

**A BRIEF OVERVIEW OF THE REMEDIES AVAILABLE TO A MINORITY SHAREHOLDER
UNDER THE UK LAW**

**İNGİLİZ HUKUKUNDA BİR AZINLIK ORTAĞIN KULLANABİLECEĞİ HUKUKİ ÇARELERE
GENEL BİR BAKIŞ**

Dr. Hasan Kadir YILMAZTEKİN*

ABSTRACT

The protection of a minority shareholder is always a contentious and complex issue. UK law provides three main types of action to a minority shareholder of public limited companies and limited liability companies, when a breach occurs in conducting company's affairs which harms the interests of some members of the company or the company as a whole. These are a statutory derivative claim under ss 260-264 of the Companies Act of 2006, a petition for unfairly prejudicial conduct under s 994 of Companies Act of 2006 (formerly s 459 of the Companies Act of 1985) or a petition for the just and equitable winding up of the company under s 122(1)(g) of the Insolvency Act of 1986. The object of this article is to provide a brief comparative analysis of these actions.

Keywords: *Minority shareholder protection, derivative action, unfair prejudice petition, just and equitable winding up.*

ÖZ

Bir azınlık ortağı korumak, tartışmalı ve karmaşık bir konudur. İngiliz hukuku, şirket işlerinin idaresinde ortaklardan birinin veya tamamen şirketin bir menfaatine zarar veren bir ihlal ortaya çıkması halinde, anonim şirket ve limited şirketteki bir azınlık ortak için üç ana dava türünü düzenlemektedir. Bunlar; 2006 tarihli Şirketler Kanununun 260 ila 264'üncü maddelerinde düzenlenen kanunî türev dava, yine aynı kanunun 994'üncü maddesinde (önceden 1985 tarihli Şirketler Kanununun 459'uncu maddesinde) düzenlenen zarar doğuran haksız işlemlere karşı açılan dava ve 1986 tarihli İflas Kanununun 122(1)(g) maddesinde düzenlenen haklı nedene ve hakkaniyet kurallarına dayalı iflas davasıdır. Bu makalenin amacı, bu davaların kısa bir karşılaştırmalı analizini sunmaktır.

Anahtar Kelimeler: *Azınlık ortakların korunması, türev dava, zarar doğuran haksız işleme karşı dava, haklı nedene ve hakkaniyet kurallarına dayalı iflas.*

* Head of Department (Judge), Directorate General for Foreign and EU Affairs, Ministry of Justice; PhD in Law; LLM in International Business Law (Jean Monnet Scholar); Co-President of the New IP Lawyers Network (www.newiplawyers.org). I thank anonymous reviewers for the selection of my paper to publish in this issue of the journal, although all errors and omissions in this study remain my own. I am also very grateful to the TFM team for their kind cooperation throughout all our correspondence. Their patient support enabled me to submit this paper to your attention. To improve this article, your comments and thoughts are most welcome: hkytekin@gmail.com; ORCID: 0000-0003-1050-4272. (Araştırma Makalesi; Geliş Tarihi: 07.01.2019 / Kabul Tarihi: 06.04.2019).

I. Introduction

When a breach occurs in conducting company's affairs, which harms the interests of some members of the company or the company itself as a whole, the affected minority shareholders have the right to seek redress. There are three main types of action available to minority shareholders of public limited companies and limited liability companies in the UK law. These are: a statutory derivative claim under ss 260-264 of the Companies Act of 2006 ("CA 2006"), a petition for unfairly prejudicial conduct under s 994 of the CA 2006 (formerly s 459 of the Companies Act of 1985) or a petition for the just and equitable winding up of the company under s 122(1)(g) of the Insolvency Act of 1986 ("IA 1986"). While the statutory derivative claim is a corporate remedy, the latter two are personal remedies.

The purpose of this article is to analyse, compare and contrast the remedies available to a minority shareholder under the UK law. The second section of the paper draws a concise picture of current case and statutory law on these remedies, while the third section comparatively assesses their weakness and strengths to illustrate where to use them under which circumstances by considering several factors.

II. CURRENT CASE AND STATUTORY LAW

A. DERIVATIVE CLAIMS: FROM COMMON LAW TO STATUTE

A derivative claim is a statutory remedy available to a shareholder provided by the CA 2006, ss 260–264. A shareholder brings a derivative claim on behalf of the company and for the benefit of the company. A director's general duties are owed to the

company rather than to individual shareholder. However, a company can benefit from legal action against a director (or former director) for breach of duty through a derivative claim or action brought on its behalf by one or more shareholders. A derivative claim is a claim derived from the rights of the company made by a shareholder or shareholders.

Before 1 October 2007, a member could bring derivative claim proceedings at common law. Under common law, the ability of a shareholder to commence a derivative action has been dominated by the rule in *Foss v Harbottle*¹ and its exceptions. The common law derivative action had been criticised as being overly complex and outdated,² and a collection of procedurally meaningless difficulties.³ To answer these criticisms, the Law Commission eventually proposed a statutory derivative action including a more modern procedure that would supersede common law derivative actions.⁴ These proposals were largely endorsed by the Company Law Review and situated in Part 11 of the CA 2006.⁵ Sections 260-264 of the CA 2006 generally derive from the principles developed by the courts over the last 150 years.

Under the CA 2006, the grounds for a derivative claim are more abundant than under common law.⁶ In this respect, a statutory derivative claim may be brought in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company.⁷ In contrast, mere negligence, for example, was not sufficient ground under common law.⁸ The other significant change is that any breach of the directors can be a ground to commence an action.⁹ In *Edwards v Halliwell*,¹⁰ on the other hand, four exceptions in common law to the rule in *Foss v Harbottle* had been adopted. These were illegal or

¹ (1843) 2 Hare 461.

² **Watkins**, S. (1999), 'The Common Law Derivative Action: An Outmoded Relic?', *Cambrian Law Review*, V: 30, p. 40.

³ **Sealy**, L. S. (1981), '*Foss v. Harbottle* - a Marathon Where Nobody Wins', *Cambridge Law Journal*, V: 40, p. 32.

⁴ Law Commission Report Shareholder Remedies (Law Commission) 1997, [No 246] Para 6.15; **Wild**, C. & **Weinstein**, S. (2016), *Smith and Keenan's Company Law*, 7th ed., Pearson Education Limited, p. 413.

⁵ These Chapters of the CA 2006 came into force on 1 October 2007.

⁶ **Mujih**, E. C. (2012), 'The new statutory derivative claim: a delicate balancing act', *Company Lawyer*, V: 33, I: 3, (Part 1) p. 76.

⁷ The CA 2006 s 260(3).

⁸ **Wild & Weinstein**, (n 4) 414.

⁹ *Ibid*.

¹⁰ [1950] 2 All ER 1064, 1066, *per Jenkins LJ*.

ultra vires acts, acts requiring the sanction of a special majority or/and a special procedure, breach of a member's personal rights and fraud on the minority.¹¹ The CA 2006 further entails that the wrongdoer has no right to vote to ratify the misconduct in contrast to the position at common law.¹² Under the CA 2006, it will no longer be necessary to show that the alleged wrongdoers are themselves in control of the company¹³ and have received benefits from the alleged misconduct.¹⁴ Additionally, the majority will no longer have the right to allow the usage of the company's name in the claim or vice versa.¹⁵ Although the statutory derivative claim facilitates commencing an action, the procedure of the action may hinder potential applications, and thus to correct a corporate wrongdoing.¹⁶

A shareholder's ability to bring a derivative claim should essentially be considered to be a secondary remedy, where the primary remedy is an unfair prejudice petition which is examined in the next section. However, a shareholder cannot resort to a derivative claim option where a company has authorised or ratified (or would clearly be able and willing to authorise or ratify) the conduct complained of. Pursuant to s 239 of the CA 2006, a director's conduct may be ratified. However, certain limits exist as to what can be authorised or ratified, including steps which would involve expropriation of the company's assets by the majority. Ratification would also require a vote excluding those who are personally interested in the ratification.

B. UNFAIR PREJUDICE

An unfair prejudice petition is a statutory remedy available to shareholders of a company now provided by the CA 2006, s 994 (formerly provided

by the Companies Act of 1985, s 459). It is one of the primary remedies available to a minority shareholder who is the victim of 'unfairly prejudicial' conduct.

The CA 2006 s 994(1), with the same wording as its predecessor CA 1985 s 459, provides that:

“A member of a company may apply to the court by petition for an order on the ground;

- that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or some part of its members (including himself), or
- that any actual or proposed act or omission on the part of the company (including an act or omission on its behalf) is or would be prejudicial.”

Section 994(1) provides that a petitioner must establish unfairly prejudicial conduct deriving from some corporate act or omission, including any act or omission on the company's behalf. In this sense, it is not necessary to show a continuing course of conduct, or indeed, unfairly prejudicial conduct subsisting at the date of the petition. A petitioner can include allegations relating to conduct which take place even before he has become a registered shareholder in the company as the section states that 'the company's affairs are being or have been conducted' in an unfairly prejudicial manner.¹⁷ Thus, the basis of the claim is that the affairs of the company have been, are being or will be conducted in a way that is 'unfairly prejudicial' to its shareholders or some of them-and at least to the petitioner.

The 'conduct of the company's affairs' that has been complained of must: (i) relate to the affairs of the company; in other words, be acts done by the

¹¹ *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 Ch 204, p. 209.

¹² **Griffin**, S. (2010), 'Shareholder Remedies and The No Reflective Loss Principle - Problems Surrounding The Identification of a Membership Interest', *Journal of Business Law*, V: 6, p. 465.

¹³ **Joffe**, V. & **Drake**, D. (2008), Giles Richardson and Daniel Lightman, *Minority Shareholders Law, Practice and Procedure*, 3rd ed., OUP, p. 19.

¹⁴ **Almadani**, M. (2009), 'Derivative Actions: Does the Companies Act 2006 Offer a Way Forward?', *Company Lawyer*, V: 30, I: 5, p. 131, 134.

¹⁵ **Almadani**, (n 14) 134.

¹⁶ **Griffin**, (n 12) 465.

¹⁷ *Lloyd v Casey* [2001] All ER (D) 371 (Dec).

company, i.e. by those authorised to act as its organs; (ii) and it should not be attributable to the conduct of an individual shareholder acting in his private capacity.¹⁸

The court has a wide discretion as to the remedy to be granted to the petitioner. However, the remedy most often granted is an order that the majority purchase the minority's shares at a value determined by the court (typically market value on a pro rata basis).

C. JUST AND EQUITABLE WINDING-UP

The winding-up of the company on the just and equitable grounds is another optional redress for a member under the IA 1986 s 122(1)(g). It is available to a shareholder, but a petitioner must be able to show that there would be a substantial surplus on a winding-up. It is not, in essence, an insolvency procedure.

In general, the circumstances in which the court will order a company to be wound up on this basis are the similar circumstances in which the court would grant relief on an unfair prejudice petition. Under the IA 1986 s 122(1)(g), however, the only remedy the court may give is to wind up the company. The circumstances, in which it will be an advantage to pursue a claim for a just and equitable winding-up, rather than an unfair prejudice petition, are limited.

Winding-up of a company on the just and equitable grounds was extensively scrutinised in the landmark decision of the House of Lords in the case of *Ebrahimi v Westbourne Galleries Ltd.*¹⁹ The House of Lords held that the company was basically established and conducted on the basis of the parties' former partnership understanding. The court named this *sui generis* company as a quasi-partnership. It was held in this case that the removal

of Ebrahimi was in accordance with the statute and the articles of associations, but it was a breach of the parties' mutual understanding on the company. Therefore, it was just and equitable to wind up the company.²⁰

III. A COMPARATIVE ANALYSIS OF THE REMEDIES

A. DIFFERENCES BETWEEN PERSONAL AND CORPORATE REMEDIES

1. *Locus Standi*

A statutory derivative claim may be brought by any member²¹ of the company (the claimant must be a member when the action commenced²²), and there is no minimum shareholding requirement.²³

Under the CA 2006 s 994, however, members²⁴ of the company, those to whom shares have been transferred or transmitted by law²⁵, such as personal representatives and trustees in bankruptcy, and in certain circumstances the Secretary of State²⁶ may bring an action.

The IA 1986 s 124(1) provides that a contributory may petition for a just and equitable winding-up. A contributory is a person (present or past member) who is liable to contribute the assets of a company in the event of its being wound up. A fully paid-up member must show a tangible interest in winding up.²⁷

2. Costs

The general rule for trial costs under English law provides that the unsuccessful party must pay the successful party's costs.²⁸ However, specific provision is laid down under rule 19.9E of the Civil Procedure Rules (CPR) for derivative claims. This rule confers to the courts discretionary powers to award an indemnity cost order to the claimant against liability for costs incurred in the permission application and/or in the

¹⁸ **Dignam, A. & Lowry, J.** (2018), *Company Law*, 10th ed., OUP, p. 216.

¹⁹ [1972] 2 All ER 492.

²⁰ *Ibid.*

²¹ CA 2006 s 260(5)(c).

²² CA 2006 s 260(4).

²³ **Wild & Weinstein**, (n 4) 414.

²⁴ CA 2006 s 994(1).

²⁵ CA 2006 s 994(2).

²⁶ CA 2006 s 995.

²⁷ **Dignam & Lowry**, (n 18) 211-212.

²⁸ CPR 44.3(2)(a).

derivative claim.²⁹ Although some later judgements have made it less clear-cut, as was in *Smith v Croft*³⁰, this position was also embraced by the Court of Appeal in *Wallersteiner v Moir*³¹ which laid down indemnity cost order conditions in common law. Thus, a claimant may be entitled to an indemnity for his costs from the company.³²

On the other hand, the courts refuse to give such a pre-emptive order in the CA 2006 s 994 and the IA 1986 s 122(1)(g), unless corporate relief is sought under s 996(2)(c).³³ When a petitioner is authorised to bring an action in the name of the company under s 996(2)(c), the courts may entitle such a petitioner to an indemnity order.³⁴ However, it should be noted that in this circumstance the action is in effect a derivative claim.

3. Grounds

The scope and nature of the grounds for a petition under unfair prejudicial conduct is much wider than for a statutory derivative claim. A derivative claim is restricted to circumstances including a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust.³⁵

In contrast, unfair prejudicial conduct brought before the court can be done or intentionally undone acts or omissions of the company or of the company's authorised organs must be related to the company's affairs.³⁶ As the Court of Appeal admitted in *Re Citybranch Group Ltd, Gross v Rackind*³⁷, the conduct of the subsidiary's affairs, in the right circumstances, can be accepted as falling within the conduct of the holding company's affairs. However, it was held in *Unisoft Group Ltd (No3)*³⁸ that the conduct of

another member in his private capacity which constitutes the essence of the dispute cannot be regarded as the conduct of the company that the petition under s 994 deals with. Additionally, Sales J, in *Oak Investment Partners XII, Limited Partnership v Boughtwood*³⁹, reasoning as to what may embody the conduct of the company, contended that the conduct of a permanent member or senior director who inappropriately uses control over the affairs of the company may lead to unfair prejudice. Thus, s 994 offers redress against any conduct of any direct or indirect controller whose acts affect the management of the company's affairs. Furthermore, the proposed (present or future) acts as well as the past conduct of the company may be the subject of the action.⁴⁰ Finally, prejudicial conduct must be 'damaging in a commercial as opposed to an emotional sense'⁴¹ and must not be trivial.⁴²

The conduct must result in an unfairly prejudicial effect to the shareholding interests of the member *qua* member as well as any other interests that the member might possess.⁴³ More recent developments in case law show that the courts have adopted a broad approach in interpretation of '*qua member*' concept. The interest of a member is not only restricted to interests held in his capacity as a member, as long as there is sufficient connection with membership. For instance, in *O'Neil v Philips*⁴⁴ the House of Lords found that the removal (as a director) of the petitioner from the management of the company was a prejudice against his membership status in the company. Likewise, the Privy Council in *Gamlestaden Fastigheter AB v*

²⁹ **Griffin**, G. (2010), 'Alternative Shareholder Remedies Following Corporate Mismanagement - Which Remedy to Pursue?', Company Law News Letter, V: 1, p. 2 (**Griffin**, Which Remedy to Pursue).

³⁰ [1986] 1 WLR 580, 597.

³¹ (No 2) [1975] Q.B. 373 per Buckley LJ.

³² **Wild & Weinstein** (n 4) 433.

³³ **Griffin**, Which Remedy to Pursue, (n 29) 2.

³⁴ **Dignam & Lowry**, (n 18) 242.

³⁵ **Griffin**, Which Remedy to Pursue, (n 29) 2.

³⁶ **Wild & Weinstein**, (n 4) 439.

³⁷ [2004] 4 All ER 735 743-744.

³⁸ [1994] 1 BCLC 609 623.

³⁹ [2009] EWHC 176 (Ch).

⁴⁰ **Wild & Weinstein**, (n 4) 439.

⁴¹ **Griffin**, (n 12) 466.

⁴² For a judicial interpretation on s 459 of the Companies Act 1985, the predecessor of s 994, see; *Re Saul D Harrison and Sons plc* [1995] 1 BCLC 14 per *Hoffmann LJ*. **Wild & Weinstein**, (n 4) 440.

⁴³ **Dignam & Lowry**, (n 18) 219.

⁴⁴ [1999] 2 BCLC 1 14-15.

*Baltic Partners Ltd*⁴⁵ extended the interest of a member qua member to member's interest as a creditor.⁴⁶ These two cases demonstrate that if a member's other roles in the company, such as director or creditor, are closely associated with his shareholding role, any conduct which targets his other status may affect and therefore be unfairly prejudicial to his membership interest qua member in the appropriate circumstances.

Another prominent case law issue under unfairly prejudicial conduct was the question of whether the interests of the member cover their legitimate expectations. In *Ebrahimi v Westbourne Galleries Ltd*⁴⁷, Lord Wilberforce emphasised that behind the corporate entity members have 'rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure'. The pursuit of attempts to demarcate the borderlines of the interest concept led the courts to create the 'equitable restraints' principle as a supplementary reference to the company's constitution. Lord Hoffman initially embraced legitimate expectations argument in *Re a Company (No 003160 of 1986)*⁴⁸, but in *O'Neil v Philips* he eventually confessed that adoption of this concept was probably a mistake. His honour stated that 'equitable restraints' is a more accurate term as this term determines the unfairness of the conduct of the company's affairs, where there are mutual agreements, promises or understandings that form the basis of the relationship. 'Equitable restraints' concept was very wide, and therefore two types of circumstances have been developed by the courts to draw limits to this concept. The courts may go beyond a company's constitution; i) where a personal relationship between the controllers of the company leads to an understanding that hinders the exercise of the constitutional powers, and ii) where

a power conferred by the articles is used for an improper purpose.⁴⁹

The CA 2006 s 994 does not define unfairly prejudicial conduct. Initially, case law, as formulated by Slade J in *Re Bovey Hotel Ventures Ltd*⁵⁰, recognised that the unfairly prejudicial conduct should be decided in an objective manner through the view of a hypothetical reasonable bystander. Subsequently, case law went towards 'a more open-textured assessment'⁵¹ of the unfairly prejudicial conduct. In *Re Saul D Harrison & Sons plc*⁵², Hoffman LJ emphasised that the fairness in terms of s 994 must be conceived in the context of the commercial relationship that is regulated by the articles of associations. Equitable considerations were added to the terms governing the company's affairs by *O'Neil v Philips* in which Lord Hoffmann expressed that fairness should be assessed in the light of 'traditional' or 'general' equitable principles. These two last judgements constitute two main grounds for determining unfair prejudice. Hence, in current situation in order to show unfair prejudice,

- either a breach of terms on which the affairs of the company should be conducted (articles of association or a member's agreement),

- or a breach of mutual agreement, promise or understanding that constitutes the basis of the association between the parties where equity will intrude by hindering the controllers from refusing this commitment, notwithstanding it does not have contractual force, whilst it is not necessarily a breach of terms on which the affairs of the company should be conducted, must be proven by the petitioner.⁵³

Specific examples of the breach of terms include misappropriation of assets⁵⁴, improper share allotments⁵⁵, mismanagement⁵⁶, misapplication of a company's property⁵⁷, asset stripping⁵⁸, excessive

⁴⁵ [2007] UKPC 26.

⁴⁶ **Dignam & Lowry**, (n 18) 219-220.

⁴⁷ [1972] 2 All ER 492 at 500.

⁴⁸ (1986) 2 BCC 99.

⁴⁹ **Dignam & Lowry**, (n 218) 221.

⁵⁰ 31 July 1981, Unreported, cited by Nourse J in *Re RA Noble & Sons (Clothing) Ltd* [1983] BCLC 273 290.

⁵¹ **Dignam & Lowry**, (n 18) 226.

⁵² [1995] 1 BCLC 14.

⁵³ **Dignam & Lowry**, (n 18) 228.

⁵⁴ *Allmark v Burnham* [2005] EWHC 2717 (Ch); [2006] 2 BCLC 437.

⁵⁵ *Dalby v Bodilly* [2004] EWHC 3078 (Ch); [2005] BCC 627.

⁵⁶ *Macro (Ipswich) Ltd, Re* [1994] 2 BCLC 354 Ch D.

⁵⁷ *Elgindata, Re* [1991] BCLC 959.

⁵⁸ *Brightview Ltd, Re* [2004] BCC 542.

redundancy payments⁵⁹, the making of secret profits⁶⁰, diverting profits⁶¹, breach of statutory rights (e.g. repeated failures to hold an annual meeting and to lay accounts before the members).⁶² Similarly, grounds required by equitable considerations can be a breach of the mutual understanding via removal from management or exclusion from financial returns, or frustrating the basis of the relationship on which the company is embodied.⁶³

To date, in case law there have been five grounds on which a petition may rely for just and equitable winding-up:⁶⁴ failure or fulfilment of the substratum of company⁶⁵, fraud⁶⁶, deadlock in management⁶⁷, cessation of confidence in the company's management and quasi-partnership.⁶⁸ These grounds may be likely for a petition under s 994 under the right circumstances.

4. Reliefs

Whilst a personal remedy (both the CA 2006 s 994 and the IA 1986 s 122(1)(g)) may make it possible for a member to exit from the company, a corporate remedy in a statutory derivative action will not provide such a result. Besides, the variety of personal remedy under the CA 2006 s 994 is much wider than the variety of corporate remedy.⁶⁹

Indeed, the court has a wide discretion to grant a remedy as it thinks fit for the matters complained of under the CA 2006 s 994.⁷⁰ Yet, some specific remedies are laid down under the CA 2006 s 996(2).⁷¹ The most common redress under this section is the purchase of the petitioner's shares. The Court of Appeal, in *Grace v Biagioli*⁷², held that the relief must cure the problem for the future.

Accordingly, in this case, it was held that a purchase order has benefits for both parties of the case. Whilst it provides the continuance of the company and its business for the benefit of the respondents, it sets free the petitioner without any loss in the value of his share.⁷³

Furthermore, both the CA 2006 s 994 and the IA 1986 s 122(1)(g) provide a member with a personal remedy when his or her interests are subject to unfairly prejudicial conduct. In contrast, a statutory derivative claim enables a remedy for the benefit of the corporate entity as a whole.⁷⁴ The CA 2006 does not include a specific provision for remedies available in a derivative claim. Nevertheless, other articles, where relevant, can be applied by analogy, e.g. breach of director's duties under the CA 2006 s 178.⁷⁵

5. Procedural Bars

Once proceedings have been commenced by a member of a company to seek corporate remedy under statutory derivative claim, the claimant must satisfy statutory requirements for permission to continue the action.⁷⁶ Section 261 of the CA 2006 stipulates two stages for obtaining permission.⁷⁷ In the first, the court initially has to determine whether the claim presents a *prima facie* case by reference to only the written evidence submitted with the application.⁷⁸ Otherwise, the claim must be rejected and the court may make any consequential order it considers appropriate.⁷⁹ This first examination 'enable(s) the courts to dismiss *unmeritorious* claims at an early stage without involving the

⁵⁹ *Anderson v Hogg* [2002] BCC 923 CS (IH).

⁶⁰ *Baumler, Re* [2005] 1 BCLC 92; [2005] BCC 181.

⁶¹ *McCarthy Surfacing Ltd, Re* [2008] EWHC 2279 (Ch); [2009] 1 BCLC 622.

⁶² **Hannigan**, B. (2016), *Company Law*, 4th ed., OUP, p. 502.

⁶³ **Hannigan**, (n 62) 502-511.

⁶⁴ **Dignam & Lowry**, (n 18) 206-211.

⁶⁵ *Re German Date Coffee Company* [1882] 20 Ch 169.

⁶⁶ *Re Thomas Edward Brimsmead & Sons Ltd* [1897] 1 Ch 45, 46 (C.A.).

⁶⁷ *Re Yenidje Tobacco Ltd* [1916-17] ALL ER Rep 1050.

⁶⁸ *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492.

⁶⁹ **Griffin**, Which Remedy to Pursue, (n 29) 2.

⁷⁰ CA 2006 s 996(1).

⁷¹ For remedies see CA 2006 s 996(2).

⁷² [2006] 2 BCLC 70 100-1.

⁷³ **Hannigan**, (n 62) 515.

⁷⁴ **Griffin**, Which Remedy to Pursue, (n 29) 1.

⁷⁵ **Dignam & Lowry**, (n 18) 200.

⁷⁶ CA 2006 s 261(1).

⁷⁷ Explanatory Notes to the Companies Act 2006, para.492.

⁷⁸ CA 2006 s 261(2).

⁷⁹ CA 2006 s 261(2). See Explanatory Notes CA 2006, para 495.

defendants or the company'.⁸⁰ At the second stage, the court must take into account a variety of factors as to whether to allow the claim to proceed. If the court approves a prima facie case, it may notify and give orders to the company in order to enable to obtain evidence or may adjourn the proceedings.⁸¹ When the court gives orders to the company for additional evidence, the procedure turns into a contested hearing at the end of which the court may either give permission to continue the action or refuse permission and dismiss the action or adjourn the proceedings and give such directions as it thinks fit.⁸² In the second, the criteria for continuance of the action are governed by the CA 2006 s 263(2) to (4). Whilst the circumstances articulated in s 263(2) form absolute bars to granting permission to continue the action, the criteria drawn in s 263(3) and (4) provide the court with a broad discretion and are not exhaustive. Hence, the final phase of the permission procedure is to evaluate all those factors listed in s 263(2) to (4).⁸³

It has been rightly contended that the CA 2006 has failed to clarify the question of which wrongs are capable of ratification and authorisation, thus ratification becomes 'a major battleground in derivative claims, by providing that actual ratification will bar a claim'.⁸⁴ On the other hand, it might be accurate to follow common law limitations on ratification and authorisation which are generally recognised by the CA 2006 s 180(4)(a) and s 239(7).

Unlike the statutory derivative claim, a petition under the CA 2006 s 994 or the IA 1986 s 122(1)(g) do not include such a permission test or any other procedural requirement regarding company affairs, e.g. ratifiability, to continue the case.

6. Additional Factors

A statutory derivative claim may be suitable

to be initiated in the context of both a private and public company. On the contrary, a petition under the CA 2006 s 994 or the IA 1986 s 122(1)(g) is mainly appropriate in private companies which are mostly based on a quasi-partnership principle of mutual trust and understanding of the members.⁸⁵

7. Academic Scepticism on Derivative Claims

Academic scepticism identifies some deficiencies about the effectiveness of the statutory derivative claim that make it less attractive.⁸⁶ First, the majority rule principle which is most important impediment still exists in the minority shareholder protection arena. Second, the power of authorisation conferred to the directors by s 175 has potential to dramatically diminish the fraud on minority based derivative claims. Third, judiciary control on derivative claims comprises a complex, tight and deterrent threshold test that could make it difficult for the claimants to prove their allegations in the test stage with sufficient evidence, since the claimants are in a disadvantageous position in obtaining information about the internal affairs of the company. Moreover, this complexity of the permission procedure and the broad discretionary power of the courts may motivate them to adjourn proceedings to seek authorisation and ratification.⁸⁷ Likewise, the procedure to lodge a statutory derivative action is more time consuming and effortful than the former one was, although the availability of a statutory derivative claim is less restrictive than under the previous common law position. The CA 2006 s 263(3)(f) also gives power to the court to refuse when considering an application for the commencement of a statutory derivative action, where the applicant has an option to sue in his own right to obtain remedy, such as under the CA 2006 s 994. Hence, the court may accept a personal action as

⁸⁰ Explanatory Notes to the Companies Act 2006, para 495.

⁸¹ CA 2006 s 261(3)(a)(b).

⁸² CA 2006 s 261(4).

⁸³ **Keay, A. & Loughrey, J.** (2008), 'Something Old, Something New, Something Borrowed: An Analysis of the New Derivative Action under the Companies Act 2006', LQR 469, 477.

⁸⁴ **Keay, A. & Loughrey, J.** (2010), 'Derivative Proceedings in A Brave New World For Company Management and Shareholders', JBL 151, 162-165.

⁸⁵ **Griffin**, Which Remedy to Pursue, (n 29) 2.

⁸⁶ **Griffin**, Which Remedy to Pursue, (n 29) 2-3; **Almadani**, (n 14) 138-140.

⁸⁷ **Hannigan**, (n 62) 511.

a preferable alternative for an existing derivative action.⁸⁸

B. Comparison of Personal Remedies

A petitioner must show that his membership interest incurred an inequitable conduct which means a breach of previous mutual trust and understanding under both the CA 2006 s 994 and the IA 1986 s 122(1)(g). The inequitable conduct may ordinarily be a breach of the terms on which the affairs of the company should be conducted that affect a membership interest. Equitable considerations may be imposed in order to provide fairness in exceptional circumstances that require going beyond the implementation of endowed legal rights.⁸⁹

The grounds justifying both remedies generally seem indistinguishable. As noted in *Hawkes v Cuddy*⁹⁰ by the Court of Appeal, the grounds for relief considered under s 994 will nearly always encompass the grounds for winding-up. In this regard, the similarities with respect to grounds for petitioning make winding-up the last option which ultimately ends the existence of the company. In addition, the relief scale under s 994 is much wider than a single remedy under the IA 1986 s 122(1)(g).⁹¹ Besides, the IA 1986 s 125(2) states that the court may dismiss a winding-up petition if it opines that it is unreasonable for the petitioner not to have seek an alternative remedy, such as a petition under s 994.⁹²

Although it is not necessary for a petitioner under s 994 to come to the court with clean hands, any contribution to the misconduct can be used against him during the proceedings.⁹³ On the contrary, a petitioner under the IA 1986 s 122(1)(g) must come with clean hands.⁹⁴

An answer to the question ‘have mentioned

superiorities made relief under s 994 supersede winding-up remedy’ must be found. Hannigan takes the view that it is difficult to identify the circumstances which fall into the scope of the winding-up while the relief is unavailable under s 994.⁹⁵ However, she leaves a leeway for unpredictable cases where winding-up would be a relief of last resort.⁹⁶ Conversely, Griffin argues that there may be a subtle difference in rare circumstances.⁹⁷ Griffin, by reference to *RA Noble*⁹⁸ and *Jesner*⁹⁹, exemplifies a situation in which a petition under s 994 would be inappropriate, since neither of the parties acted unfairly in a deadlock in company management that the courts finally ordered winding-up.¹⁰⁰ Further, Griffin underlines that winding-up will be more advantageous where the parties drew up articles of association including separate and strict rules concerning the valuation procedure of the shares, e.g. in *Abbey Leisure Ltd*¹⁰¹ Finally, Griffin reminds that in contrast to s 994, a petitioner for winding-up must have a tangible interest for winding-up, and the company must be solvent after the payment of its creditors.¹⁰²

IV. CONCLUSION

Where misconduct affects company’s interest, a statutory derivative claim may be more reasonable to bring since there is the possibility of a *Wallersteiner* costs order. Also, the statutory derivative claim may be pursued by a member of a public or private company while personal remedies are more suitable to seek in private companies.

However, mentioned shortcomings led to the pendulum swinging in favour of the pursuit of a personal remedy. First, the benefit attainable via a derivative claim indirectly affects a member’s interest, and it is, therefore, less desirable than a petition for unfairly prejudicial conduct which also

⁸⁸ **Griffin**, Which Remedy to Pursue, (n 29) 2-3.

⁸⁹ As is seen in *O'Neill v Phillips* [1999] 1 W.L.R. 1092; [1999] BCC 600; **Griffin**, Which Remedy to Pursue, (n 29) 3. [2009] EWCA Civ 291; [2009] BCLC 427.

⁹⁰ **Griffin**, Which Remedy to Pursue, (n 29) 3.

⁹¹ For example; *Woven Rugs Ltd, Re* [2008] BCC 903.

⁹² **Dignam & Lowry**, (n 18) 245-246.

⁹³ **Dignam & Lowry**, (n 18) 213.

⁹⁴ See **Hannigan**, (n 62) 482-525.

⁹⁵ See **Hannigan**, (n 62) 482-525.

⁹⁶ **Griffin**, Which Remedy to Pursue, (n 29) 3.

⁹⁷ **Griffin**, Which Remedy to Pursue, (n 29) 3.

⁹⁸ *& Sons (Clothing) Ltd, Re* [1983] BCLC 273.

⁹⁹ *v Jarrad Properties Ltd* [1992] BCC 807.

¹⁰⁰ **Griffin**, Which Remedy to Pursue, (n 29) 4.

¹⁰¹ *Re* [1990] BCC 60. **Griffin**, Which Remedy to Pursue, (n 29)

4; **Dignam & Lowry**, (n 18) 211.

¹⁰² **Griffin**, Which Remedy to Pursue, (n 97) 4.

does not require permission test. Secondly, s 994 is the most advantageous provision to be employed to protect a minority shareholder's interests, since it contains the flexible procedure and broad scope of the grounds for petition and the available reliefs. Thirdly, s 994 may provide a minority shareholder with a personal remedy and by the virtue of s 996(2)(c) a corporate remedy, even in

circumstances where the misconduct was harmful to the corporate entity. Finally, a petitioning member who seeks a personal remedy has opportunity to petition under the IA 1986 s 122(1)(g).

BIBLIOGRAPHY

I. Primary Resources

A. Statutes

Companies Act of 2006.

Insolvency Act of 1986.

Civil Procedure Rules

Law Commission Report Shareholder Remedies (Law Commission) 1997, [No 246]

B. Cases

Foss v Harbottle (1843) 2 Hare 461.

Ebrahimi v Westbourne Galleries Ltd [1972] 2 All ER 492.

O'Neil v Philips [1999] 2 BCLC 1.

Smith v Croft [1986] 1 WLR 580, 597.

Wallersteiner v Moir (No 2) [1975] QB 373.

Edwards v Halliwell [1950] 2 All ER 1064.

Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] 1 Ch 204.

Gamlestaden Fastigheter AB v Baltic Partners Ltd [2007] UKPC 26.

Abbey Leisure Ltd Re [1990] B.C.C. 60.

Allmark v Burnham [2005] EWHC 2717 (Ch); [2006] 2 BCLC 437.

Anderson v Hogg [2002] BCC 923 CS (IH).

Baumler, Re [2005] 1 BCLC 92; [2005] B.C.C. 181.

Brightview Ltd, Re [2004] BCC 542.

Dalby v Bodilly [2004] EWHC 3078 (Ch); [2005] BCC 627.

Elgindata, Re [1991] BCLC 959.

Grace v Biagioli [2006] 2 BCLC 70 100-1.

Hawkes v Cuddy [2009] EWCA Civ 291; [2009] BCLC 427.

Jesner v Jarrad Properties Ltd [1992] BCC 807.

Lloyd v Casey [2001] All ER (D) 371 (Dec).

Macro (Ipswich) Ltd, Re [1994] 2 BCLC 354 Ch

D.

McCarthy Surfacing Ltd, Re [2008] EWHC 2279 (Ch); [2009] 1 BCLC 622.

Oak Investment Partners XII, Limited Partnership v Boughtwood [2009] EWHC 176 (Ch).

RA Noble & Sons (Clothing) Ltd, Re [1983] BCLC 273.

Re a Company (No 003160 of 1986) (1986) 2 BCC 99.

Re Bovey Hotel Ventures Ltd 31 July 1981, Unreported, cited by Nourse J in *Re RA Noble & Sons (Clothing) Ltd* [1983] BCLC 273.

Re Citybranch Group Ltd, Gross v Rackind [2004] 4 All ER 735.

Re German Date Coffee Company [1882] 20 Ch 169.

Re Saul D Harrison & Sons plc [1995] 1 BCLC 14.

Re Thomas Edward Brimsmead & Sons Ltd [1897] 1 Ch 45, 46 (CA).

Re Yenidje Tobacco Ltd [1916-17] ALL ER Rep 1050.

Unisoft Group Ltd (No3) [1994] 1 BCLC 609.

Woven Rugs Ltd, Re [2008] B.C.C. 903.

II. Secondary Resources

Almadani, M. (2009), 'Derivative Actions: Does the Companies Act 2006 Offer a Way Forward?', *Company Lawyer*, V: 30, I: 5, 131.

Dignam, A. & Lowry, J. (2018), *Company Law*, 10th ed., OUP.

Griffin, S. (2010), 'Alternative Shareholder Remedies Following Corporate Mismanagement - Which Remedy to Pursue?', *Company Law News Letter*, V: 1 (Griffin, Which Remedy to Pursue).

Griffin, S. (2010), 'Shareholder Remedies and The No Reflective Loss Principle - Problems Surrounding The Identification of a Membership Interest', *Journal of Business Law*, V: 6, 461.

Hannigan, B. (2016), *Company Law*, 5th ed., OUP.

Joffe, V. & Drake, D. (2008), Giles Richardson and Daniel Lightman, *Minority Shareholders Law, Practice and Procedure*, 3rd ed., OUP.

Keay, A. and Loughrey, J. (2010), 'Derivative Proceedings In A Brave New World For Company Management and Shareholders', *JBL*, 151.

Keay, A. & Loughrey, J. (2008), 'Something Old, Something New, Something Borrowed: An Analysis of the New Derivative Action under the Companies Act 2006', *LQR*, 469.

Mujih, E. C. (2012), 'The New Statutory Derivative Claim: A Delicate Balancing Act', *Company Lawyer*, V: 33, I: 3, (Part 1), 76.

Sealy, L. S. (1981), '*Foss v. Harbottle* - a Marathon Where Nobody Wins', *Cambridge Law Journal*, V: 40, 29.

Watkins, S. (1999), 'The Common Law Derivative Action: an Outmoded Relic?', *Cambrian Law Review*, V: 30, 40.

Wild, C. & Weinstein, S. (2016), *Smith and Keenan's Company Law*, 7th ed., Pearson Education Limited.