shareholders to personally agree not to vote to create new share capital without unanimous written consent as enforceable whereas it was not considered lawful for the company to agree to fetter its own discretion in relation to the power to create capital. Consequently, where a company is a party to a shareholders' agreement, care needs to be taken to ensure that it is not undertaking to restrict its statutory powers.[126]

2.2 *Status of shareholders' agreements*

Unlike company constitutions which bind existing and future members, shareholders' agreements are contracts that only bind participants. In *Welton v Saffery*[127] Lord Davey stated:

> "such contracts, whether made by all or some only of the shareholders, would create personal obligations, or an exceptio personalis against themselves only, and would not become a regulation of the company, or be binding on the transferees of the parties to it, or upon new or non-assenting shareholders."[128]

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[121] LAW COMMISSION (England and Wales), *Shareholder Remedies, A Consultation Paper*, No.142, 1996, at [3.5]. See *eg Redfern Ltd v O'Mahony* [2010] IEHC 253; unreported, High Court, McGovern J., June 29, 2010.
[122] *Hennessy v Griffin* [2011] IEHC 335; High Court, unreported, Murphy J., July 29, 2011.
[123] [1992] 3 All ER 161.
[124] [1992] 3 All ER 161, at 162.
[125] [1992] 3 All ER 161, at 167.
[126] The decision is not without controversy. See B.J. DAVENPORT, "What did Russell v Northern Bank Development Corporation Ltd Decide?", LQR, 1999, Vol.109, Iss. 4, pp. 553-572 and E. FERRAN, "The Decision of the House of Lords in Russell v Northern Bank Development Corporation Ltd", CLJ, 1994, Vol. 53, Iss. 2, pp. 343-366.
[127] [1897] AC 299.
[128] [1897] AC 299, at 331.

As a consequence, a shareholders' agreement cannot be enforced against or enforced by a new member unless he or she has entered into a deed of adherence agreeing to bound by the shareholders' agreement or all the members have entered into a new shareholders' agreement.

One of the tactical advantages of a shareholders' agreement is the possibility of confidentiality as to its terms, a matter which does not apply in relation to a company's articles of association as a public document. However, where a shareholders' agreement expressly purports to override a provision of a company's articles of association, it may be contended that this is an amendment of the company's articles which requires to be filed in the Companies Registration Office.[129] Otherwise the mirror principle of the register which is associated with the privilege of incorporation is impaired. The matter is not directly addressed by the Companies Act 2014. There was tacit judicial acceptance of registration in *Burke v Independent Colleges*[130] where Laffoy J. noted that amended articles of association had been filed in the Companies Registration Office to reflect a shareholders' agreement. To minimise the implication that a shareholders' agreement is varying a company's articles, it is sensible to include an express provision in the agreement to the effect that it does not purport to be an agreement to alter the company's articles of association. It is common to provide that in the event of conflict between the shareholders' agreement and the articles, the shareholders' agreement takes precedence while the agreement remains in force. This helps to indicate that the shareholders' agreement operates outside the articles and that a permanent alteration of the articles is not occurring.

VIII. CORPORATE DEADLOCK: LEGAL AND PRACTICAL IMPLICATIONS

Choosing the right corporate strategy where there is a decision-making impasse within a close corporation is important as not only will it affect the powers of the court in terms of the remedy granted, it will also have consequential implications for the future of the company. As explored in the Parts that follow, there are a number of legal remedies that may be sought by shareholders under Irish law where deadlock is reached within a company - where the parties are at loggerheads and it is not possible to move forward given the extent of the falling out between the parties. While derivative actions focus on a wrong to the company, the law provides a number of platforms from which a personal action may be launched by a shareholder based on how they have been adversely affected. These mechanisms are of particular assistance in breaking deadlock, although in the process the company may legally or practically be forced out of existence.

Hirschmann's classic thesis is that in the absence of loyalty, shareholders leave rather than exercise voice.[131] However, within close corporations the ability to sell shares in the absence of an open market for buying and selling them raises a real difficulty. Companies legislation assists by providing a substantive personal action and remedies to recognise

[129] See further A. MARSDEN (fn. 119); P. MCGOVERN, "Shareholders' Agreements – Their Nature and Effect", *Commercial Law Practitioner*, 1995, Vol. 2, Iss. 5, pp. 113-117.
[130] [2010] IEHC 412, High Court, unreported, Laffoy J., [2.5].
[131] A.O. HIRSCHMANN, *Exit, Voice and Loyalty: Responses to Declines in Firms, Organizations and States*, Harvard University Press, 1970.

this. Thus a shareholder may choose to bring an oppression application under section 212 of the Companies Act 2014 as a means to "an exit from the company or the rectification of its affairs".[132] More radically, an alternative petition to wind up the company under section 569(1)(e) on the grounds that it would be just and equitable may be chosen. As Courtney remarks, this "may have disastrous consequences for all concerned."[133] The fact that legislation has sought to temper the strictures of the rules on derivative actions by shareholders by providing other avenues such as the oppression cause of action and the winding up jurisdiction allows disgruntled shareholders alternative means to pursue their grievance but this may come at a wider cost in terms of the ongoing survival of the company. This of course reflects the facts that in private companies much depends on productive working relationships between the key protagonists being maintained in order for the company to flourish.

O'Donnell J. commented incisively upon this in the Supreme Court in *Glynn v Owen*:

> "While the pursuit of proceedings against other directors or shareholders, on behalf of the company and funded by it, may satisfy the human, and perhaps tactical, desire to cause maximum damage to opposing shareholders: it is as a practical matter normally fatal to any prospect of the company continuing in its current form as a business enterprise. The difficulty with any of the forms of litigation open to a shareholder is that they are sometimes crude remedies which risk causing serious damage to the company."[134]

These themes are further explored in the Parts that follow.

IX. MINORITY OPPRESSION UNDER SECTION 212 OF THE COMPANIES ACT 2014

A claim for minority oppression under section 212 of the Companies Act 2014 is likely to constitute the most obvious route to remedy for a minority shareholder. This involves making a claim that the affairs of the company are being conducted, or the powers of the directors are being exercised, in a manner which is oppressive to members or in disregard of their interests.

1. Policy rationale and background

Section 212 of the Companies Act 2014 provides a mechanism for a minority shareholder "who feels disenfranchised by the majority".[135] It allows such a shareholder to institute proceedings seeking a remedy where the company's affairs or the directors' powers are being exercised in a manner which qualifies as oppressive or in disregard of a member or members' interests.[136] This route to a remedy was created as more flexible and less all or

[132] *Re Dublin Cinema Group Ltd* [2013] IEHC 147, *per* Charleton J.
[133] T.B. COURTNEY, *The Law of Companies,* 3rd ed., Bloomsbury, 2012, at p. 631.
[134] [2012] IESC 15, [22].
[135] D. AHERN (fn. 37), p. 134.
[136] See generally J. TEMPLE LANG, "Minority Shareholder Protection under Irish Law", NILQ, 1974, Vol. 25, Iss. 4, pp.387-420; P. USSHER, "Company Law – Oppression, Justice and Equity", *Dublin University Law Journal*, 1979-1980, pp. 92-95.

nothing than an alternative application to have the company wound up on grounds that it would be just and equitable to do so.

Section 212 originally appeared as section 205 of the Companies Act 1963 and was modelled on section 210 of the UK Companies Act 1948 (see now sections 994 to 999 of the UK Companies Act 2006).[137] Many regard section 212 as a means of getting around the complex hurdles to litigation presented by the rules on derivative actions, including the fraud on the minority exception to *Foss v Harbottle*.[138] The original section 205 of the Companies Act 1963 (now section 212 of the 2014 Act) has its genesis in the 1962 Jenkins Committee report on the reform of company law.[139] The Irish provision is modelled on one contained in UK legislation. When introduced in 1963, the provision, said Kenny J. in *Re Westwinds Holding Co. Ltd*, "made a profound change in the remedies available to a shareholder."[140] This power of judicial intervention allowed a court to provide a remedy for morally suspect conduct which impacted unfairly on certain shareholders even where no legal rights had necessarily been infringed. In this light, Ussher, a leading commentator on Irish company law, made the point that "[f]or the first time in Ireland the court was given a discretion to remedy unprincipled conduct in the company even where no legal rights had been infringed ...."[141]

Given that section 212 proceedings may prove fatal to the survival of the company, there is a strong tactical advantage in instituting these proceedings with a view to negotiating an out of court settlement. There is a danger of a minority shareholder holding the company and other shareholders as a hostage to fortune. Given that there is no duty on shareholders (as opposed to directors) to act in good faith and in the interests of the company, the oppression jurisdiction can quickly become an instrument of oppression in the wrong hands. Hoffmann J. pointed out in *Re a Company No. 007623 of 1984*[142] in relation to the equivalent British regime, "the very width of the jurisdiction means that unless carefully controlled it can become a means of oppression."[143] There is also judicial awareness in these cases of the need to respect share buy-out provisions bargained for in shareholder agreements.

This form of statutory jurisdiction has the potential to ride roughshod over traditional judicial reluctance to meddle in the internal management of company affairs. The courts have, however, been mindful of not opening the floodgates to the wrong type of litigation. In *Re Unisoft Ltd (No 2)*[144] Harman J noted the costs, information to be produced and estimated length of the hearing and commented:

> In those circumstances it befits the court, in my view, to be extremely careful to ensure that oppression is not caused to parties, respondents to such petitions, indeed petitioners to such petitions, by allowing the parties to trawl through facts

[137] The UK provisions moved from initially using the concept of 'oppression' to utilising the concept of 'unfair prejudice'.
[138] J. TEMPLE LANG (fn. 136), p. 395.
[139] *Report of the Company Law Committee* ("the Jenkins Committee Report"), 1962, HMSO London Cmnd 1749, para. 212.
[140] High Court, unreported, Kenny J., 21 May 1974.
[141] P. USSHER, *Company Law in Ireland*, Sweet and Maxwell, 1986, p.256.
[142] [1986] 2 BCLC 362.
[143] [1986] 2 BCLC 362, at 367.
[144] [1994] BCC 766.

> which have given rise to grievances but which are not relevant conduct within even the very wide words of the section.[145]

In terms of judicial guidance on what conduct qualifies as oppression, the jurisprudence is slim as it is rare for section 212 petitions to proceed to judgment rather than settling or being abandoned at an earlier point. Often the cases involve companies where it can be said that the parties are in a quasi-partnership.

2. *Locus standi*

The petitioner under section 212 must be a member – a registered shareholder. Therefore if a person is not a shareholder because the directors have refused to register a share transfer or they are no longer a member because of the invocation of a drag along provision in a sale of the company, they will not be able to invoke section 212.[146] The oppression of a member may include oppression in the separate capacity of a shareholder as a director.[147] The member does not have to be in the minority in order to be entitled to bring a section 212 action.[148]

3. Procedural matters

3.1.1 *Relationship with derivative action*

There is common law authority to suggest that a personal claim in the nature of section 212 can be maintained even where it would have been possible to bring a derivative claim.[149] Thus, in principle, the same facts may found a derivative action or a section 205 petition. In *Re a Company (No. 005287 of 1985)*[150] the petitioners were minority shareholders alleging that the respondent majority shareholder had sold assets of the company in breach of fiduciary duty to the company and that this was unfairly prejudicial to the interests of the petitioners. The court's view was that although they could have brought a derivative action, this did not prevent them seeking relief by means of an unfair prejudice petition. In *Re Charnley Davies Ltd (No. 2)*[151] Millett J. noted the strategic difference between when it would be appropriate to choose one cause of action over the other:

> "Had the petitioners' true complaint been of the unlawfulness of the respondent's conduct, so that it would be met by an order for restitution, then a derivative action would have been appropriate and [an unfair prejudice petition] would not. But that was not the true nature of the petitioners' complaint. They did not rely on the unlawfulness of the respondent's conduct to found their cause of action; and they would not have been content with an order that the respondent make restitution to the company. They relied on the respondent's unlawful conduct as evidence of the manner in which he had conducted the company's affairs for his own benefit

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[145] [1994] BCC 766, at 767.
[146] *Carlo Tassara Assets Management S.A. v Éire Composites Teoranta* [2016] IEHC 103.
[147] *Re Murph's Restaurants Ltd* [1979] ILRM141.
[148] *Re Westwinds Holding Co Ltd* High Court, unreported, Kenny J., 21 May 1973.
[149] *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227, at 229 (Privy Council *Re A Company (No. 005297 of 1985)* [1986] BCLC 68; *Re Charnley Davies Ltd (No. 2)* [1990] BCLC 760.
[150] [1986] BCLC 68.
[151] [1990] BCLC 760.

> and in disregard of their interests as minority shareholders; and they wanted to be bought out. They wanted relief from mismanagement, not a remedy for misconduct."[152]

Thus misconduct should be pursued by way of derivative action, while mismanagement is a matter for an oppression petition under section 212.[153] In the absence of a clear-cut ruling on the point, there is doubt concerning whether it is possible for a shareholder to simultaneously pursue a derivative claim on behalf of the company alongside a personal claim pursuant to a section 212 petition.[154] The existence of a section 212 petition certainly constitutes a matter to which the court may have regard in deciding on an application for leave to bring a derivative action.[155] No attempt was made to statutorily address the relationship between the derivative action and the oppression action in the Companies Act 2014.

3.1.2 *Possibility of a private court hearing*

In certain circumstances, a private rather than a public hearing of the petition may be permitted by a court to protect the company's interests.[156] This is likely to only be available in exceptional circumstances given the constitutional precept that justice is generally to be administered in public.

3.1.3 *Costs*

Although the company does not usually play a part in section 212 proceedings which are between shareholders or between shareholders and directors, generally it is possible for a minority shareholder to obtain an indemnity from the company in respect of the costs of bringing a section 212 petition.

4. Nature of the wrong

As Heslin remarks, "our courts will be concerned, not only with *oppression* and breach of *rights*, but with conduct in disregard of *interests*."[157] In *Re New Ad Advertising Co. Ltd*[158] Smyth J. emphasised that the jurisdiction is concerned with complaints about how the affairs of the company are conducted or that the power of the directors of the company are being exercised in an oppressive manner or in disregard of the interests of a member. In this case the court did not consider that share dealing between directors constituted the conduct of company affairs as it did not involve the acts of corporate organs.

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[152] [1990] BCLC 760, at 784.
[153] *Re Chime Corp* [2004] 7 HKCFAR 546, at [63].
[154] See *Glynn v Owen* [2007] IEHC 328 (the question did not ultimately arise for consideration as the personal claim was continued before the issue was ruled on); *Fanning v Murtagh* [2008] IEHC 277; [2009] 1 IR 551; [2009] 1 ILRM 368 (issue stated to be a relevant consideration in relation to discretion to grant leave to bring a derivative action).
[155] *Fanning v Murtagh* [2008] IEHC 277; [2009] 1 IR 551, at 586-587, [2009] 1 ILRM 368, at 399-340.
[156] Section 212(9) of the Companies Act 2014. See further *Re R Ltd* [1989] IR 126.
[157] M. HESLIN, "Shareholder Oppression – Rights, Interests, Expectations and Equity", *Commercial Law Practitioner*, 2016, Vol. 23, Iss. 11, p. 286.
[158] [2007] IEHC 436.

4.1.1 *Disregard of members' interests*

Notably the wrongful behaviour founding an application need not go so far as to constitute an infringement of legal rights. This is clear from reference to the interests of a member or members. In *Re Sam Weller & Sons Ltd*[159] Peter Gibson J. considered this in the context of s.459(1) of the then applicable English Companies Act 1985. He stated:

> "The word 'interests' is wider than a term such as 'rights', and its presence as part of the test of section 459(1) to my mind suggests that Parliament recognised that members may have different interests, even if their rights as members are the same."[160]

Re Williams Group Tullamore Ltd[161] is the leading Irish case on disregard of a member's interest. A resolution was passed by the preference shareholders extending the sharing of profits from ordinary shareholders alone to both ordinary and preference shareholders. The ordinary shareholders could not vote on this resolution, only the preference shareholders. This was acting within their power in the articles and not considered to amount to oppression. However, Barrington J. regarded the resolution as being passed in disregard of the interests of some members. Unfortunately he blurred the line with oppression by classifying it as oppressive to the interests of ordinary shareholders.

4.2.2 *Oppression*

A) *The substantive test for establishing oppression*

"Oppressive conduct" within the meaning of section 212 is judicially understood as relating to the exercise of a company's powers "in a manner burdensome, harsh and wrongful"[162] to the petitioner. This was established by Keane J. in *Re Greenore Trading Company Ltd*[163] and has been accepted ever since. This understanding itself derives originally from the English case of *Scottish Co-operative Wholesale Society v Meyer*.[164] There a co-operative society set up a subsidiary company for the purpose of producing rayon cloth. The co-op set up the subsidiary with persons who held a licence to produce such cloth under relevant government regulations. It was agreed that the co-op would supply the necessary raw materials to the subsidiary to enable the subsidiary to produce the cloth. Later the regulations were repealed so that the co-op no longer needed the licence held by the minority shareholders. The co-op decided to produce the rayon cloth themselves and refused to supply any further raw material to the subsidiary. The minority shareholders successfully brought an oppression petition under the equivalent of what is today section 212. In the course of his judgment Viscount Simonds stated that the society

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159 [1990] 1 Ch 682.
160 [1990] 1 Ch 682, at 690.
161 [1985] IR 613.
162 This phraseology is originally to be found in the English case of *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, at 342.
163 [1980] ILRM 94. See also *Re Charles Kelly Ltd; Kelly v. Kelly & Kelly (No. 2)* [2011] IEHC 349; *Re Vantage Resources Ltd; Hamill v Vantage Resources Ltd* [2015] IEHC 195.
164 [1959] AC 324.

behaved in an "oppressive" manner and had exercised their majority in a manner "burdensome, harsh and wrongful."[165]

In determining whether or not conduct can be considered to be burdensome, harsh and wrongful the courts have employed an objective test. In *Irish Visiting Motorists Bureau Ltd*[166] Kenny J. stated:

> "The affairs of a company may be conducted or the powers of the directors may be exercised in a manner oppressive to any of the members although those in charge of the company are acting honestly and in good faith. If one defines oppression as harsh conduct or depriving a person of rights to which he is entitled, the person whose conduct is in question may believe that he is exercising his rights in doing what he does… the question then when deciding whether the conduct of the affairs of a company or the passing of a resolution is oppressive is whether, judged by objective standards, it is."

Given that oppressive behaviour is judged by objective standards utilising the objective test of harsh conduct or conduct depriving a person of rights to which he is entitled is judicially applied, it is irrelevant that the oppressor believed that they were acting fairly, honestly and in good faith.[167]

B) *Conduct constituting shareholder oppression*

It has been judicially accepted that even single or isolated acts may constitute oppression – there need not be a continuing series of acts or omissions. Thus in *Re Westwinds Holding Company Ltd*[168], a sale of lands of the company conducted fraudulently to the detriment of the petitioner was held by the High Court to provide sufficient grounds alone to justify an order. A one off act constituting oppression was also seen as sufficient to ground an order in *Re Williams Group Tullamore Ltd.*[169] Barrington J. considered a resolution passed by the preference shareholders in general meeting which altered the rights attaching to classes of shares to the detriment of the ordinary shareholders (at a meeting at which the ordinary shareholders could not vote). This was held to be in objective disregard of the interests of the ordinary shareholders, as well as being an act of oppression. However, although this was a single act, its effects were continuing. Barrington J. stated:

> "It appears to me that the implementation of these resolutions is an ongoing matter in the company and justifies the view that the affairs of the company are being conducted in disregard of the interests of the ordinary shareholders. I fully accept that the proposal put forward in the resolution was put forward in good faith. Nevertheless, it appears to me that it is in objective disregard of the interests of the ordinary shareholders and that to persist in implementing it would, in the circumstances, be oppressive to the ordinary

[165] [1959] AC 324, at 342.
[166] High Court, unreported, Kenny J., 7 February 1972.
[167] *Re Irish Visiting Motorists' Bureau Ltd* High Court, unreported, Kenny J., 7 February 1972.
[168] High Court, unreported, Kenny J., 21 May 1974.
[169] [1985] IR 613.

> shareholders."[170]

On the other hand, various acts may be judicially be considered in aggregate to be conduct in disregard of the petitioner's interests as a shareholder, even if none of these acts would individually be sufficient to qualify as oppression.[171]

A wide variety of conduct may potentially fall under the umbrella of oppression. Oppression covers illegal assistance with the purchase of the company's shares.[172] However, mere non-compliance with the formal obligations of the Companies Acts will not usually in and of itself be regarded as constituting oppression. In *Re Clubman Shirts Ltd*[173] O'Hanlon J. stated:

> "I would not classify as oppressive conduct within the meaning of the Act, the omission to comply with the various provisions of the Act referable to the holding of General Meetings and the furnishing of information and copied documents. These were examples of negligence, carelessness, irregularity in the conduct of the affairs of the company, but the evidence does not suggest that these defaults or any of them formed part of a deliberate scheme to deprive the petitioner of his rights or to cause him loss or damage."[174]

A deliberate scheme of exclusion from information and meetings would be treated differently.

Notably it is not open to minorities to use the oppression jurisdiction as a route to challenges what they regard as mismanagement, but what is in fact a matter of internal management. The position taken by the Irish courts, which is consistent with an equivalent English judicial position,[175] is seen in *McCormick v Cameo Investments Ltd*[176] where McWilliam J. held that mere mismanagement by the directors of the company did not constitute oppression.[177]

a) *Exclusion from management*

On the other hand, exclusionary behaviour which prevents participation in management and failure to consult with shareholders may qualify as oppression.[178] *Re Harmer*[179] related to a company in which a father and his sons were shareholders and which was an incorporation of the father's long-standing business. The father continued to run the company as his business and ignored board decisions and resolutions. This culminated in his unilateral decision to establish a branch of the company in Australia. The trial judge regarded this qualifying as oppression of the other shareholders and ordered his exclusion from the management of the company. This was upheld by the Court of Appeal. In *Irish*

[170] [1985] IR 613, at 622.
[171] *Re Vantage Resources Ltd; Hamill v Vantage Resources Ltd* [2015] IEHC 195.
[172] *Re Greenore Trading Co Ltd* [1980] ILRM 94.
[173] [1983] ILRM 323.
[174] [1983] ILRM 323, at 327.
[175] *Re 5 Minute Carwash Service Ltd* [1966] 1 All ER 242.
[176] [1978] ILRM 191.
[177] See also *Re Vantage Resources Ltd; Hamill v Vantage Resources Ltd* [2015] IEHC 195.
[178] *Re Murph's Restaurant Ltd* [1979] ILRM 141.
[179] [1958] 3 All ER 689.

Press plc v Ingersoll Irish Publications Ltd[180] the applicant and respondent were equal partners in the running of certain newspapers. The respondent's failure to operate a management agreement was central to a finding of oppression. Barron J. regarded there as being a deliberate plan to damage the interests of the company by the manner in which a shareholder exercised the power to conduct the affairs of the company. This was found to constitute oppression.

b) *Quasi-partnership principles*

Where the directors and shareholders overlaps and there are close relationships between them, the company may be regarded as a quasi-partnership giving rise to a relationship of trust and confidence where equitable considerations come into play. The case law has established that it is possible to establish oppression founded upon equitable principles in companies where a quasi-partnership relationship is found to exist. This typically arises where a proven relationship of equality, trust and confidence, upon which a quasi-partnership is based, is found to have irretrievably broken down. In these cases, the courts are more likely to regard certain acts and omissions as unconscionable and therefore in breach of section 212.[181]

Quasi-partnership principles may be invoked where "formal rights may be forced to give way to equitable principles implied from the law of partnership where oppression or disregard of members' interests is alleged."[182] The bar in relation to establishing a quasi-partnership and fault for its breakdown is set reasonably high. Thus in *Re Vantage Resources Ltd; Hamill v Vantage Resources Ltd*[183] the High Court was at pains to point out that while a relationship of mutuality, trust and confidence had developed between the parties, neither party was at fault in relation to its having broken down through an act of oppression or disregard of the petitioner's interests.

(c) Breaches of directors' duties

Breaches of the duty to avoid conflicts of interests that entail a misapplication of company funds to the personal benefit of a director will be likely to qualify as oppression.[184] However, in *Rock Nominees Ltd v RCO (Holdings) plc (In Liq)*[185] a clear conflict of interest in relation to the sale of the company was held not to constitute unfair prejudice because the sale was not at an undervalue. The position in relation to failings of care, skill and diligence is also similarly nuanced. The courts have drawn a line in the sand between serious mismanagement and mere carelessness[186] and there is a clear judicial reluctance to use hindsight to second-guess decisions based on commercial judgment by directors.[187] By contrast, where there is a mental element of deliberateness in relation to acts or

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[180] High Court, unreported, Barron J., 15 December 1993.

[181] See *eg Re Murph's Restaurants Ltd* [1979] ILRM 141.

[182] *O'Connor v Atlantis Seafood Wexford Ltd* [2017] IEHC 589, [35], *per* Keane J.

[183] [2015] IEHC 195.

[184] See *eg Re Greenore Trading Co Ltd* [1980] ILRM 94; *Re Westwinds Holding Co Ltd* High Court, unreported, 21 May 1974.

[185] [2003] EWHC 936 (Ch); [2003] 2 BCLC 493; [2004] EWCA Civ 118; [2004] 1 BCLC 439.

[186] *Re Five Minute Car Wash Service Ltd* [1966] 1 All ER 242; *Re a Company (No 00789 of 1987)*; *Ex p Shooter* [1990] BCLC 384; *Re Elgindata Ltd* [1991] BCLC 959.

[187] *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354; *Re New Ad Advertising Co Ltd* [2007] IEHC 436.

omissions which harm a company's interests, a finding of oppression or disregard of members' interests, is more likely to be made out under section 212.[188]

5. Remedies

As this author has commented previously in relation to the aim to provide a personal remedy to the shareholder, "[t]he major point is that [these] petitions are designed to provide an individual remedy to a shareholder (usually in the form of an order that the petitioner's shares be bought out) rather than providing a remedy to the company as is the case with derivative actions."[189]

The discretion of the court in terms of providing a personal remedy to the petitioning shareholder is broad. The courts have discretion to craft a remedy suitable to bringing the particular circumstances – generally a situation of acute conflict - to an end. The court can flexibly fashion a remedy to suit the conduct complained of and the circumstance of the parties. That said, the section 212 jurisdiction "does not exist to enable the High Court to become a substitute board of directors."[190] Section 212(3) indicates that the available remedies include an order cancelling a transaction or regulating the future conduct of the company's affairs. The most common remedy is that directing the purchase of the petitioner's shares, utilised where the prospect of a future working relationship between the parties is not realistic.

1.1 *Share-buy-out orders*

Orders requiring the majority (or the company) to buy out a minority petitioner at a price fixed by the court having regard to expert valuation are the most usual type of remedial order. For example, in *Colgan v Colgan & Colgan*[191] differences had arisen between the sons of the petitioner as successors to the business he had founded. The court made an order requiring the respondents to buy out the petitioner at a valuation determined by the court. It has, however, been acknowledged that the court also has the power to order the majority to sell its shareholding to the minority.[192] This is likely to occur only in exceptional cases. In the English case of *Re a Company (No. 006834 of 1988), Ex p. Kramer*[193] Hoffmann J. stated: "I think it must be very unusual for the court to order a majority shareholder actively concerned in the management of the company to sell his shares to a minority shareholder when he is willing and able to buy out the minority shareholder at a fair price."[194]

1.2 *Amendment of constitution*

One of the remedies available to the court for oppression or disregard of members' interests is an order that the company's constitution be amended to ensure appropriate

[188] *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324; *Irish Press Plc v Ingersoll Irish Publications Ltd* High Court, unreported, Barron J., 15 December 1993.
[189] D. AHERN, (fn. 37), p. 135.
[190] *Re Dublin Cinema Group Ltd* [2013] IEHC 147, *per* Charleton J.
[191] High Court, unreported, Costello J., 22 July 1993.
[192] M. HESLIN (fn. 157), p. 271.
[193] [1989] 5 BCC 218.
[194] [1989] 5 BCC 218, at 221.

minority protection.[195] The result of such an order is that a subsequent inconsistent amendment cannot be made to the constitution without obtaining the consent of the court.[196]

1.3 *Compensation*

Prior to the reforming Companies Act 2014, the availability of a power to award damages under the predecessor to section 212 - section 205 of the Companies Act 1963 - was rejected by the Supreme Court in *Irish Press plc v Ingersoll Irish Publications Ltd*.[197] The major reform brought by the 2014 Act was in this area of remedies. There is now an express indication in section 212(3)(d) of the 2014 Act that compensation may be awarded. At this stage it remains to be seen how the courts will approach issues in relation to the appropriateness of awarding compensation to an oppressed shareholder and how such compensation would be calculated in the absence of any statutory guidance. Moreover, as Heslin notes, there is also a lack of clarity as to whether a remedial order may also be made against the company as well as against members.[198]

X. WINDING UP

Section 569 of the Companies Act 2014 provides a jurisdiction for the High Court to wind up a company in a range of circumstances. Of most relevance for present purposes is the jurisdiction under section 569(1)(e) of the Act to wind up the company on an application by a shareholder "if the court is of the opinion that it is just and equitable that the company be wound up" and under section 569(1)(f) "if the court is satisfied that the company's affairs are being conducted, or the powers of the directors are being exercised, in a manner oppressive to any member or in disregard of his or her interests as a member and that, despite the existence of an alternative remedy, winding up would be justified in the general circumstances of the case".

1. Winding up on just and equitable grounds

It is open to members to petition the court under section 569(1)(e) of the Companies Act 2014 to wind up the company on just and equitable grounds.[199] In *Ebrahimi v Westbourne Galleries Ltd*[200] Lord Wilberforce observed:

> "a limited company is more than a mere judicial entity, with a personality in law of its own: ... there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure .... The 'just and equitable' provision does not ... entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from

[195] See *Lee & Co. (Dublin) Ltd v Egan (Wholesale) Ltd* High Court, unreported, Kenny J., 23 May 1979; *Re Charles Kelly Ltd; Kelly v Kelly (No. 2)* [2011] IEHC 349.
[196] Section 212(4) of the Companies Act 2014. See *Re R Ltd* [1989] ILRM 757.
[197] [1995] 2 IR 175. Blayney J emphasised that damages would not qualify as an order made with a view to bringing an end to the matters complained of.
[198] M. HESLIN (fn. 157), p. 286.
[199] See *eg Re Murph's Restaurant Ltd* [1979] ILRM 141; *Re Murray Consultants Ltd* [1997] 3 IR 23.
[200] [1973] AC 360.

> it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations, that is, of a personal character arising between one individual and another, which may make it unjust or inequitable, to insist on legal rights, or to exercise them in a particular way."[201]

This jurisdiction to wind up a company on just and equitable grounds derives from recognition that where there is a quasi-partnership relationship between the parties, a complete breakdown in relationship may sometimes best be dealt with by means of the winding up of the company. In *Re Dublin Cinema Group*[202] Charleton J. described a quasi-partnership as existing in a company when "[i]ts background is two or more friends, two or more family members, two or more business partners operating together through a limited liability or other corporate vehicle for the purpose of carrying on their business…"[203] This captures the close bonds that underlie many close corporations, but also the potential for a falling out to derail the communication necessary to managing a company's affairs in a professional manner.

In these type of circumstances, there may be no obvious way forward, and the law provides an option for a court to decide that it may be just and equitable to wind up the company where there is a situation of deadlock. Thus in *Re Vehicle Buildings and Insulations Ltd*[204] an order was made for the winding up of the company on just and equitable grounds in circumstances where both parties agreed that the dispute between them was fundamental and irretrievable. By contrast, in *Vantage Resources Ltd; Hamill v Vantage Resources Ltd*,[205] a winding up order was not appropriate where one of the parties was happy to continue working with the petitioner and for his company to resume providing services to the company.

Understandably, there is a certain reluctance on the part of this court to allow this trigger to be successfully pulled given that it spells the end of a company. Deficiencies in terms of carelessness and poor commercial decisions will generally not be judicially considered to justify a winding up.[206] Where the courts consider that wrongdoing could be remedied in another fashion *eg* through the company suing or the bringing of a derivative claim, they have been slow to entertain a petition for winding up on the just and equitable ground. Even where petitions disclose conduct amounting to bad faith and a lack of probity on the part of directors,[207] an application to wind up the company on the just and equitable ground is unlikely to succeed in circumstances where a court views the matter as capable of remedy by alternative means such as through a derivative claim.[208] The existence of a shareholders' agreement regulating the company's affairs may be relevant

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[201] [1973] AC 360, at 379.
[202] [2013] IEHC 147.
[203] [2013] IEHC 147, at p. 7.
[204] [1986] ILRM 239.
[205] [2015] IEHC 195.
[206] *Re Five Minute Car Wash Service Ltd* [1966] 1 All ER 242.
[207] See *Loch v John Blackwood Ltd* [1924] AC 783 (PC); *Re Straw Products Pty Ltd* [1942] VLR 222 (SC, Vic); *Re Concrete Column Clamps Ltd* [1953] 4 DLR 60 (Quebec); *Re Maritime Asphalt Products Ltd* (1965) 52 DLR (2d) 8 (PEISC); *Re Worldhams Park Golf Course Ltd* [1998] 1 BCLC 554.
[208] See *Re Anglo-Greek Steam Co* (1866) LR 2 Eq 1, at 5, *per* Lord Romilly MR; *Re Diamond Fuel Co.* (1879) 13 Ch D 400, at 408, *per* Baggallay LJ; *Re Thomas Edward Brinsmead & Sons* [1897] 1 Ch 45; *Re Kitson and Co. Ltd* [1946] 1 All ER 435, at 441, *per* Lord Greene MR; *Re Surrey Garden Village Trust Ltd* [1965] 1 WLR 974, at 981, *per* Plowman J.

to the exercise of the court's discretion. In *Re Vantage Resources Ltd; Hamill v Vantage Resources Ltd*[209] the court noted the unfairness which would result if express provisions of a shareholders' agreement concerning the buy-out of shares could be overridden by a petitioner seeking an order to wind up the company on just and equitable grounds. In some instances the court will exercise its discretion to make an alternative order to winding up.

A question as to the extent of the remedial powers available to a court came up for consideration in the High Court in *Re Dublin Cinema Group Ltd*[210] where the only application brought was one to wind up the company on the just and equitable ground. Charleton J. considered the history and purpose of the provision and went on to state:

> "Taking into account the wide powers that are given to the High Court on hearing any application to wind up a company and the lack of statutory qualification to same and in particular my duty not to construe [provisions] in isolation, I would regard it as an unnecessary fettering of the court's power for me to construe the phrase " *on hearing a winding up petition, the court may dismiss it, or make any other order that it thinks fit* " as excluding the power to order the petitioner … to buy out the shares of the respondent … or vice versa or to make any order that will fairly restore appropriate governance to this important company. In looking to whether it would be just and equitable to wind up a company, of course a court must look to whatever alternatives to that ultimate step might also meet the justice and equity of the situation."[211]

The alternative remedies open therefore include a court-ordered share buy-out between the parties at an agreed rate.

2. Winding up on grounds of oppression or disregard of members' interests

Section 569(1)(f) of the Companies Act 2014 provides a separate mechanism for a shareholder to petition to wind up a company where the court is satisfied that the company's affairs are being conducted, or the powers of the directors are being exercised in a manner oppressive to any member or in disregard of his interests as a member and that, despite the existence of an alternative remedy, winding up is justified. The addition of this provision was seen as appropriate in cases where a remedy relating to the buy out of shares would not be the best available solution. However, section 569(2) indicates that a court may dismiss a petition to wind up under section 569(1)(f) if it is of the opinion that the matter would be better dealt with by means of proceedings for oppression under section 212. Therefore it makes sense for a shareholder to consider also making an alternative application *eg* for oppression under section 212.

XI. POTENTIAL FOR EUROPEAN HARMONISATION?

[209] [2015] IEHC 195.
[210] [2013] IEHC 147.
[211] [2013] IEHC 147, at p. 6.

The difficulty for minority shareholders of obtaining relevant information due to informational asymmetries and cost are well-known. In some legal systems such as Austria and Italy (but not the UK and Ireland) the use of a special representative with power to demand information from the company is of assistance.[212] This illustrates the obvious potential for Member States to learn from each other's experiences of dealing with shareholder protection, positive and negative, albeit with the caveat that one is not necessarily comparing like with like given differences between legal systems, types of close corporation and principles, procedures and remedies available. Moreover, it must be acknowledged that the status quo in different Member States is path dependent.

The lack of a unified approach to shareholder remedies for close corporations within Europe and the resulting disparities of approach have been remarked upon.[213] Indeed, some discussion has occurred in relation to the possibility of European harmonisation measures in relation to shareholder actions.[214] Kalss argues that for the most part as regards private companies, legal systems should lean away from mandatory rules even where this means that the majority rule out the right to bring minority suits.[215] The Trojan work of a group of scholars across Europe in producing the European Model Business Corporation Act provides inspiration in offering a potential harmonised framework for company law but leaving it up to Member States to decide whether to adopt it.[216] This framework lies outside the scope of this chapter on national law. It does, however, suggest interesting possibilities that merit study. Of note, for example, is its principle of equal treatment of shareholders in the same position by the company.[217] Also, its provision for a right to a dividend to prevent the well-known phenomenon of 'dividend starvation' where dividends are not declared despite healthy profits.[218]

Nonetheless, it would be foolhardy not to take cognisance of the fact that the task of the EU in deciding to approach a harmonised framework would be a complex one, both legally and politically fraught. Underlining this, a detailed 2018 study commissioned by the EU Commission analysing minority shareholder protection across the 28 Member States highlighted that in spite of a broadly similar framework of shareholder protection, how both regulation and enforcement is handled raises disparate national responses.[219] Furthermore, looking at the bigger historical picture, with the exception of the single member company, the EU's influence on company forms thus far has largely been confined to a public company context, seen most evidently in the context of regulation of takeover bids. It is clear that previous attempts to created harmonised positions in the sphere of close corporations have not prospered. Efforts foundered as Member States clung fast to important strands of national sovereignty. This can be seen in the fate both the SPE and SPE proposals.[220] Against that background, any moves to harmonise the

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[212] S. KALSS, "Shareholder Suits: Common Problems, Different Solutions and First Steps Towards a Possible Harmonisation by Means-of a European Model Code", *European Company and Financial Law Review*, 2009, Vol. 6, Iss. 2, p.342.

[213] S.K. MILLER (fn. 11), p. 392.

[214] S. KALSS (fn. 212).

[215] S. KALSS (fn. 212), p. 344.

[216] P. KRÜGER ANDERSEN, J.B. ANDERSSON et al, *European Model Company Act (EMCA)*, 1st ed, 2017, *Nordic & European Company Law Working Paper* No.16-26.

[217] EMCA (fn. 216), Section 1.09.

[218] EMCA (fn. 216), Section 7.03(2) and associated commentary.

[219] TGS Baltic, *Study on Minority Shareholders Protection: Final Report*, European Commission, 2018.

[220] See further J. VIERA GONZÁLEZ, C. TEICHMANN (eds), *Private Company Law Reform: The Race of Flexibility*, Thomson Reuters, 2015; D. AHERN, "The Societas Unius Personae: Using the Single-Member Company as a Vehicle for EU Private Company Law Reform – Some Critical Reflections on

treatment of minority shareholder protection in the EU would require delicate handling and keen awareness of national sensibilities.

XII. CONCLUSION

While it is certainly open to minority shareholders to seek protection by contractual means in a shareholders' agreement or in a company's constitution, statutory provisions afforded the opportunity to seek relief in the courts are worth having as they do not need to be contracted for or are not dependent upon bargaining power to achieve. What is perhaps most remarkable to non-common law jurists is the considerable role of the courts as a shaping force of doctrines protecting minorities. In Ireland to a large extent shareholders in close corporations receive protection based on a broad appeal to judicial discretion to fashion relief and remedy. Allied to this, in common with the United Kingdom, and the United States, judicial equation of close corporations with incorporated partnerships is "a common refrain".[221] As a consequence, in the common law world, "uncritical majoritarianism has yielded to judicial activism on behalf of minority shareholders."[222]

The potential for actual or threatened judicial intervention adds nuance to majority decision-making. It is telling that the bulk of litigation in relation to shareholder protection is settled or does not proceed beyond initial stages, illustrating that there are tactical advantages to initiating proceedings. On the downside, the deficit in cases not proceeding to judgment means that considerable uncertainty exists in relation to the application of aspects of the law. It is also difficult to predict outcome in individual cases since much rests on a combination of the individual facts and judicial discretion. The winding up of a company is the most radical potential outcome in relation to judicial resolution of minority-majority conflicts. It will have effects on other stakeholders such as employees, customers and suppliers and as such is not lightly ordered by a court.

As regards national reform and evolution of the law as it impacts on resolving conflicts between majorities and minorities, failure to reform the derivative action in Ireland to address its limitations as a tool to protect the company and minority shareholders in the Companies Act 2014 stands out as a major missed opportunity. On the question of closer integration of national rules between Member States, as matters stand, the EU Commission is currently considering the question of whether EU law should intervene in minority shareholder protection. In doing so, it will need to tread carefully in working with national systems with long-standing regimes of differing characters and significance as well as different forms of close corporation.

ABBREVIATIONS

Regulatory Approach" in A.J. VIERA GONZÁLEZ, C. TEICHMANN (eds), *Private Companies in Europe: The Societas Unius Personae (SUP) and the Recent Developments in the EU Member States*, Thomson Reuters, 2016, pp. 55-87.

[221] F.H. EASTERBROOK, D.R. FISCHEL, *The Economic Structure of Corporate Law*, Harvard University Press, 1996, p. 249.

[222] J.G. MACINTOSH (fn. 5), p. 644.

CLJ – Cambridge Law Journal

Co Law – The Company Lawyer

Del J Corp L – Delaware Journal of Corporate Law

NILQ – Northern Ireland Legal Quarterly

S Cal L Rev – Southern California Law Review

Utrecht L Rev – Utrecht Law Review

Yale LJ – Yale Law Journal

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