Was Mr Phillips unfair?

The Court of Appeal found that by 1991 the company had the characteristics identified by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* as commonly giving rise to equitable restraints upon the exercise of powers under the articles. They were (1) an association formed or continued on the basis of a personal relationship involving mutual confidence, (2) an understanding that all, or some, of the shareholders shall participate in the conduct of the business and (3) restrictions on the transfer of shares, so that a member cannot take out his stake and go elsewhere. I agree. It follows that it would have been unfair of Mr Phillips to use his voting powers under the articles to remove Mr O'Neill from participation in the conduct of the business without giving him the opportunity to sell his interest in the company at a fair price. Although it does not matter, I should say that I do not think that this was the position when Mr O'Neill first acquired his shares in 1985. He received them as a gift and an incentive and I do not think that in making that gift Mr Phillips could be taken to have surrendered his right to dismiss Mr O'Neill from the management without making him an offer for the shares. Mr O'Neill was simply an employee who happened to have been given some shares. But over the following years the relationship changed. Mr O'Neill invested his own profits in the company by leaving some on loan account and agreeing to part being capitalised as shares. He worked to build up the company's business. He guaranteed its bank account and mortgaged his house in support …

The difficulty for Mr O'Neill is that Mr Phillips did not remove him from participation in the management of the business. After the meeting on 4 November 1991 he remained a director and continued to earn his salary as manager of the business in Germany. The Court of Appeal held that he had been constructively removed by the behaviour of Mr Phillips in the matter of equality of profits and shareholdings. So the question then becomes whether Mr Phillips acted unfairly in respect of these matters.

To take the shareholdings first, the Court of Appeal said that Mr O'Neill had a legitimate expectation of being allotted more shares when the targets were met. No doubt he did have such an expectation before 4 November and no doubt it was legitimate, or reasonable, in the sense that it reasonably appeared likely to happen. Mr Phillips had agreed in principle, subject to the execution of a suitable document. But this is where I think that the Court of Appeal may have been misled by the expression 'legitimate expectation'. The real question is whether in fairness or equity Mr O'Neill had a right to the shares. On this point, one runs up against what seems to me the insuperable obstacle of the judge's finding that Mr Phillips never agreed to give them. He made no promise on the point. From which it seems to me to follow that there is no basis, consistent with established principles of equity, for a court to hold that Mr Phillips was behaving unfairly in withdrawing from the negotiation. This would not be restraining the exercise of legal rights. It would be imposing upon Mr Phillips an obligation to which he never agreed. Where, as here, parties enter into negotiations with a view to **(p. 705)** a transfer of shares on professional advice and subject to a condition that they are not to be bound until a formal document has been executed, I do not think it is possible to say that an obligation has arisen in fairness or equity at an earlier stage.

The same reasoning applies to the sharing of profits. The judge found as a fact that Mr Phillips made no unconditional promise about the sharing of profits. He had said informally that he would share the profits equally while Mr O'Neill managed the company and he himself did not have to be involved in day-to-day business. He deliberately retained control of the company and with it, as the judge said, the right to redraw Mr O'Neill's responsibilities. This he did without objection in August 1991. The consequence was that he came back to running the business and Mr O'Neill was no longer managing director. He had made no promise to share the profits equally in such circumstances and it was therefore not inequitable or unfair for him to refuse to carry on doing so …

No-fault divorce?

Mr Hollington, who appeared for Mr O'Neill, said that it did not matter whether Mr Phillips had done anything unfair. The fact was that trust and confidence between the parties had broken down. In those circumstances it was obvious that there ought to be a parting of the ways and the unfairness lay in Mr Phillips, who accepted this to be the case, not being willing to allow Mr O'Neill to recover his stake in the company. Even if Mr Phillips was not at fault in causing the breakdown, it would be unfair to leave Mr O'Neill locked into the

company as a minority shareholder.

Mr Hollington's submission comes to saying that, in a 'quasi-partnership' company, one partner ought to be entitled at will to require the other partner or partners to buy his shares at a fair value. …

I do not think that there is any support in the authorities for such a stark right of unilateral withdrawal. …

The Law Commission Report on Shareholder Remedies to which I have already referred considered whether to recommend the introduction of a statutory remedy 'in situations where there is no fault' (paragraph 3.65) so that members of a quasi-partnership could exit at will. They said, at p. 39, para. 3.66:

> 'In our view there are strong economic arguments against allowing shareholders to exit at will. Also, as a matter of principle, such a right would fundamentally contravene the sanctity of the contract binding the members and the company which we considered should guide our approach to shareholder remedies.'

The Law Commission plainly did not consider that section 459 already provided a right to exit at will and I do not think so either. …

The offer to buy

Mr Ralls, who appeared for Mr Phillips, submitted that even if his conduct had been unfairly prejudicial, the petition should have been dismissed because he had made an offer to buy the shares at a fair price, which was the whole of the relief to which Mr. O'Neill would have been entitled. In view of the conclusion I have reached about the absence of unfair prejudice, with which I understand your Lordships to agree, this point does not need to be decided. Nevertheless, the effect of an offer to buy the shares as an answer to a petition under section 459 is a matter of such great practical importance that I would invite your Lordships to consider it. …

The Law Commission Report on Shareholder Remedies, at pp. 30–37, paras. 3.26–56 has recommended that in a private company limited by shares in which substantially all the members are directors, there should be a statutory presumption that the removal of a shareholder as a director, or from substantially all his functions as a director, is unfairly prejudicial conduct. … [T]he unfairness does not lie in the exclusion alone but in exclusion without a reasonable offer. If the respondent to a petition has plainly made a reasonable offer, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out. It is therefore very important that participants in such companies should be able to know what counts as a reasonable offer.

(p. 706) In the first place, the offer must be to purchase the shares at a fair value. This will ordinarily be a [pro rata] value … without a discount for its being a minority holding. [Although sometimes it will be fair to apply a discounted value.]

Secondly, the value, if not agreed, should be determined by a competent expert. …

Thirdly, the offer should be to have the value determined by the expert as an expert. I do not think that the offer should provide for the full machinery of arbitration or the half-way house of an expert who gives reasons. …

Fourthly, the offer should, as in this case, provide for equality of arms between the parties. Both should have the same right of access to information about the company which bears upon the value of the shares and both should have the right to make submissions to the expert, though the form (written or oral) which these submissions may take should be left to the discretion of the expert himself.

Fifthly, there is the question of costs. In the present case, when the offer was made after nearly three years of litigation, it could not serve as an independent ground for dismissing the petition, on the assumption that it was otherwise well founded, without an offer of costs. But this does not mean that payment of costs need

always be offered. If there is a breakdown in relations between the parties, the majority shareholder should be given a reasonable opportunity to make an offer (which may include time to explore the question of how to raise finance) before he becomes obliged to pay costs. …

LORDS JAUNCEY OF TULLICHETTLE, CLYDE, HUTTON and HOBHOUSE OF WOODBOROUGH concurred.

➤ Notes

1. *O'Neill v Phillips* **[13.30]** is the first (and, to date, the only) House of Lords or Supreme Court case on the 'unfair prejudice' provisions (rather than the earlier CA 1948 s 210 'oppression' provisions). The case has generated a good deal of debate as to whether Lord Hoffmann (both in this case and in his earlier judgment in *Re Saul D Harrison & Sons plc* **[13.29]**) has given a restrictive interpretation to s 459 (and in particular to the concept of 'legitimate expectations'), so that the remedy is likely to be less readily available (as the Law Commissions seem to think), or whether the law remains substantially unchanged (as the CLR believes).

2. In *Re Coroin Ltd* [2012] EWHC 2343 (Ch), David Richards J refused to recognise legitimate expectations where the founding members were:

> a group of highly sophisticated and experienced business people and investors with a view to the purchase of a well-known group of hotels for a price running into many hundreds of millions of pounds and to retaining and managing some of those hotels. There was little prior relationship between many of the investors and some were unknown to each other until a few days before the company was formed. More importantly, articles of association and a shareholders' agreement were negotiated and drafted, containing lengthy and complex provisions governing their relations with each other and with the company. I find it hard to imagine a case where it would be more inappropriate to overlay on those arrangements equitable considerations of the sort discussed by Lord Wilberforce and Lord Hoffmann.

3. In relation to pre-trial offers to buy, in *Harborne Road Nominees Ltd v John Greenway Karvaski* [2011] EWHC 2214 (Ch), the court held that the rules in *O'Neill v Phillips*did not apply in the case of equal shareholders. In such cases, the question was whether the shareholder had been offered a sale on terms that gave him all the advantages he could reasonably expect to achieve from issuing an unfair prejudice petition: only then would it be an abuse to continue those proceedings in the face of such an offer.

(p. 707) Valuing shares in buy-out orders

Relevance of parties' conduct to the valuation of shares.

[13.31] Bird Precision Bellows Ltd [1984] Ch 419 (Nourse J), affd [1986] Ch 658 (Court of Appeal)

The only issue before the court was the issue of valuing shares when (in this case pursuant to an order made by consent) the petitioner's shares were to be purchased by the majority under CA 1980 s 75 [now CA 2006 s 994]. Nourse J, at first instance, held that the conduct of the parties could be relevant in determining whether the shares of the respective parties in the company were to be valued pro rata or whether the minority's interest should be discounted.

> NOURSE J: Broadly speaking, shares in a small private company are acquired either by allotment on its incorporation or by transfer or devolution at some later date. In the first category it is a matter of common occurrence for a company to be incorporated in order to acquire an existing business or to start a new one, and in either event for it to be a vehicle for the conduct of a business carried on by two or more shareholders

which they could, had they wished, have carried on in partnership together. Although it has been pointed out … that the description may be confusing, it is often convenient and it is certainly usual to describe that kind of company as a quasi-partnership. In the second category, irrespective of the nature of the company, it is a matter of common occurrence for a shareholder to acquire shares from another at a price which is discounted because they represent a minority holding. It seems to me that some general observations can usefully be made in regard to each of these examples …

I would expect that in a majority of cases where purchase orders are made under s 75 in relation to quasi-partnerships the vendor is unwilling in the sense that the sale has been forced upon him. Usually he will be a minority shareholder whose interests have been unfairly prejudiced by the manner in which the affairs of the company have been conducted by the majority. On the assumption that the unfair prejudice has made it no longer tolerable for him to retain his interest in the company, a sale of his shares will invariably be his only practical way out short of a winding up. In that kind of case it seems to me that it would not merely not be fair, but most unfair, that he should be bought out on the fictional basis applicable to a free election to sell his shares in accordance with the company's articles of association, or indeed on any other basis which involved a discounted price. In my judgment the correct course would be to fix the price pro rata according to the value of the shares as a whole and without any discount, as being the only fair method of compensating an unwilling vendor of the equivalent of a partnership share. Equally, if the order provided … for the purchase of the shares of the delinquent majority, it would not merely not be fair, but most unfair, that they should receive a price which involved an element of premium.

Of the other, I would expect more rare, cases in which the court might make a purchase order in relation to a quasi-partnership, the arguments of Mr Jacob require me to mention one. Suppose the case of a minority shareholder whose interests had been unfairly prejudiced by the conduct of the majority, but who had nevertheless so acted as to deserve his exclusion from the company. It is difficult to see how such a case could arise in practice, because one would expect acts and deserts of that kind to be inconsistent with the existence of the supposed conduct of the majority. Be that as it may the consideration of that possibility has been forced upon me by the agreement for the price to be determined by the court without any admission of unfairly prejudicial conduct on the part of the respondents. As will appear, Mr Jacob submitted that the petitioners did act in such a way as to deserve their exclusion from the company. He further submitted that it would therefore be fair for them to be bought out on the basis which would have been applicable if they had made a free election to sell their shares pursuant to the articles, ie at a discount. Assuming, at present, that the **(p. 708)** respondents can establish the necessary factual basis, I think that Mr Jacob's further submission is correct. A shareholder who deserves his exclusion has, if you like, made a constructive election to sever his connection with the company and thus to sell his shares.

On appeal, the Court of Appeal declined to interfere with the judge's approach, which was a matter for his discretion.

➢ Note

In *Re OC (Transport) Services Ltd* [1984] BCLC 251, Mervyn Davies J held that it was proper to backdate a valuation to the commencement of the 'unfairly prejudicial' conduct, so that the value of the shares would not be affected by the changes which that conduct had brought about. In this, he was following the approach of the House of Lords under the old s 210 in the *Scottish Co-operative* case **[13.24]**. Citing the position in *Re OC (Transport) Services Ltd*, Proudman J in *Re Phoenix Contracts (Leicester) Ltd* [2010] EWHC 2375 (Ch) was of the view that it would be required 'to specify an early valuation date where it was simply unclear whether the respondent's conduct after the date of unfairly prejudicial conduct caused the diminution in the value of the shares, on the basis that it was unfair for the petitioner to assume the burden of the risk' [150]. The learned judge therefore fixed the date of valuation as the date the petitioner was excluded from the company. Similarly, in *Re Abbington Hotel Ltd* [2012] 1 BCLC 410, David Richards J held that such a date 'meet[s] and provide[s] a remedy for the exclusion of Mr D'Angelo from the company' [140]. Also see *Attwood v*

Maidment [2013] EWCA Civ 119 for discussion of other relevant issues.

Even in quasi-partnerships, purchase at an undiscounted price is not inevitable.

[13.32] Re Phoenix Office Supplies Ltd [2003] 1 BCLC 76 (Court of Appeal)

P appealed against a decision ordering its two remaining directors to purchase the shares of a departing director, L, at their full undiscounted value. L had decided to leave his employment with P for personal reasons but had remained a director whilst seeking to sell his shareholding without a discount to reflect his minority holding. The remaining directors had refused L's request to pay one-third of the company's net asset value for the shares and had further rejected his requests for copies of management accounts. The Court of Appeal, allowing the appeal, held that a director leaving his position of his own volition was not entitled to have his shares bought out at their full undiscounted value: not every quasi-partnership entitles directors to a 'no fault divorce', and L could not 'put' his shares on the company.

AULD LJ: Section 459 has two roles, as explained by Lord Hoffmann in *O'Neill v Phillips* **[13.30]** at pp 1098G–1099A. First, it protects shareholders against the breach of terms on which they have agreed the affairs of the company should be conducted, through the articles of association or, say, some collateral agreement. Secondly, it protects them against some inequity that makes it unfair for those conducting the company's affairs to rely upon their strict legal power, for example, a resolution by majority shareholders to remove a minority director under s 303 of the 1985 Act [see CA 2006 s 168]. As Lord Wilberforce had earlier explained in *Re Westbourne Galleries Ltd* **[16.13]**, the latter protection is the source of the notion of a relationship of quasi-partnership between shareholders …

[He then referred to various authorities, including *O'Neill v Phillips* **[13.30]**, citing some of the passages cited previously on 'legitimate expectations' and whether exclusion might be in breach **(p. 709)** of such expectations. He then continued:] Given the breadth of such propositions, it is important to keep in mind that s 459 is designed for the protection of the members of companies. It is in that capacity that they seek its protection, not as directors or employees, an important reminder where the provision is prayed in aid by a departing member who may also be a director or employee. And, as Lord Hoffmann indicated in *O'Neill v Phillips* at p 614B; 1107B–C, where the member is departing because he has been excluded by other members from his involvement as a director and/or employee, the provision is aimed not at unfairness in such exclusion for its own sake, but at unfairness in his exclusion without a reasonable offer for his shares …

How then is the principle to be applied in a quasi-partnership company where the departing minority shareholder, not the majority shareholders, seeks to put an end to the association for personal reasons and take his investment in it with him, and where, as the judge found, there was no agreement for such a 'no-fault divorce'? I have already indicated the answer in my summary of Lord Hoffmann's propositions, but here is the place to put it in his own words, at pp 611G–612D; 1104D–1105B:

> 'Mr Hollington's submission comes to saying that, in a "quasi-partnership" company, one partner ought to be entitled at will to require the other partner or partners to buy his shares at a fair value. All he need do is to declare that trust and confidence has broken down …
>
> I do not think that there is any support in the authorities for such a stark right of unilateral withdrawal. There are cases, such as *Re a Company No 006834 of 1988* (1989) 5 BCC 218, in which it has been said that if a breakdown in relations has caused the majority to remove a shareholder from participation in the management, it is usually a waste of time to try to investigate who caused the breakdown. Such breakdowns often occur … without either side having done anything seriously wrong or unfair. It is not fair to the excluded member, who will usually have lost his employment, to keep his assets locked in the company. But that does not mean that a member who has not been dismissed or excluded can demand that his shares be purchased simply because he feels that he

> has lost trust and confidence in the others. I rather doubt whether even in partnership law a dissolution would be granted on this ground in a case in which it was still possible under the articles for the business of the partnership to be continued. And as Lord Wilberforce observed in *Re Westbourne Galleries Ltd* … [at] p 380B, one should not press the quasi-partnership analogy too far: "A company, however small, however domestic, is a company not a partnership or even a quasi-partnership …"
>
> The Law Commission, in the report to which I have already referred, *Shareholder Remedies*… considered whether to recommend the introduction of a statutory remedy "in situations where there is no fault", so that members of a quasi-partnership could exit at will. They said, in para 3.66:
>
> > "In our view there are strong economic arguments against allowing shareholders to exit at will. Also, as a matter of principle, such a right would fundamentally contravene the sanctity of the contract binding the members and the company which we considered should guide our approach to shareholder remedies."
>
> The Law Commission plainly did not consider that s 459 already provided a right to exit at will and I do not think so either.'

The [trial] judge … ruled that a consequence of the quasi-partnership here was that Mr Larvin was entitled to the full undiscounted value of his shares. In so ruling, he appears to have proceeded as if it had been Messrs Parish and Ogden who had taken the initiative to sever the association rather than, as was the case, Mr Larvin. True it was that they refused to recognise him as a director or to give him access to certain company information, but that was only after he had made plain that he wanted to sever all relationship with the company and them and to take the value of his shareholding with him. In my judgment, this is not the sort of case that Lord Hoffmann had in mind when formulating his propositions applicable to excluded members. The judge did not expressly **(p. 710)** refer to such propositions, but he appears to have had them in mind in the passages that I have emphasised …

Lord Hoffmann's different treatment of those cases where there is a withdrawal because of a sense of loss of trust and confidence applies *a fortiori* to a shareholder who, even without such a sense, but for other personal reasons, simply wishes to leave and take his investment in the company with him. Where, as here, the company is small and with only a few shareholders each holding a significant proportion of the company's issued capital, a sudden demand from one of them, for essentially personal reasons, to seek to withdraw his investment could be very damaging, even potentially ruinous, to them and the company.

As to the judge's reliance on the 'lock-in' effect of art. 6 of the company's articles of association, I do not consider that the 'absolute discretion' it purported to give to the directors to decline to register any transfer of any share pointed to an intention that if any one of them wanted to move elsewhere, for whatever reason, he could be sure of realising the full value of his shareholding. Such an entitlement could, for the reasons I have just given, be ruinous to the company and its members. The company's directors have a fiduciary duty as such to act in the interests of the company. The power of veto on a transfer, despite its terms, is not absolute. It is subject to the equitable jurisdiction of the court to intervene by winding up the company on the just and equitable ground or to the provisions of s 459 itself. …

As Mr Crawford submitted, not every quasi-partnership company relationship gives rise to an entitlement to a 'no-fault divorce'; there must be something more. …

Accordingly, it does not follow from the fact that the company was a quasi-partnership that Mr Larvin was entitled to insist on leaving with an undiscounted value of his minority shareholding. …

Depending on the issues as they developed between the parties, there might have been a claim for an appropriately discounted value of his holding. Or Mr Larvin could have continued with his substantial

minority holding, with a view eventually to agreeing a price with the others or for its transfer to a third party. Failing such agreement, he might have been able to seek such relief as might then be appropriate under s 459 or for the company to be wound up on the just and equitable ground. But that was not the basis of his petition. …

[He then went on to allow the appeal.]

CLARKE LJ concurred.

JONATHAN PARKER LJ delivered a concurring judgment.

➢ Note

By contrast, in *Strahan v Wilcock* [2006] EWCA Civ 13, [2006] BCC 320, CA, purchase at the undiscounted price was ordered. The company was held to be a quasi-partnership. This despite the facts that S had not participated in the business from the outset, had commenced the relationship as a consultant, had only later become a shareholder and manager, and had held only a minority of the shares. Given the quasi-partnership nature of the relationship at the time the shares were acquired, however, there were equitable considerations which bound W to purchase S's shares on a non-discounted basis once S had been dismissed by the company. S's departure from the company was involuntary. He did not take a unilateral decision to leave and nor was he guilty of misconduct. Fairness demanded that he should be entitled to claim back not simply the cost of acquiring the shares, but their value at the date of the buy-out order.

Indeed, in quasi-partnerships involving two shareholders with 50% shareholding each, the court will be reluctant to apply market discounts to the price at which 50% of the shares are purchased, even where the vendor shareholder has been found to be responsible for the breakdown of the 'partnership': *Re Home & Office Fire Extinguishers Ltd* [2012] EWHC 917 (Ch). To do so, in the learned judge's *dicta* at [77], 'when no loss has been proved, would be in effect to impose a penalty on the selling shareholder, and to give a windfall to the buying shareholder'.

(p. 711) ***Date of valuation.***

[13.33] Profinance Trust SA v Gladstone [2002] 1 WLR 1024 (Court of Appeal)

The facts are immaterial.

ROBERT WALKER LJ for the court (SCHIEMANN and ROBERT WALKER LJ and LLOYD J): In our judgment the deputy judge was right in his view that an order for the equivalent of interest [ie a sum paid in addition to the settled price of the shares to be bought out, where the valuation has been carried out early] is not beyond the powers of the court under section 461(1) of the Companies Act 1985 [re-enacted in CA 2006 s 996]. The court has repeatedly emphasised the width of the discretion conferred by that subsection, which is not limited to the particular powers enumerated in subsection (2). The House of Lords has (in relation to the court's closely comparable powers under section 210 of the Companies Act 1948) approved the making of adjustments in the valuation process which mean that the court is actually valuing shares, not as they are, but as they would have been if events had followed a different course; and that practice is regularly followed by the court in orders under section 461(1). In these circumstances a denial of the court's power to award the equivalent of interest would come close to straining at a gnat.

It is however a power which should be exercised with great caution. Miss Newman [counsel] has rightly drawn attention to the need for lawyers to be able to advise their clients as to the likely range of outcomes of section 459 proceedings, in order to encourage compromise in an area in which litigation can be cripplingly expensive. If a petitioner seeking an order for the purchase of his shares contends (either as his

only claim or in the alternative) that they should be valued at a relatively early date but then augmented by the equivalent of interest, he must put forward that claim clearly and persuade the court by evidence that it is the only way, or the best way, to a fair result. It should not be a last-minute afterthought (as it may have been, to some extent, in *In re Bird Precision Bellows Ltd* **[13.31]** and*Elliott v Planet Organic Ltd* [2000] BCC 610). Unless a petitioner is asking for no more than simple interest at a normal rate he should also put before the court evidence on which the court can decide what amount (if any) to allow. The exercise which the deputy judge undertook, as described in the last paragraph of his judgment, does not appear to have had a solid evidential basis. …

[And on the more general issue of valuation of shares, he continued:] The starting point should in our view be the general proposition stated by Nourse J in *In re London School of Electronics Ltd* [1986] Ch 211, 224: 'Prima facie an interest in a going concern ought to be valued at the date on which it is ordered to be purchased.' That is, as Nourse J said, subject to the overriding requirement that the valuation should be fair on the facts of the particular case.

The general trend of authority over the last 15 years appears to us to support that as the starting point, while recognising that there are many cases in which fairness (to one side or the other) requires the court to take another date. It would be wrong to try to enumerate all those cases but some of them can be illustrated by the authorities already referred to:

(i) Where a company has been deprived of its business, an early valuation date (and compensating adjustments) may be required in fairness to the claimant: see*Scottish Co-operative Wholesale Society Ltd v Meyer* **[13.24]**.

(ii) Where a company has been reconstructed or its business has changed significantly, so that it has a new economic identity, an early valuation date may be required in fairness to one or both parties: see *In re OC (Transport) Services Ltd* [1984] BCLC 251, and to a lesser degree *In re London School of Electronics Ltd*[1986] Ch 211. But an improper alteration in the issued share capital, unaccompanied by any change in the business, will not necessarily have that outcome: see *In re DR Chemicals Ltd* (1988) 5 BCC 39.

(p. 712) (iii) Where a minority shareholder has a petition on foot and there is a general fall in the market, the court may in fairness to the claimant have the shares valued at an early date, especially if it strongly disapproves of the majority shareholder's prejudicial conduct: see *In re Cumana Ltd* [1986] BCLC 430.

(iv) But a claimant is not entitled to what the deputy judge called a one-way bet, and the court will not direct an early valuation date simply to give the claimant the most advantageous exit from the company, especially where severe prejudice has not been made out: see *In re Elgindata Ltd* [1991] BCLC 959 **[13.27]**.

(v) All these points may be heavily influenced by the parties' conduct in making and accepting or rejecting offers either before or during the course of the proceedings: see *In re A Company (No 00709 of 1992)* [1999] 1 WLR 1092.

In our judgment the fairest course in this case would be to take the agreed value as at the time of the first instance hearing, that is £215,000. We allow this appeal and substitute an order that Mr Gladstone should purchase Profinance's 40% holding in the company for £86,000.

Unfair prejudice and other remedies

Before leaving this discussion of CA 2006 s 994, it is worth noting that this avenue for complaint by members might fruitfully be used to remedy a wide variety of wrongs that have been considered elsewhere in this book. Many of the cases traditionally located in some other part of the company law syllabus, such as those relating to the alteration of a company's articles, might well be decided differently today if proceedings were brought under this section. For example, consider the saga which culminated in the case of *Greenhalgh v Arderne Cinemas Ltd* **[4.27]** and **[11.09]**. Mr Greenhalgh might well have claimed (possibly with success) that he had been the victim of unfairly prejudicial conduct. It is also possible that minority shareholders who were in fact successful in some older cases might now choose to seek a remedy under CA 2006 s 994 rather than whatever was then available to

them: for instance, the petitioners in *Loch v John Blackwood Ltd* **[15.12]** might well have preferred a buy-out rather than having the company compulsorily wound up.

On the other hand, where CA 2006 s 994 seems less than satisfactory, members might resort to petitioning the court for a winding-up order on the 'just and equitable' ground: see 'Compulsory winding up on the "just and equitable" ground', pp 795ff. There is also, at least in theory, the possibility of invoking the powers of the Department for Business, Innovation and Skills under CA 1985 Pt XIV (not re-enacted in CA 2006), to have the affairs of the company investigated (see 'Public investigation of companies', pp 730ff). In practice, the Department's powers are most commonly invoked in cases of insolvency, fraudulent trading and financial scandal —that is, in matters of interest to the investing public and to creditors—while minority shareholders who seek aid are sent away empty-handed. Mr Moir (see *Wallersteiner v Moir (No 2)* cited in *Iesini v Westrip Holdings Ltd* **[13.02]**, p 641) is reported to have made 15 unsuccessful requests to the Department (*Economist*, 8 February 1975).

Also note a recent decision by the Court of Appeal, in which it was held that members' rights to bring a petition under s 994 is not inalienable, in that members can agree to resolve such disputes through means of alternative dispute resolution, such as arbitration. No objection can be raised both as a matter of statutory construction, and on the ground of public policy: *Fulham Football Club (1987) v Richards* [2011] EWCA Civ 855, [2012] Ch 333, [2012] 2 WLR 1008, [2012] Bus LR 606, [2012] 1 All ER 414, [2012] 1 All ER (Comm) 1148, [2011] BCC 910, [2012] 1 BCLC 335.

(p. 713) ➢ Questions

1. Reconsider the cases on *directors'* decision-making (see Chapter 7) and assess the extent to which a *company* can complain that its directors have not acted bona fide, or not acted for proper purposes, and so impugn a decision on those grounds without having to prove that a particular *commercial* decision is inappropriate and in itself constitutes maladministration. Do the CA 2006 provisions on directors' duties strengthen the law in this regard?

2. Once you have read this entire chapter, assess the extent to which a *member* can complain about the sorts of directors' activities just described. If action *is* possible, is the remedy one for the company or one for the shareholders personally?

3. Reconsider the cases on *members'* decision-making (eg see 'Members' personal rights', pp 250ff, 'Permitted reductions of capital', pp 513ff and 'Variation of class rights', pp 563ff) and assess the extent to which a *company* can complain that its members have not acted bona fide, or not acted for proper purposes. Can *members* use this as a ground for complaint, in seeking a remedy for the company *or* a remedy for themselves personally?

Further Reading

ARSALIDOU, D, 'Litigation Culture and the New Statutory Derivative Claim' (2009) 30 *Company Lawyer* 205.
Find This Resource

BAXTER, C, 'The True Spirit of *Foss v Harbottle*' (1987) 38 *Northern Ireland Law Quarterly* 6.
Find This Resource

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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,