RILEY, C, ‘Contracting Out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts’ (1992) 55 MLR 782.
Find This Resource

(p. 714) SEALY, LS, ‘Problems of Standing, Pleading and Proof in Corporate Litigation’ in B Pettet (ed), *Company Law in Change* (1987), p 1.
Find This Resource

SULLIVAN, GR, ‘Restating the Scope of the Derivative Action’ [1985] CLJ 236.
Find This Resource

WEDDERBURN, KW, ‘Derivative Actions and *Foss v Harbottle*’ (1981) 44 MLR 202.
Find This Resource

WEDDERBURN, KW, ‘Shareholders’ Rights and the Rule in *Foss v Harbottle*’ [1957] CLJ 194 and [1958] CLJ 93.
Find This Resource

WORTHINGTON, S, ‘Corporate Governance: Remedying and Ratifying Directors’ Breaches’ (2000) 116 LQR 638.
Find This Resource

Notes:

[1] Also see ‘The statutory derivative action: CA 2006 ss 260ff’, pp 642ff.

[2] A ‘representative action’ is a court procedure allowing one or more individuals to appear as claimants or defendants on behalf of a larger number of people having an identical interest in the proceedings, and so obtain a remedy (or provide a defence) for the entire class of them, as individuals, without each appearing individually before the court. See the Civil Procedure Rules 1998 (CPR) r 19.6; also see fn 33, p 668.

[3] *Carlen v Drury* (1812) 1 Ves & B 154 at 158.

[4] This is because the controllers can usually count on a high degree of apathy and inertia on the part of the small ‘armchair’ investor. In addition, various devices such as ‘pyramid’, circular and cross-holdings of shares between companies can be used to concentrate power: see the classic analysis of A Berle and G Means, *The Modern Corporation and Private Property* (1932) and MA Pickering, ‘Shareholders’ Voting Rights and Company Control?’ (1965) 81 LQR 248. More generally, see JE Parkinson,*Corporate Power and Responsibility* (1993), pp 241–259.

[5] By contrast, in public companies where there is a ready market for shares, and exit is a real possibility, it seems that the chance of UK directors being sued by their companies is ‘virtually nil’: J Armour et al, ‘Private Enforcement of Corporate Law: An Empirical Comparison of the UK with the US?’ (2009) 6 *Journal of Empirical Legal Studies* 687, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1105355.

[6] RWV Dickerson, JL Howard and L Getz, in *Proposals for a New Business Corporation Law for Canada* (1971), §482, called it an ‘infamous doctrine’ which they recommended should be ‘relegated to legal limbo without compunction’. In England, by contrast, the rule has been defended with enthusiasm by the Court of Appeal in cases such as *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, which itself was cited with approval in the House of Lords decision in *Johnson v Gore Wood and Co* **[13.22]**.

[7] GD Hornstein [1967] JBL 282.

[8] (1843) 2 Hare 461. For further reading, see AJ Boyle, ‘The Minority Shareholder in the Nineteenth Century?’ (1965) 28 *MLR* 317; Lord Wedderburn, ‘Shareholders’ Rights and the Rule in *Foss v Harbottle*’ [1957] CLJ 194; [1958] CLJ 93 (a classic); SM Beck, ‘An Analysis of *Foss v Harbottle*’ in JS Ziegel (ed), *Studies in Canadian Company Law* (1967) and ‘Shareholders’ Derivative Action’ (1974) 52 *Canadian Bar Review* 159; C Baxter, ‘The True Spirit of *Foss v Harbottle*?’ (1987) 38 *Northern Ireland Law Quarterly* 6; LS Sealy, ‘Problems of Standing,

Pleading and Proof in Corporate Litigation' in *Company Law in Change* (1987), p 1; HC Hirt, 'The Company's Decision to Litigate against its Directors' [2005] JBL 159.

[9] These are the heads used as a basis for discussion by KW Wedderburn, 'Shareholders' Rights and the Rule in *Foss v Harbottle*' [1957] CLJ 194 at 203. The same exceptions are listed (in a different order) by Jenkins LJ in *Edwards v Halliwell* [1950] 2 All ER 1064, CA.

[10] More properly described in most cases as a fraud on the *company*: see *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1981] Ch 257 (Ch, Vinelott J), the most significant case on this issue and on the rule in *Foss v Harbottle*.

[11] See especially *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1981] Ch 257 (Ch, Vinelott J); and *Smith v Croft (No 2)* **[13.17]**.

[12] See the detailed discussion in the 9th edition of this book, at Chapter 12.

[13] See CPR 1998 r 19.9–19.9F (subject to transitional provisions specified in SI 2007/2204, r 21):

19.9 Derivative Claims—how started

(1) This rule—
(a) applies to a derivative claim (where a company, other body corporate or trade union is alleged to be entitled to claim a remedy, and a claim is made by a member of it for it to be given that remedy), whether under Chapter 1 of Part 11 of the Companies Act 2006 or otherwise; but
(b) does not apply to a claim made pursuant to an order under [section 996] of that Act.

(2) A derivative claim must be started by a claim form.
(3) The company, body corporate or trade union for the benefit of which a remedy is sought must be made a defendant to the claim.
(4) After the issue of the claim form, the claimant must not take any further step in the proceedings without the permission of the court, other than—
(a) a step permitted or required by rule 19.9A or 19.9C; or
(b) making an urgent application for interim relief.

19.9A Derivative claims under Chapter 1 of Part 11 of the Companies Act 2006—application for permission

(1) In this rule—
'the Act' means the Companies Act 2006;
'derivative claim' means a derivative claim under Chapter 1 of Part 11 of the Act;
'permission application' means an application referred to in [section 261(1), 262(2) or 264(2)] of the Act;
'the company' means the company for the benefit of which the derivative claim is brought.
(2) When the claim form for a derivative claim is issued, the claimant must file—
(a) an application notice under Part 23 for permission to continue the claim; and
(b) the written evidence on which the claimant relies in support of the permission application.

(3) The claimant must not make the company a respondent to the permission application.
(4) Subject to paragraph (7), the claimant must notify the company of the claim and permission application by sending to the company as soon as reasonably practicable after the claim form is issued—
(a) a notice in the form set out in the practice direction supplementing this rule, and to which is attached a copy of the provisions of the Act required by that form;
(b) copies of the claim form and the particulars of claim;
(c) the application notice; and
(d) a copy of the evidence filed by the claimant in support of the permission application.

(5) The claimant may send the notice and documents required by paragraph (4) to the company by any method permitted by Part 6 as if the notice and documents were being served on the company.
(6) The claimant must file a witness statement confirming that the claimant has notified the company in

accordance with paragraph (4).

(7) Where notifying the company of the permission application would be likely to frustrate some party of the remedy sought, the court may, on application by the claimant, order that the company need not be notified for such period after the issue of the claim form as the court directs.

(8) An application under paragraph (7) may be made without notice.

(9) Where the court dismisses the claimant's permission application without a hearing, the court will notify the claimant and (unless the court orders otherwise) the company of that decision.

(10) The claimant may ask for an oral hearing to reconsider the decision to dismiss the permission application, but the claimant—

- **(a)** must make the request to the court in writing within seven days of being notified of the decision; and
- **(b)** must notify the company in writing, as soon as reasonably practicable, of that request unless the court orders otherwise.

(11) Where the court dismisses the permission application at a hearing pursuant to paragraph (10), it will notify the claimant and the company of its decision.

(12) Where the court does not dismiss the application under section 261(2) of the Act, the court will—

- **(a)** order that the company and any other appropriate party must be made respondents to the permission application; and
- **(b)** give directions for the service on the company and any other appropriate party of the application notice and the claim form.

[14] Although note that the Explanatory Notes to the 2006 Act specifically state at para 491 that, 'The sections in this Part do *not* formulate a substantive rule to replace the rule in *Foss v Harbottle*, but instead reflect the recommendations of the Law Commission that there should be a "new derivative procedure with more modern, flexible and accessible criteria for determining whether a shareholder can pursue an action" (*Shareholder Remedies*, paragraph 6.15)' (emphasis added).

[15] A 'member' is defined in CA 2006 s 112, and is not restricted to a shareholder.

[16] The possibility of personal benefit should be addressed via personal claims, either at common law or under the statutory 'unfair prejudice' provisions in CA 2006 s 994.

[17] See Chapter 7, and the cases and articles cited.

[18] See the cases cited in Chapter 7, and also *Smith v Croft (No 2)* **[13.17]**.

[19] See the law on authorisation by the board or the general meeting in Chapter 7.

[20] The question is whether there are any 'non-ratifiable wrongs', see Notes following *Franbar Holdings Ltd v Patel* **[13.12]**, pp 661ff.

[21] In *Franbar Holdings Ltd v Patel* [2008] EWHC 1534 (Ch), [2009] 1 BCLC 1, the court interpreted s 239(7) as requiring it to decide whether the purported ratification was such as to improperly prevent the member from bringing a claim on behalf of the company. This approach focuses not on the nature of the wrong done to the company, but on the quality of the approval/ratification decision.

[22] Note a contrary argument advanced by D Lightman, who argues that multiple derivative claims fall outside the definition of 'derivative claim' under s 260(1); therefore, it is said that a multiple derivative may still be brought under common law outside the statutory framework: D Lightman, 'Two Aspects of the Statutory Derivative Claim' [2011]*Lloyd's Maritime and Commercial Law Quarterly* 142. For a comparative analysis of the appetite for multiple derivative claims between Hong Kong and England, see SH Goo, 'Multiple Derivative Action and Common Law Derivative Action Revisited: A Tale of Two Jurisdictions' (2010) *Journal of Corporate Law Studies* 255.

[23] Or in pursuance of a court order in proceedings under s 994 (unfair prejudice): s 260(2)(b).

[24] Although see *Re Fort Gilkicker Ltd* [2013] EWHC 348, cited earlier at p 647.

[25] *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1981] Ch 257 (Ch), overturned in part in [1982] Ch 204, CA.

[26] [1900] 2 Ch 56, CA.

[27] [1956] Ch 565.

[28] This distinction between different forms of negligence is eliminated in CA 2006 ss 260ff, where, prima facie, all claims based on negligence can be pursued by way of derivative action, although the relevance of proper confirmation by the general meeting remains: see 'Grounds for bringing a derivative claim', p 645.

[29] His test of independence was: 'In my judgment in this case votes should be disregarded if, but only if, the court is satisfied either that the vote or its equivalent is actually cast with a view to supporting the defendants rather than securing benefit to the company … The court should not substitute its own opinion but can, and in my view should, assess whether the decision making process is vitiated by being or being likely to be directed to an improper purpose' (at 186D–F).

[30] [1975] QB 173, CA.

[31] See CLR, *Completing the Framework*, paras 5.64–5.74; R Drury, 'The Relative Nature of a Shareholder's Right to Enforce the Company Contract' [1986] CLJ 219.

[32] See E Ferran [1994] CLJ 343.

[33] This procedure allows one or more individuals to appear as claimants or defendants on behalf of a number of persons having an identical interest in the proceedings. It was developed by the courts of Chancery in the early nineteenth century especially to deal with the problems of large unincorporated associations. Now the procedural rules are found in CPR r 19.6 (Representation of parties with the same interest):

> **(1)** Where more than one person has the same interest in a claim—
> > **(a)** the claim may be begun; or
> > **(b)** the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.
>
> **(2)** The court may direct that a person may not act as a representative.
> **(3)** Any party may apply to the court for an order under paragraph (2).
> **(4)** Unless the court otherwise directs any judgment or order given in a claim in which a party is acting as a representative under this rule—
> > **(a)** is binding on all persons represented in the claim; but
> > **(b)** may only be enforced by or against a person who is not a party to the claim with the permission of the court. …

It should be obvious that a *derivative* claim can be pursued by a shareholder acting in a *representative* capacity, so the two types of procedures may be in use at the same time.

[34] Although whether s 263(3)(f) will change this in favour of personal claims remains to be seen—see *Franbar Holdings Ltd v Patel* **[13.12]**.

[35] The analysis is not persuasive, however, and in the light of the comments in the Notes following *Franbar Holdings Ltd v Patel* **[13.12]**, p 661, seems of doubtful authority.

[36] Ie suing personally or in a representative capacity, but not pursuing a derivative claim.

[37] *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443.

[38] See the parallel provision applying to the acts and omissions of the administrator, which can be invoked by creditors as well as shareholders: IA 1986 Sch B1, para 74. This substitutes the word 'harm' for 'prejudice' (it is not clear whether this was intended to have substantive implications) and specifically allows for complaints that the administrator is not performing his functions 'as quickly or as efficiently as is reasonably practicable'.

[39] One unreported case (*Re Freudiana Music Co Ltd* (Ch, 24 March 1993)) lasted for 165 full court days, with the respondent awarded *costs* of £2 million. In *Re Elgindata Ltd* **[13.27]**, costs totalling £320,000 were run up in a dispute over shares worth less than £25,000: see [1993] BCLC 119. The judgment of Arden J in *Re Macro (Ipswich) Ltd***[13.28]** reviews the history of the company over a period of nearly 50 years and extends to 56 pages. In *Re Unisoft Group Ltd (No 3)* [1994] 1 BCLC 609 at 611, Harman J said: 'Petitions under s 459 have become notorious to judges of this court—and also to the Bar—for their length, their unpredictability of management, and the enormous and appalling costs which are incurred upon them.'

[40] See Law Commission, *Shareholder Remedies* (LCCP No 142, 1996), pp 55–102; and *Shareholder Remedies* (Law Com No 246, 1997), Pts 2–4 (for reform proposals); CLR, *Developing the Framework* (2000), paras 4.100–4.111; *Completing the Structure* (2000), paras 5.75–5.81, and *Final Report I* (2001), paras 7.41–7.45. Also see C Riley, 'Contracting Out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts?' (1992) 55 MLR 782.

[41] Since CA 2006 s 996 gives the court the widest possible discretion (as did CA 1985 s 461), this might seem unnecessary, but precedents suggested that courts could not make such an order, given that it would profoundly affect parties not before the court, without providing all the protections delivered by the IA 1986 procedures.

[42] [1932] AC 161, HL.

[43] (1986) 11 ACLR 279.

[44] *Atlasview Ltd v Brightview Ltd* [2004] EWHC 1056 (Ch), [2004] 2 BCLC 191.

[45] Eg in *Re HR Harmer Ltd* (see Note following *Scottish Co-operative Wholesale Society Ltd v Meyer* **[13.24]**, p 685) the petitioners were majority shareholders but did not have voting control.

[46] A petition may not be brought by persons having voting control, since they may have recourse to domestic remedies (such as changing the directors) to remedy the conduct which is the source of complaint: *Re Legal Costs Negotiators Ltd* [1999] 2 BCLC 171, CA.

[47] On the 'just and equitable' ground (IA 1986 s 122(1)(g)), see 'Compulsory winding up on the "just and equitable" ground', pp 795ff.

[48] Lord Hoffmann in *O'Neill v Phillips* **[13.30]** expressed reservations about the use of this expression (borrowed from administrative law) in the s 456 (CA 2006 s 994) context, but it is fairly well established—and no one has yet suggested a better alternative.

[49] The expression used by Warner J in *Re JE Cade & Sons Ltd* [1992] BCLC 213 at 227.

[50] *R&H Electric Ltd v Haden Bill Electrical Ltd* [1995] 2 BCLC 280.

[51] This means that the court is not limited to giving the relief asked for by the petitioner: *Hawkes v Cuddy* [2009] EWCA Civ 291.

[52] [1987] BCLC 562.

[53] [1986] BCLC 362.

[54] [1987] 1 WLR 102.

[55] Note that it is not necessary that the members of a 'quasi-partnership' should have equal shares in the venture: a junior partner in *Quinlan v Essex Hinge Co Ltd* [1996] 2 BCLC 417 successfully petitioned following his exclusion from management by a dominant senior partner.

[56] [1990] Ch 682.

[57] [1978] Ch 406, Notes 2 and 3 following *Franbar Holdings Ltd v Patel* **[13.12]**, p 661.

[58] Note, however, that in *O'Neill v Phillips* **[13.30]** Lord Hoffmann states that 'conduct which is perfectly fair

between competing businessmen may not be fair between members of a family', a consideration which weighed with the judge in giving a petitioner relief in *Brownlow v GH Marshall Ltd* [2000] 2 BCLC 655.

14. Public Disclosure, Market Regulation and Public Investigations of Companies

Chapter: **(p. 715)** 14. Public Disclosure, Market Regulation and Public Investigations of Companies
Author(s): Len Sealy and Sarah Worthington
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Public disclosure and the disclosure philosophy

It has long been recognised that the 'price' that companies must pay for the privileges of incorporation (separate personality) and limited liability is a fair degree of openness and publicity about their affairs. The Companies Acts have been largely based on this philosophy. Even the obligatory term 'Limited' is intended to achieve this purpose, warning those dealing with a company that its resources are finite.

In the ordinary course of business of a company, disclosure under the Act is secured by: (i) delivery of information to the registrar of companies; (ii) publication in the*Gazette*; (iii) information made available at the company's registered office; and (iv) notifications in various business documents. The Stock Exchange imposes additional obligations on listed companies. And, quite outside any legal regime, the market, and the financial press, may publicly disclose information considered significant.

Companies are also subject to special disclosure rules designed to give interested parties information on substantial share ownership in the company and to provide appropriate information to investors when new shares are issued to the public. Finally, there are rules restricting the use of non-public information by those acquiring shares in the market.

General disclosure obligations

The Registrar of Companies

A company's obligation to make public disclosure is generally fulfilled by delivering the required information to the Registrar of Companies. Section 1061 of the Companies Act 2006 (CA 2006) confirms the role of the registrar, whose duties and functions date back to 1844.

There are three separate registrars, for England and Wales (situated in Cardiff), for Scotland and for Northern Ireland. The registrar maintains a file for every company and adds to it all the documents relating to that company as they are lodged for registration over the years. Files are open to public search, either electronically or using a microfiche system. Certain information delivered after 1 January 2007 must be filed electronically (CA 2006 s 1078); otherwise the filing mechanism is discretionary (s 1080).

All the company's most important documents relating to its constitution and its history subsequent to its incorporation, together with information about its membership, finances and management must be notified to the registrar with, as history shows, each successive Act stepping up the reporting obligations.

A person searching the records of a company at the registry will find the following documents available: the memorandum and articles of association, notices giving the situation of its registered office and details of its directors and secretary, particulars of charges over its **(p. 716)** property and trust deeds covering issues of debentures, copies of any prospectus or listing particulars that may have been issued, returns of allotments and lists of current members. In addition, there must be filed once a year an annual return giving all the information specified by regulations (ss 854–856A,[1] and see s 858 for the consequences of non-compliance), and various accounts and reports depending upon the size of the company (s 441), but generally including copies of the

company's annual accounts (ss 394 and 399), together with the directors' report (s 415), the auditors' report (ss 475 and 495–497, unless the company is exempt under s 477 or 480, although s 476, gives the members the power to require an audit in any event), and, for quoted companies, a directors' remuneration report (s 420).[2] Other events in the life of a company, both major ones such as alterations of its constitution (s 21) or the appointment of a receiver (s 871), and more minor ones where shares in public companies are issued for a non-cash consideration (ss 593 and 597), or where public companies agree to certain transfers of non-cash assets (ss 598 and 602), may trigger filing obligations. Today, company secretaries (or their equivalent for companies without secretaries) need the aid of very extensive checklists.

The registration system is first and foremost an information service: not many legal consequences turn on the fact that a document has or has not been filed. Of these, the most important for the student are: (i) what remains of the constructive notice doctrine ('Constructive notice and its abolition', pp 128ff); (ii) the sanction of partial voidness which follows from the non-registration of charges ('Requirement to register charges', pp 601ff); and (iii) official notification (see the following section).

Although the information provided by the registration system was initially seen as a means of helping creditors to assess the risks of dealing with a limited company (the 'forewarned is forearmed' principle), the disclosure regime is now seen as increasingly essential in reducing the risks of managerial self-interest and incompetence, and facilitating the efficient operation of the capital markets.[3]

Publication in the *Gazette*

The registrar is obliged to give publicity in the *Gazette* to a company's incorporation (CA 2006 s 1064) and to various events affecting a company's administration or status—an alteration of its constitution or change in its directorate, for instance, or the appointment of a liquidator or redemption of shares out of capital. Most 'official notifications' in the *Gazette* are made under CA 2006 s 1077 in compliance with the First Company Law Directive (68/151/EEC).

These s 1077 notifications are really only token publicity, for very few copies of the special Companies Supplement to the *Gazette* (which is available only on microfiche) are sold. The Company Law Review (CLR) suggested electronic publication might be more effective (*Final Report* (2001), para 11.48). Accordingly, CA 2006 s 1116 provides a power for the Secretary of State to specify alternative means which the registrar may then approve for use. To ensure that any such change in current practice is itself publicised, s 1116(5) requires it to be announced first in the *Gazette*.

(p. 717) In contrast to the registers maintained at Companies House, legal consequences do flow from failures to secure the necessary official notification of specified events. These include the making of winding-up orders or appointments of liquidators in voluntary liquidations, alteration of the company's articles, changes in the company's directors or changes in the company's registered office (at least for service of documents on the company). Third parties dealing with the company are protected by CA 2006 s 1079: it provides that the company cannot rely, as against a third party, on the happening of the specified events if, at the material time, the event had not been officially notified, unless the company can prove that the third party knew of the event at the material time.

On the other hand, notification in the *Gazette* is intended to protect third parties, not the company, so notification does not operate as constructive notice to third parties that the event has occurred: *Official Custodian for Charities v Parway Estates Developments Ltd* [1985] Ch 151, CA.

Publicity at the company's own registered office

Many of the statutory provisions requiring registration of matters at the Companies Registry are duplicated or supplemented by obligations to maintain copies of documents and other information at the company's own office, and to have facilities there for searching these records. Normally, this means public search, but sometimes the right is restricted to members of the company or to members and creditors. In practice, little use is made of these search facilities: people generally prefer the anonymity of the registrar's public office, even if it means getting less up-to-date or less detailed information. Despite this, companies are required to keep registers of directors (s 162),

directors' residential addresses (s 165—not open for inspection—see Pt 10, Ch 8), directors' service contracts (ss 228 and 229), secretaries (s 275—public companies only), members (ss 114, 116), members' substantial shareholdings (ss 808, 809; also see 'Transparency obligations: investigation and notification of major voting shareholdings in certain public companies', p 720), debenture holders (s 743), and company charges (ss 876 and 877). CA 2006 no longer requires companies to keep a register of directors' interests in shares and debentures.

Specific provision of information to members

Most of the material which the Act requires a company to send to its members is linked to the annual general meeting. Copies of the accounts for the past year, the auditors' report and directors' report are required to be sent to members along with the notice summoning the meeting (ss 423 and 424). The confidentiality which one might associate with these essentially domestic reports is, however, destroyed by the statutory requirement that they also be filed with the registrar and made available at Companies House for public inspection. The directors' report, in particular, has in recent times become a vehicle for giving publicity to matters of general interest, such as the company's policy on employment or the environment. CA 2006 s 416 lists those items currently required to be covered, and allows the Secretary of State to make regulations as to other matters that must be disclosed. Unless the company is subject to the small companies' regime (s 381), the directors' report must also contain a business review (s 417), as required by the EU Accounts Modernisation Directive (2003/51/EEC), which is intended to inform members and help them to assess how the directors have performed in their duty to promote the success of the company (s 172).

There are other scattered sections of the Act which make it obligatory to provide information to members, or to keep documents available for them to inspect, for example directors' service contracts (ss 228 and 229) and contracts relating to share repurchase (s 702).

(p. 718) Publicity on business documents

The Act may require a company to display its name outside its offices and places of business, and to state its name and registration details on its business letters and certain other business documents (s 82, authorising the Secretary of State to make appropriate regulations). In addition, if the company wishes to mention its share capital or directors' names on its business stationery, the Act may provide for the appropriate form. Finally, investment companies, charitable companies and insolvent companies must reveal that status on their business stationery.

Enforcement of the disclosure regime

CA 2006 seeks to secure compliance with these various disclosure obligations by a vast array of criminal sanctions (see the various penalties set out in the Act in relation to the individual sections noted later), which—depending upon the wording of the particular provision—may be imposed upon the company or its officers, or both. In practice, at least so far as the predecessor provisions in the Companies Act 1985 (CA 1985) were concerned, virtually no attempt was made to police or enforce any of these provisions except the requirements to file accounts (now CA 2006 ss 441 and 451–453) and annual returns (now CA 2006 ss 854 and 858).[4] Note the range of sanctions for failure to file accounts: the directors commit an offence and may be subjected to a fine (s 451), the company is automatically liable to a 'civil penalty' (which is a fine in all but name) (s 453) and the court may order immediate compliance with the statutory provision on pain of punishment for contempt of court (s 452).

Whether it makes best sense to use the criminal law to sanction compliance with a purely commercial regime—particularly if it is not enforced in practice—is a matter of debate. Some overseas systems largely manage without. The CLR reviewed the scheme, but saw advantages in retaining criminal sanctions: even though the number of prosecutions is relatively small, a high degree of compliance with the statutory filing obligations is achieved by the practice of sending pre-prosecution warning letters (threatening 'worse to come'). The CLR did, however, recommend that most of the criminal sanctions imposed on companies should be removed, and only the individual officers concerned should be made liable. CA 2006 has largely adopted this suggestion.

Listed companies and the Stock Exchange

Those companies whose shares are listed for dealing on the Stock Exchange (including the Alternative Investment Market (AIM)) are required, by the Listing Rules, as one of the conditions for the admission of their securities to listing, to undertake to make more frequent periodic disclosures about their financial and other affairs[5] to the Quotations Department and to the investing public (see 'Company investigations into share ownership and the disclosure register', pp 722ff). In addition, such companies are subject to a '*continuing disclosure*' obligation which requires them to ensure prompt publicity of any matters which are likely to have, when made public, a substantial effect on the price of the company's shares.

These enhanced disclosure requirements are motivated primarily by a desire to ensure accurate pricing by the market of the securities traded on it, so promoting investor confidence.

(p. 719) Public regulation of securities markets

Most of the world's developed countries have a Securities Regulation Act of some kind. Uniquely, the control of securities dealing in the UK was traditionally not a matter for the law at all. Until relatively recently, it was largely left in the hands of 'self-regulatory' agencies such as the London Stock Exchange, with some informal backing from institutions like the Bank of England. For the enforcement of their rules, these bodies relied almost entirely on extra-legal sanctions, such as the disciplinary powers which they could exercise over their own members (eg stockbrokers) who acted as intermediaries in securities dealings, and the power to suspend or withdraw the listing of a particular company's securities. These sanctions were, on the whole, remarkably effective, but only because the self-regulatory bodies had virtual monopoly control of access to the securities markets. Supplementing this informal regime was a modest array of legislation, such as the Prevention of Fraud (Investments) Act 1958, which imposed limitations on the distribution of circulars and other inducements to invest.

Since then we have moved, in several steps, to the point where the conduct of financial investment businesses is now subject to an all-embracing, statute-based regime in the form of the Financial Services and Markets Act 2000 (FSMA 2000). This Act was in gestation from the earliest days of the Blair administration. The essence of the new scheme was the creation of a single regulator for financial businesses of every description—not just investment businesses, but fund managers, banking and insurance firms, clearing houses, building societies, friendly societies and so on. The Financial Services Authority (FSA) was the supreme regulator, and under the 2000 Act it had full statutory authority and corresponding accountability.

Such radical reform was inspired by a combination of factors. First, the proliferation of regulatory and self-regulatory bodies meant that there were some areas of overlap, some areas not covered and many inconsistencies; moreover, the fragmentation of management effort between these bodies was both inefficient and expensive. Secondly, many of the leading firms in the City were multifunctional, and under the earlier regime were required to seek multiple authorisations. Thirdly, there was a growing belief that self-regulation was no longer working well: there were well-publicised scandals to do with pensions mis-selling, Lloyd's insurance and the collapse of banks such as BCCI and Barings, and doubts whether foreign-based businesses could ever be effectively policed by a voluntary regime.

Under FSMA 2000 there was one 'super' regulator, one authorisation procedure, one rule book and one monitoring and disciplinary procedure. Overall responsibility lay with the Treasury, and little remained of the City's long-standing self-regulatory tradition.

Against this backdrop, we embarked on yet another round of reforms which radically shake up the system. On 1 April 2013 the Financial Services Act 2012,[6] came into force. It seeks to strengthen the financial regulatory structure in the UK by making substantial changes to the previous system. The previous system divided responsibility for financial stability between the Treasury, the Bank of England and the FSA, but the FSA was the 'super regulator'.

This unitary 'super regulator' structure has now been divided, and the Bank of England is required to play a far bigger role in financial regulation and stability. Rather than having the FSA as the supreme authority, three separate bodies have been created, each with defined and focused responsibilities. As described in policy documents issued by HM Treasury,[7] the Financial Policy Committee (FPC) within the Bank of England will be

responsible for 'macro-prudential oversight' of the financial services system. For instance, s 3 of the Act inserts a new s 9(c) into the Bank of England Act 1993, which brings 'systematic risks attributable to structural features of financial markets' to the future agenda of the FPC. It is intended that the **(p. 720)** FPC will make use of Bank of England's expertise and experience to make independent decisions, free of undue political influence. Where the FPC disagrees and does not act in accordance with the recommendations of the Treasury, however, the FPC will be required to set out its reasons for taking such course of action.

At the same time, the Prudential Regulation Authority (PRA) has been created as a subsidiary of the Bank of England, and is charged with adopting a 'micro-prudential approach' in order to regulate firms which manage significant risks, and thus it is expected to harness the 'safety and soundness of individual firms'. The PRA is expected to intervene where necessary so as to ensure that firms satisfactorily address possible solvency and systemic risks, and mitigate costs that could otherwise be brought to their clients and the public in general.

Finally, outside the Bank of England structure, the Financial Conduct Authority (FCA) has been created. It is to act as the regulator of business conduct. This means that the FCA will be responsible for dealing with an extensive range of issues, from encouraging effective competition, to protecting consumers and providing for transparency, disclosure and access to information.

Overall, the spirit of these reforms places judgement and expertise at the heart of the financial regulatory regime. The aspiration is that these new regulators will take a more proactive and preventive role, in lieu of the 'box-ticking approach' evident in the lead up to the financial crisis. It remains to be seen, however, whether these reforms will be effective in instilling a new regulatory culture, and whether the new regulators are indeed able to take and maintain a hard line against some of the biggest financial institutions in the world. Perhaps the biggest challenge facing the new structure is how the elements will coordinate as between themselves so as to achieve a clear demarcation of functions and duties.

Transparency obligations: investigation and notification of major voting shareholdings in certain public companies

The Transparency Directive

The register of members of a company does not necessarily reveal the true identity of its shareholders: nominees often hold shares for unnamed beneficial owners. The Transparency Directive (2004/109/EC) replaces earlier Directives (and corresponding provisions in CA 1985) and makes detailed provision for disclosure of substantial interests in the shares of public companies that are traded on regulated markets (ie not all public companies—see 'Company investigations into share ownership and the disclosure register', pp 722ff). The object of these measures is to enable both the company and the market to know who has a controlling interest, or who may be in a position to acquire such an interest in the company. More particularly, they enable a close eye to be kept on those who might otherwise obtain control without adhering to the principles laid down in the City Code on Takeovers and Mergers (see 'Takeovers', pp 753ff).

The Directive also makes provision for the periodic financial disclosures that must be made by issuers admitted to trading on a regulated market.

Substantial holdings

The new Transparency Directive was implemented in the UK on 20 January 2007, and responsibility for major shareholding disclosures moved from the Department of Trade and Industry (DTI) (as BIS previously was, several iterations ago) to the FSA (and now to the FCA). According to the Directive, a notification requirement is triggered when the size of a **(p. 721)** shareholder's voting holdings reaches, exceeds or moves below certain thresholds stated in the Directive (5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%). The shareholder is required to inform the issuer, and the issuer must then inform the market.

In preparation for this implementation, CA 2006 s 1266 inserted seven new sections into FSMA 2000 (ss 89A–89G). These new sections enabled new rules to be made by the FSA to implement the Directive. The UK's new