COMPANY LAW

INTRODUCTION TO COMPANIES

There are two main types of company, a company “limited by guarantee”, and a company “limited by shares”.

Company limited by guarantee

A company limited by guarantee is most usually employed by charitable organisations (such as schools, museums) where there is no profit sharing imperative. A company is “limited by guarantee” if members’ liability is limited to such amount as the members undertake to contribute to the company’s assets in the event of its being wound up (s.3(3) CA 2006). Thus, companies limited by guarantee provide a valuable alternative to companies limited by shares, particularly in the case of charities and other not-for-profit organisations. This form of company is also commonly used for property management companies, members’ clubs and trade associations, as well as for mutual assurance companies. The broad application of such corporate structures makes this explanatory text all the more valuable.

Company limited by shares

A company limited by guarantee is unsuitable, however, where the primary object is to carry on business for profit and to divide that profit amongst the members. Thus, a company limited by shares is the primary corporate structure used for businesses operating with a view to a profit intending to divide that profit amongst its shareholders. The fundamental rule that dividends should only be paid out of distributable profits (s.830, CA 2006).

A company is a “limited company” if the liability of its members is limited by its constitution (s.3(1), CA 2006) (“limited company”). A limited company means that the members’ liability to contribute towards the company’s debts is limited to the “nominal” value of the shares for which they have subscribed. Shares must have a fixed nominal value (s.542 CA, 2006). Once the shares have been “paid up” the members/shareholders are under no further liability in the event of liquidation of the company. Thus, a company is “limited by shares” if members’ liability is limited to the amount, if any, unpaid on the shares held by them: (s.3(2), CA 2006).
Share capital is still capable of being increased by ordinary resolution (CA 2006, s.617). Minimum share capital for public companies remains fixed at £50,000 (CA 2006, s.763). No minimum is prescribed for private companies.

**Unlimited Companies**

It is also possible to incorporate an “unlimited” company, but these are rare creatures. In an unlimited company there is no limit, provided by the shares or a guarantee on the liability of its members. Given limited liability is a prime reason for incorporation, so as to protect the decision-making of businessmen and entrepreneurs, it is unsurprising that there are few limited companies.

**Separation of corporate legal personality/limitation of liability of companies**

The fundamental attribute of corporate personality is that the corporation is a legal entity distinct from its members. It is capable of enjoying rights and being subject duties which are not the same as those enjoyed or borne by its members.

A company has an “artificial” personality in the sense. It follows that a company’s members are not liable for its debts. Hence, in the absence of express provision to the contrary, the members will be completely free from any personal liability in respect of the company’s debts. Non-liability applies not only in respect of debts, but in respect of all obligations of the company. However, is separate legal personality of a company does not necessarily protected directors from personal liability to third parties. Thus, although directors are acting on behalf of the company, they may be responsible for acts which have made them personally liable to third parties and outsiders e.g. breach of fiduciary duty. There are exceptions to limited liability. It is a criminal offence to carry on business of the company with intent to defraud creditors of the company or of any other person for any other purpose (s.993 CA 2006). Every person knowingly party to the carrying on of the business in this manner commits a criminal offence. Civil liability is contained in s.213 IA 1986. S.213 requires in addition that the company being in the course of winding up (which the criminal sanctions does not). S.213 is not limited to the liability of directors. Banks and parent companies have, at times, been concerned as to their potential liability under this section by providing finance to striking companies, fearing they may fall foul of these provisions. However, so long as there is no active role in the running of the company with fraudulent intent, no liability will attach. There must be “positive steps in the carrying on of the
company’s business in a fraudulent manner” (Maidstone Building Provisions Limited, Re [1971] 1 WLR 1085; Augustus Barnett & Sons Ltd, Re [1986] BCLC 170 - where an attempt against a parent company under this section also found on the same basis).

The “wrongful-trading” provisions under s.214 IA 1986 also provide an exception to the principle of limited liability. The court can make a declaration, where a company is gone into insolvent liquidation for a “contribution” against a person who, at the same time before the commencement of the winding up, was a director or shadow director of the company. The declaration is not to be made if the court is satisfied that the person concerned to every step with a view to minimising the potential loss to the company’s creditors as, on the assumption that he knew there was no reasonable prospect of avoiding insolvent liquidation, he ought to have taken (s.214(2) IA 1986). In judging what facts the director ought to have known or ascertained, what conclusions the director should have drawn or what steps should have been taken, the director is assumed to be a reasonably diligent person having both the general knowledge, skill and experience to be expected of the person carrying out the director’s functions in relation to the company and the general knowledge, skill and experience that the director in fact has (s.214(4) IA 1986). Section 214 applies to “shadow” directors as well as to directors. This greatly widens the class of persons who may be caught by this section. A shadow director includes a person who influences at least a certain category of board decisions on a continuing basis (Secretary of State for Trade and Industry v Becker (2003) 1 BLCL 565). It sometimes happens that real controllers, or “directing minds” of companies, will often lurk in the shadows of companies directing “nominee” directors in an attempt to conceal their control of a company. This will often be because a director is subject to an order of disqualification from being a director. There are many instances where such directors are described as “puppet-masters”.

Many creditors, particularly banks, in lending to companies will therefore seek to circumvent the absence of responsibility for the debts by members and directors of companies by seeking “personal guarantees” from those running companies secure lending. Moreover, lenders may seek to enhance the party of their claims by taking security against the company’s assets e.g. fixed and floating charges over the company’s assets.

The Company’s Constitution: Articles of Association

Articles of Association regulate the internal allocation of powers between the company directors and shareholders. Articles often deal with the division of powers between shareholders, the Board of
Directors, and the composition, structure and operation of the board of directors. Articles often adopt a “model” articles for private and public companies.

S.33 of the 2006 Act provides that:

“The provisions of the company’s constitution by the company and its members to the same extent as if there were a covenant on the part of the company and of each member to observe it”.

Thus, although the articles have a contractual status, there are more in the nature of a private bargain among the company and its members. The company’s articles become a public document at the moment formation. The articles cannot be later rectified to give effect to what the incorporate is actually intended but failed to embody in the registered document, since the reader of the registered documents that have no way of guessing that any error had been made in transposing the incorporators’ agreement into the document (Scott v Frank F Scott (London) Ltd (1940) Ch 794). For the same reason, a court will not implied terms into the statutory contract comprised in the articles, since such evidence would not be known to third parties who would therefore have no basis for anticipating that any such implication had been made, or as appropriate (Bratton v Seymour Service Ltd v Oxborough [1992] BCLC 693).

Shareholders often, in addition to the articles, bind themselves, in relation to their rights and duties by an extraneous agreement inter se known as a Shareholders’ Agreement. This will often provide for rights of pre-emption between shareholders (ie first refusal on the sale of shares on a given valuation). The main disadvantages of shareholders agreement is that it does not automatically bind new members of the company, as the articles do (s.33(1) CA 2006).

Memorandum

A memorandum is defined as a document stating that the subscribers wish to form a company under the Companies 2006 Act. The subscribers also agree to become members of the company, and in the case of a company that is to have a share capital, to take at least one share each. The memorandum is required to be in the prescribed form and must be authenticated by each subscriber (s.8, CA 2006). A company’s memorandum will essentially be a “snapshot” of part of the company's constitution upon registration. Companies formed under CA 2006 and existing companies will have unrestricted objects unless they specifically restrict them: cl.33.
Private/Public Limited Companies

Most smaller companies are private limited companies. They are millions of private limited companies registered in England and Wales. A “private” company is any company that is not a public company (s.4(1), CA 2006). A private company must not offered to the public any securities (s.755 CA 2006).

A “public” company is a company limited by shares, whose certificate of incorporation states that it is a public company, and in relation to the requirements of the Companies Acts as to registration.

A company purchasing its own shares

The courts have always been astute to guard against companies being used as instruments of illegality, fraud, corporate asset stripping, or to defeat the claims of creditors. This policy lies behind the historic rules against companies using their own capital to purchase their own shares; and also in the rule against gratuitous transfers.

Lord Watson in Trevor v Whitworth (1887) 12 App Cas 409 at 423 said this:

“Paid-up capital may be diminished or lost in the course of the company's trading, that is a result which no legislation can prevent; but the persons who deal with, and give credit to a limited company, naturally rely upon the fact that the company is trading with a certain amount of capital already paid, as well as the responsibility of its members for the capital remaining at call; and they are entitled to assume that no part of the capital which has been paid in to the coffers of the company has been subsequently paid out, except in the legitimate course of its business”

This is the rule in Trevor v Whitworth. It underlines the concern of the law to protect the creditor of a company against the diminution of the company's assets. The case concerned an article in the company’s articles of association, purporting to allow the company to purchase its own shares. The House of Lords in Trevor v Whitworth held that such a purchase offended the principle that no part of the capital of a company may be returned to a member, save by a reduction of capital sanctioned by the court, in order to prevent the dissipation of funds, of which the creditors have a right to be paid. Thus, in the absence of such a power under company legislation, the purchase was ultra vires. This
principle applies even if the company's memorandum of association expressly provides for such a return (Barclays Bank plc v British & Commonwealth Holdings plc [1995] BCC 19 at 22). Harman J concluded in Barclays Bank that:

“All these cases therefore apply the same principle that a transaction which upon examination can be seen to involve a return of capital in whatever form, under whatever label, and whether directly or indirectly, to a member, is void. In none of them was the payment made (using those words deliberately loosely) other than to or for the benefit of a shareholder and the constant use of the word “return” is a clear indication of the constant existence of the member/company relationship underlying the transaction”

And:

“that any agreement which is only likely to be called upon if the company has no distributable profits and which will, if called upon when the company becomes insolvent, have the effect of increasing the liabilities of the company, by substituting, for rights which are rights held by shareholders ranking behind creditors, rights held by a creditor, ranking equally with other creditors, is objectionable by reason of the rule in Trevor v Whitworth”

Kitto J in Davis Investments Pty Ltd v Commissioner of Stamp Duties (1957-8) 100 CLR 392 at 413:

‘The fundamental principle of company law that the whole of the subscribed capital of a company ... unless diminished by expenditure upon the company’s objects (or by means sanctioned by the court) shall remain available for the discharge of its liabilities ... Trevor v Whitworth; Re Walter’s Deed of Guarantee”

Today, however, many thousands of reductions of capital take place every year. The procedures, as outlined in the Companies Act 1985, ss.135-138, are convoluted and expensive: every reduction requires the passing of a special resolution, implementation of transparency measures and finally the obtaining of the sanction of the court. However, for private companies, they are permitted, by virtue of ss.642-644 CA 2006, to reduce capital on the back of a “declaration of solvency”. Prior authorisation in the articles is no longer a necessity (s.690, CA 2006). the removal of the need for prior authorisation in the articles (s.690).
Thus, the law has moved well away from some regarded as the “restrictive attitudes” exemplified in *Trevor v Whitworth*. The current position is that companies can purchase their own shares provided they comply with the statutory safeguards imposed by the Companies Act 2006. Thus, the brutal truth is that many of the share capital maintenance rules no longer offer any real protection to creditors of limited companies.

**Gratuitous dispositions by companies**

No company may make truly gratuitous dispositions of its assets. This principle can be seen operating by analogy with the rule prohibiting the return of capital to a member: both are designed to ensure the assets of a company are maintained for the creditors. In *Barclays Bank plc v British & Commonwealth Holdings plc* [1995] BCC 19 Harman J, held:-

“as it seems to me it must equally be unlawful to make an agreement expressed to impose a liability to make a gratuitous payment, that is not one for the advancement of a company's business nor made out of distributable profits, at a future date when in the event the company has no distributable profits”

Such an agreement would be unenforceable by being beyond the capacity of the company (although Harman J does not rely on the *ultra vires* principle, that is implicit from the above). That this is the basis of his reasoning is apparent from the authorities he cites. Returning to Harman J cites the following;

“A company can only lawfully deal with its assets in furtherance of its objects. The corporators may take assets out of the company by way of dividends, or with leave of the court, by way of reduction of capital or in a winding up. They may, of course, acquire them for full consideration. They cannot take assets out of the company by way of voluntary disposition, however described, and if they attempt to do so the disposition is *ultra vires* the company” (Pennycuick J, in *Ridge Securities Ltd v IRC* [1964] 1 WLR 479 at 495)

“In its broadest terms the principle is that a company cannot give away its assets. So stated, it is subject to the qualification that in the realm of theory a memorandum of association may authorise a company to give away all its assets to whomsoever it pleases, including the shareholders” (Nourse J, in *Brady v Brady* (1987) 3 BCC 535 at 550).

This is subject to the caveat that provided the granting of a guarantee could be construed as being “within the constitution” of a given company, it cannot be a gratuitous disposition by being *ultra vires*
The underlying “mischief” that the courts are astute to guard against in relation to gratuitous payments is that creditors may stand to be prejudiced if corporate assets are given away. The courts are be astute to intervene indirectly on behalf of creditors of companies and to seek to upset such transactions, especially in cases where the company has become insolvent not long after the gifts were made.

LIMITED COMPANIES

Overview

The overwhelming majority of English corporations are now registered limited companies (In March 2012, there were around 2.4 million of these registered in England and Wales: Companies House, Statistical Tables on Companies Registration Activities (2012), Table A1), formed in accordance with the procedures set out in the Companies Act 2006 (A registered company must have a memorandum of association (Companies Act 2006, ss 7 and 8); this, along with certain other documents, must be delivered to the Registrar of Companies (s 9), who then registers the documents delivered to him (s 14) and issues a certificate of incorporation (s 15); on the date stated in the certificate, the company is ‘born’ (s 16)) or previous companies legislation (Companies Act 2006, s 1(1)(b)), and subject to the provisions of the 2006 Act. Most registered companies are companies limited by shares, but there are also a relatively small number of companies limited by guarantee, and an even smaller number of unlimited companies (In March 2012, there were 107,500 registered companies without share capital (0.04% of the total number of registered companies): Companies House, Statistical Tables on Companies Registration Activities (2012), Table A6). Much of the law governing the activities or English registered companies is contained in the Companies Act 2006, which at 1300 sections is the longest statute passed by the UK Parliament to date (It is also the first Companies Act to be accompanied by a comprehensive set of Explanatory Notes: see Companies Act 2006: Explanatory Notes.)

More extensive protection for third parties is given by the Companies Act 2006, section 40(1), the impetus for which was the First Company Law Directive (Directive 2009/101/EC [2009] OJ L258/11 (consolidating amendments to Directive 68/151/EEC [1968] OJ Spec Ed (I) 41, Art 10). The section provides that ‘in favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, shall be deemed to be free of any limitation under
the company’s constitution’. Three aspects of this are worth expanding upon. First, ‘good faith’. Under section 40(2)(b)(i), an outsider is not bound to enquire whether there is any limitation on the powers of the directors to bind the company or authorise others to do so; by section 40(2)(b)(ii), an outsider is presumed to have acted in good faith unless the contrary is proved; and section 40(2)(b)(iii) provides that an outsider shall not be deemed to have acted in bad faith merely because he knows that a transaction is beyond the directors’ powers under the company’s constitution. The cumulative effect is that an outsider is deemed to be in good faith unless it is shown that they were party to an abuse of power by the board in authorising the transaction.

Directors’ duties and disabilities

(i) Appointments, remuneration, and removal of directors

Under the Companies Act 2006, section 154, private companies must have at least one director, and public companies must have at least two. Moreover, at least one director of every company must be a natural person (Companies Act 2006, s 155). The Companies Act 2006 model articles provide that directors may be appointed either by the shareholders in general meeting or by the board (see Companies (Model Articles) Regulations 2008, SI 3229/2008, Sch 1, Art 17; Sch3, Art 20 (cf Companies (Tables A-F) Regulations 1985, SI 1985/805, Table A, Arts 73-80)). Executive directors normally also enter service contracts with their companies, under which they are entitled to be paid for their services.

The Companies Act 2006, section 168, provides that a director may be removed from office before expiry of his term by an ordinary resolution of the members in general meeting, notwithstanding anything in the company’s articles or in an extrinsic contract between the director and the company. If the members invoke section 168 to sack a director with a service contract, however, the company will be liable to pay damages for breach of an implied term of his contract, that the company will do nothing of its own accord to prevent the director from continuing in office (Southern Foundries v Shirlaw [1940] AC701, HL; Shindler v Northern Raincoat Co Ltd [1960] 1 WLR 1038. On the assessment of the damages payable, see Clark v B & T plc [1997] IRLR 348).

DIRECTORS’ DUTIES

Breach of a duty owed by a director to a registered company is a civil wrong committed against the company. In a line of cases commencing with Foss v Harbottle ((1843) 2 Hare 461, 67 ER 89; Mozley v Alston (1847) 1 Ph 790, 41 ER 833; Bailey v Birkenhead, Lancashire, and Cheshire Junction Railway Co
(1850) 12 Beav 433, 50 ER 1127; Anglo-Universal Bank v Baragnon (1881) 45 LT 362; Burland v Earle [1902] AC 83, PC; Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204, CA; Stein v Blake [1998] 1 All ER 724, CA), the English courts held that the company is therefore the proper person to complain of such a breach of duty, even if the breach causes indirect loss to an individual shareholder by causing the value of his shareholding to diminish (Prudential Assurance v Newman Industries (No 2); Johnson v Gore Wood & Co (a firm) [2002] 2 AC I; Gardner v Parker [2004] EWCA Civ 781, [2004] 2 BCLC 554. See C Mitchell, ‘Shareholders’ Claims for Reflective Loss’ (2004) 120 LQR 57).

The control of the company’s name in litigation is generally vested in the board of directors as part of their management powers (Breckland Group Holdings Ltd v London & Suffolk Properties Ltd [1989] BCLC 100). If the nature of the alleged wrongdoing is such that the board is unable to make an independent decision, then the power to commence litigation in the company’s name reverts to the shareholders in general meeting (consistently with the cases on ‘board deadlock’ such as Barron v Potter [1914] 1 Ch 895 and Foster v Foster [1916] Ch 532, and with the result—albeit not the reasoning—in Marshall’s Valve Gear Co Ltd v Manning, Wardle & Co [1909] 1 Ch 267. See also Prudential Assurance Co Ltd v Newman Industries Ltd (No 2) [1982] Ch 204, 221, CA, per curiam; Regenterest plc v Cohen [2001] 2 BCLC 80. The issue is discussed in HC Hirt, ‘The Company’s Decision to Litigate Against its Directors’ [2005] JBL 159), subject to the principle of majority rule.

The only true exception to this principle arose where a shareholder could show that the wrong committed against the company constituted a ‘fraud’, that the wrongdoers controlled the company (a requirement considered in Prudential Assurance Co Ltd v Newman Industries Ltd [1982] Ch 257, CA), and that a majority of the independent shareholders favoured litigation against them (Smith v Croft (No 2) [1988] Ch 114). In practice, one of these were easy to prove, albeit that ‘fraud’ was used in a specialised sense in this context to entail more than the deliberate misappropriation of company property (as in Menier v Hooper’s Telegraph Works (1874) 9 Ch App 350; Cook v Deeks [1916] 1 AC 554, PC), and to include other breaches of duty in circumstances where the wrongdoer received some benefit from the breach (e.g., compare Pavlides v Jensen [1956] Ch 565 with Daniels v Daniels [1978] Ch 406). The effect of the rule was to minimise the number of cases brought by registered companies against their directors for breaches of duty (over the period 1990-2006, there were on average only 1.5 reported cases per year involving derivative actions, all of which involved private companies: J Armour, ‘Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Review’ in J Armour and J Payne (eds), Rationality in Company Law: Essays in Honour of DD Prentice (2009) 71, 83), with the result that the law in relation to directors’ duties was for many years only moved forward in the rather different contexts of petitions by minority shareholders to remedy unfair prejudice (Companies Act 2006, ss 994-996), complaining that their companies have been managed in an

The formidable difficulties formerly placed in the way of minority shareholder litigation by the rule in Foss v Harbottle have been lessened by the new provisions on derivative actions contained in the Companies Act 2006, Part 11 (For background, see Law Commission, Shareholder Remedies (Law Com No 246, 1997); DTI Company Law Review Steering Group, Developing the Framework (2000) 104-109, 123-134; Completing the Structure (2000) 98-101; Company Law Reform, Cm 6456 (2005) 24-24. For detailed analysis of the structure and operation of the new provisions, see Companies Act 2006: Explanatory Notes, 73-77). The new provisions shift responsibility for decision-making on corporate litigation away from the general meeting, and to some extent the board, in favour of the court. The starting point is that a shareholder may now seek permission from the court to pursue a derivative action in respect of a claim arising from any breach of directorial duty (Companies Act 2006, s 260(3). This includes, e.g., claims against third parties for knowing receipt or dishonest assistance in relation to a breach of directorial duty: lesini v Westrip Holdings Ltd [2009] EWHC 2526 (Ch), [2011] 1 BCLC 1 498, at [75]). It is no longer necessary to show that the breach was one that constituted ‘fraud’, or that the perpetrators control the company (see Wishart v Castlecraf Security Ltd [2009] CSIH 65, [2010] SC 16, at [38]).

An application for permission to continue a derivative claim has two stages. At the first stage, the court reviews evidence filed by the shareholder in support of the application. Permission must be refused if the court is satisfied the evidence does not disclose a prima facie case for its grant (Companies Act 2006, s 261). At the second stage, the court will ordinarily review evidence from both the applicant and the company (See Companies Act 2006, s 261(3)). The court must now dismiss the application if the breach has been authorised or ratified by the company (Companies Act 2006, s 263(2)(b), (c). Breaches of directors’ duties may only be ratified by a majority of members excluding votes attached to shares held by the directors in question and persons connected with them: Companies Act 2006, s 239, and in circumstances such that the ratification is not unfair or oppressive to those who oppose it: Northwest Transportation Co Ltd v Beatty (1887) 12 App Cas 589, 594; Franbar Holdings v Patel [2008] EWHC 1534 (Ch), [2009] 1 BCLC 1, at [43]-[45]), or if the court concludes that
A director acting to promote the success of the company would not seek to continue the claim (Companies Act 2006, s 263(2)(a)). Taking into account that the views of such directors might reasonably differ, section 263(2)(a) has been construed narrowly so as to mandate dismissal only if the court concludes that no director seeking to promote the success of the company would seek to continue the claim (Iesini v Westrip Holdings, [2009] EWHC 2526 (Ch), [2009] 1 BCLC 498, at [86]; Stainer v Lee [2010] EWHC 1539 (Ch), [2011] 1 BCLC 537, at [28]).

If there are no grounds for mandatory dismissal, then the court has power to grant permission to continue. In exercising its discretion, the court must take into account the following factors under section 263(3) (Companies Act 2006 s 263(3), (4)): (a) the good faith or otherwise of the shareholder seeking permission; (b) the importance that a director acting to promote the success of the company would attach to the action; (c) the likelihood that the action will be ratified, or, if it has yet to occur, authorised; (d) whether the company has decided not to pursue the claim; and (e) whether the shareholder seeking permission has an alternative remedy available to him in respect of the wrong complained of. The court must also take particular account of any evidence available as to the views of shareholders without an interest in the matter (Companies Act t 2006 s 263(4). ‘An interest in the matter’ means a financial interest in the outcome of the proceedings beyond their interest as shareholders: Iesini v Westrip Holdings, n 214, at [130]). The ‘hypothetical director’ acting to promote the success of the company is deemed to take into account a range of considerations, including (Iesini v Westrip Holdings, n 14, at [85], per Lewison J; Stainer v Lee, n 214, at [27]. See also Franbar Holdings v Patel, n 212, at [36]; Wishart v Castlecroft Securities, [2009] CSIH 65, [2010] SC 16, at [37]):

the size of the claim; the strength of the claim; the cost of the proceedings; the company’s ability to fund the proceedings; the ability of the potential defendants to satisfy a judgment; the impact on the company if it lost the claim and had to pay not only its own costs but the defendant’s as well; any disruption to the company’s activities while the claim is pursued; whether the prosecution of the claim would damage the company in other ways (e.g. by losing the services of a valuable employee or alienating a key supplier or customer) and so on.

Whilst court are well-equipped to assess the likely merits of a claim, the aggregate assessment of this congeries of factors ‘is essentially a commercial decision, which the court is ill-equipped to take, except in a clear case’ (Iesini v Westrip Holdings, n 214, at [85], per Lewison J).

A derivative action is brought for the benefit of the company as a whole. Consequently the court will ordinarily order the company to indemnify a shareholder whose application to continue a derivative
claim is successful against the costs of the derivative proceedings (CPR 19.9E. See also Wallersteiner v Moir (No 2) [1975] QB 373; Jaybird Group Ltd v Greenwood [1986] BCLC 319). This points against granting leave to continue where the applicant has available an alternative remedy in relation to which the company would not be so liable (lesini v Westrip Holdings, n 214, at [124]-[126]).

Fiduciary Duties

At least since the eighteenth century, the directors of chartered and statutory corporations have been understood to occupy a position analogous to that of trustees, as controllers of other people’s property (Charitable Corp v Sutton (1742) 2 Atk 400, 26 ER 642. See too Mayor of Colchester v Lowten (1813) IV & B 226, 35 ER 89; A-G v Wilson (1840) Cr & Ph 1, 41 ER 389; York and North-Midland Railway Co v Hudson (1845) 16 Beav 485, 51 ER 866), and in the nineteenth century the directors of unincorporated joint stock companies were also held liable for ‘breaches of trust’ notwithstanding the fact that the company’s property was formally vested in trustees under a deed of settlement (Benson v Heathorn (1842) 1 Y & CCC 326, 62 ER 909; Grimes v Harrison (1859) 26 Beav 435, 53 ER 966). The Companies Act 2006 makes clear that most of the codified general duties of directors are fiduciary in character (Companies Act 2006, s 178(2); see also Re Coroin Ltd [2012] EWHC 2343 (Ch), at [488]. The exception is the duty of skill and care: see 3.76. On the distinction between fiduciary and other duties, see Bristol and West Building Society v Mothew [1998] Ch 1, 18).

Section 171 of the Companies Act 2006 provides that directors must act in accordance with the company’s constitution, (Rolled Steel Ltd v British Steel Corp [1986] Ch 246, 282-286, 297-298, 303-304; Clark v Cutland [2003] EWCA Civ 810, [2003] 2 BCLC 393, at [21]-[31]; Criterion Properties plc v Stratford UK Properties LLC [2004] UKHL 28, [2004] 1 WLR 1846) and may only exercise powers for the purposes for which they are conferred (Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821, 835-837; Lee Panavision Ltd v Lee Lighting Ltd [1992] BCLC 22). The analogies here are with a trustee’s duty to obey the terms of the trust, and (more loosely) with the equitable doctrine of fraud on a power (see R Nolan ‘Controlling Fiduciary Power’ [2009] CLJ 293, 297-304). An important difference from the latter is that courts will give much more leeway to directors than they will to trustees in determining what sorts of purposes are ‘proper’. The purposes for which duties are conferred will be determined in the first instance by the company’s constitution. Most powers are conferred for the purpose of carrying on the company’s business, but where the company has non-commercial objects, this will constrain the purposes for which they may be exercised. Moreover, the exercise of directors’ powers in a way so as to interfere with decision-making by the general meeting will be improper (see cases cited at n 227).
The centrepiece of the new statutory regime is section 172: directors’ duty to promote the success of the company for the benefit of its members as a whole. This is a subjective duty, in the sense that it imposes an obligation to act in a way that the directors believe, not what the court believes, will promote the company (Re Smith and Fawcett Ltd [1942] Ch 304, 306; Regenterest plc v Cohen [2001] 2 BCLC 80, at [120]-[123]; Re Phoenix Contracts (Leicester) Ltd [2010] EWHC 2375 (Ch), at [103]-[104]). Thus it will be breached by actions that are manifestly contrary to members’ interests – such that no reasonable director could have believed it would benefit members (Hutton v West Cork Ry Co (1883) 23 ChD 654, 671; Extrasure Travel Insurances Ltd v Scattergood 2003] 1 BCLC 598, at [87]-[91], esp at [90]). However, section 172(1) stipulates a non-exhaustive list of factors to which directors must ‘have regard’ in so acting: (a) the likely consequences of any decision in the long term; (b) the interests of the company’s employees; (c) the need to foster the company’s business relationships with suppliers, customers and others; (d) the impact of the company’s operations on the community and the environment; (e) the desirability of the company maintaining a reputation for high standards of business conduct; and (f) the need to act fairly as between members of the company (On the consequences of directors’ failure to consider material factors which might have influenced their decision, see Hunter v Senate Support Services Ltd [2004] EWHC 1085 (Ch), [2005] 1 BCLC 175, at [165]-[179]). Moreover, in coming to decisions about the exercise of their powers, directors must exercise an independent judgment (Companies Act 2006, s 173). The structure of section 172 reflects what the Company Law Review termed an ‘enlightened shareholder value’ approach (see JE Parkinson, Corporate Power and Responsibility (1993); Company Law Review Steering Group, The Strategic Framework (1999) 33-53; Completing the Structure (2000) 33-36; A Keay, ‘Section 172(1) of the Companies Act 2006: An Interpretation and Assessment’ (2007) 28 Co Law 106): the obligation to consider factors other than the immediate benefit of members is purely instrumental to benefitting the members as a whole. This is further reinforced by the fact that only members may appoint and remove directors, and only members may enforce the duty (Nevertheless, the mandatory phrasing of the list may raise the possibility of a procedural challenge to directorial decision-making on the basis that they failed to take into account relevant considerations: see Hunter v Senate Support Services Ltd [2004] EWHC 1085, [2005] 1 BCLC 175, at [165]-[187]). Whilst section 40 will protect counterparties to transactions where directors merely exceed their powers under the constitution, this will not extend to circumstances where the counterparty is aware that the directors are abusing their powers, in the sense of acting in a way other than what they believe so as to promote the success of the company (see companies Act 2006 s40(2)(b); see also International and Agencies Ltd v Marcus [1982] 3 All E 551, 559-560; Rolled Steel Products (Holdings Ltd v British Steel Corp [1986] Ch 246, 295, 304; GHLM Trading Ltd v Maroo [2012] EWHC 61 (Ch), at [171]; Dd Prentice, ‘Group Indebtedness’ in CM
Schmitthoff and F Wooldridge (eds), *Groups of Companies* (1991) 55, 62; see also Nolan, n 228, at 317-320; and 3.58).

Should a company be unable to pay its debts, then the interests of creditors must become paramount in the directors’ concerns (see P Davies, ‘Directors’ Creditor-Regarding Duties in Respect of Trading Decisions Taken in the Vicinity of Insolvency’ (2006) 7 EBOR 301). On the one hand, directors face potential liability for wrongful trading at any point after they knew or ought to have known that the company had no reasonable prospect of avoiding insolvent liquidation, unless from that point onward they took every reasonable step with a view to minimising the potential losses to creditors (Insolvency Act 1986 s 214). On the other hand, when a company is in financial difficulties such that its creditors are at risk ([Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch), [2006] FSR 17, at [1304]), the ‘success of the company’ which the directors are bound to promote by section 172 becomes the interests of its creditors ([Companies Act 2007, s 172(3), Kinsela v Russell Kinsela Pty Ltd (1986) 4 NSWLR 722, 730; West Mercia Safetywear Ltd v Dodd (1989) 4 BCC 30, 33; Official Receiver v Stern (No 2) [2001] EWCA Civ 1787, [2002] 1 BCLC 119, at [32]). The relevant interests are those of the creditors as a class; actions taken which promote the interests of a single creditor inconsistently with the interests of the class will constitute a breach of duty just as would those treating shareholders unfairly inter se in a solvent company ([West Mercia Safetywear Ltd v Dodd (1989) 4 BCC 30; GHLM Trading Ltd v Maroo [2012] EWHC 61 (Ch), [2012] 2 BCLC 369, at [168]. See Also Companies Act 2006, s 172(1)(f)).

As fiduciaries, the directors of a registered company must avoid situations in which there is a reasonable possibility of conflict between their personal interest, or their duty to another person, and the interests of the company ([Companies Act 2006, s 175(1), (4)(a), (7). See also Bhullar v Bhullar [2003] EWCA Civ 424, [2003] 2 BCLC 241, at [27]-[30]). This rule, which applies in particular to the exploitation of any property, information or opportunity (see e.g. Cook v Deeks [1916] 1 AC 554, PC; Regal (Hastings) Ltd v Gulliver, n 239; IDC v Cooley [1972] 2 All ER 162; Queensland Mines Ltd v Hudson (1978) 2 ALJR 399, PC), is strictly enforced against directors, even if they have acted in good faith and their actions have enured to the benefit of the company (as in e.g. Regal (Hastings) Ltd v Gulliver, n 239; Bhullar v Bhullar, n 257; Re Allied Business and Financial Consultants Ltd [2009] EWCA Civ 751, [2009] 2 BCLC 666; and Premier Waste Management Ltd v Towers [2011] EWCA Civ 923, [2012] 1 BCLC 67). However, it is open to directors to avoid potential liability by seeking authorisation from the other directors (discounting the votes of those interested) or the general meeting ([Companies Act 2006, ss 174(4)(b), 175(5), 175(6), 180(4)(a); Regal (Hastings) Ltd v Gulliver, n 239, at 150). In giving such authorisation, the company can be understood as making a determination that there is no actual conflict between its interests and those of the director (see J Armour and MDC Conaglen, ‘Directorial...
Disclosure’ (2005) 64 CLJ 48). The purpose of the rule is thus prophylactic (See Lindsley v Woodfull [2004] EWCA Civ 165, [2004] EWCA Civ 720, [2004] 2 BCLC 131, at [30]) to encourage directors both to avoid putting their own interests ahead of those of the company, and to refer situations in which there is any doubt to the company for resolution (see Law commission, Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties, LCCP 153 (1998) paras 3.47-350).

Two special cases of conflict of interest are treated separately from the general obligation in section 175. The first is a prohibition in section 176 on the receipt by directors of any benefits from third parties (i.e., not mediated through the company) that are linked to his role as director (Although this section, unlike s 175, does not make provision for authorisation by the board, s 180(4) permits authorisation by the company where this would have been permissible under general equitable principles (on which, see Regal (Hastings) Ltd v Gulliver, [1967] 2 AC 134, 147, HL, at 150), or where the articles so provide (see Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch), [2006] FSR 17, at [1318]). Moreover, payments from third parties could be structured, with the company’s approval, as payments via the company to the director) and which might reasonably be regarded as giving rise to a conflict of interest (see companies Act 2006, s 176(4)). The second relates to contracts or transactions with the company, in which a director has a direct or indirect personal interest. For such transactions, the general duty to avoid conflicts of interest does not apply (Companies Act 2006, s 175(3)); instead section 177 imposes a duty on the director to disclose the nature and extent of his interest to the board before they consider whether or not to enter into the transaction (Companies Act 2006, s 177. Section 182 imposes an equivalent duty to disclose directors’ interests in transactions that have already occurred). The board should then take this information into account in deciding whether, and on what terms, to enter the transaction. This also marks a change from the old law. Prior to the 2006 Act, so-called ‘self-dealing’ transactions would have fallen within the scope of directors’ general duty to avoid potential conflicts of interest, and so interested directors would have needed to obtain the company’s authorisation to (their interest in) the transaction to avoid its being liable to be set aside (Aberdeen Railway Co v Blaikie Bros (1854) 1 Macq 461; Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549, CA. The better view was that this was part of the more general duty to avoid conflicts of interest, as opposed simply to a disability; Gwembe Valley Development Co Ltd v Koshy (No 3) [2003] EWCA Civ 1048, [2004] 1 BCLC 131, at [104]-[108], cf Movitex Ltd v Bulfield [1988] BCLC 104, 119-121). Of course, in entering into transactions on the company’s behalf, directors remain subject to their general duty to promote the success of the company (Companies Act 2006, s 172. See 3.72). Moreover, they have no actual authority to act inconsistently with these interests. Consequently ‘self-dealing’ transactions are still liable to be set aside on the demonstration of an actual conflict of interest, because the counterparty – the director or their associate – will have
knowledge of the circumstances under which the transaction was effected (Re Capitol Films Ltd [2010] EWHC 2240 (Ch), [2011] 2 BCLC 359, at [53]-[55]. See also Neptune (Vehicle Washing Equipment) Ltd v Fitzgerald (No 2) [1995] BCC 1000, 1017).

The duty of skill and care

Directors also owe their companies a statutory duty to exercise reasonable care, skill and diligence in the performance of the functions entrusted to them in relation to the company (Companies Act 2006, s 174; see also Insolvency Act 1986, s 214(5)). This duty has its origins in analogous duties imposed simultaneously in tort and in equity (Daniels v Anderson (1995) 16 ACSR 607, NSWCA. See also Henderson v Merrett Syndicates Ltd [1995] AC 145, 205, HL).

Remedies

The importance of the origins of directors’ duties is most pronounced as regards remedies: the Companies Act 2006 provides that the general statutory duties shall have the same remedial consequences as the corresponding common law rule or equitable principle. Thus the company will ordinarily be able to obtain an account of profits made by a director breaching the duty to avoid conflicts of interest (This is a personal remedy (see Ultraframe (UK) Ltd v Fielding [2005] EWHC 1638 (Ch), [2006] FSR 17, at [1511]-[1517]; Sinclair Investments (UK) Ltd v Versailles Trade Finance [2011] EWCA Civ 347, [2011] 2 BCLC 501). However, the company will be entitled to a proprietary claim to the traceable proceeds of property taken from the company). Although the pre-existing law is modified in relation to corporate transactions in which a director is personally interested, it seems clear that the statutory intention is for remedies that would have applied in relation to such transactions where they gave rise to a potential conflict of interest to apply mutatis mutandis to transactions where a director has failed to make a timely disclosure of his interest. Thus the company will be entitled to rescind such a transaction and an account of profits from the director (provided the company has not affirmed the transaction after discovering the director’s breach of duty, and that the rights of third parties have not supervened: Lagunas Nitrate Co v Lagunas Syndicate [1899] 2 Ch 392, CA; Transvaal Lands Co v New Belgium (Transvaal) Land & Development Co [1914] 2 Ch 488, CA. See also R Nolan, ‘Directors’ Self-Interested Dealings: Liabilities and Remedies’ (1999) 3 CFILR 235), moreover, it should in principal be entitled to claim equitable compensation in the alternative (Gwembe Valley Development Co Ltd v Koshy (No 3) [2003] EWCA Civ 1048, [2004] 1 BCLC 131, at [142]-[147; see also MDJ Conaglen ‘Equitable Compensation for Breach of Fiduciary Dealing Rules’ (200) 119 LQR 246; Sinclair Investments v Versailles Trade Finance, m 262).
THE RELATIONSHIP BETWEEN MEMBERS OF A COMPANY & MINORITY SHAREHOLDER INTERESTS

The relationship between the members of a registered company, their right to a say in the formulation of company policy, and their right to a financial return on their investment in the company, are all usually governed by the company’s constitution. Under the Companies Act 2006, section 33, the provisions of the constitution take effect as a contract between the members and the company, and between the members and each other (Hickman v Kent or Romney Marsh Sheepbreeders Association [1915] 1 Ch 881; Rayfield v Hands [1960] 1 Ch 1). Under section 21, however, the articles can be unilaterally altered by the company if 75 per cent of the voting members agree to this, and such a ‘special majority’ of the voting members therefore have the means at their disposal to improve their own position within the company at the expense of the minority. To protect minority shareholders in this situation, the English courts have developed a rule that the majority may only vote to alter the articles if they genuinely believe this to be in the best interests of the company as a whole (Allen v Gold Reefs of West Africa Ltd [1900] 1 Ch 656, 671; Shuttleworth v Cox Bros & Co (Maidenhead) Ltd [1927] 2 KB 9, CA; Peter’s American Delicacy Co v Heath (1939) 71 CLR 457; Greenhalgh v Arderne Cinemas Ltd [1951] Ch 286, CA; Rights and Issues Investment Trust Ltd v Stylo Shoes Ltd [1965] 1 Ch 250. See also Redwood Master Fund Ltd v TD Bank Europe Ltd [2002] EWHC 2703 (Ch), [2006] 1 BCLC 149, at [99]-[106]). Whilst the subjective nature of this test means that it will restrain only the most egregious of abuses, it is open to minority shareholders to bargain for greater protection at the point in time at which they invest in a company. This can be reflected in the constitution through class rights (see Companies Act 2006, ss 629-640), quorum restrictions (see Union Music Ltd v Watson [2003] 1 BCLC 453), or different voting rights (see Bushell v Faith [1970] AC 1099), so as to limit the ability of the majority to alter the constitution to the detriment of the minority. Greater limitations on the majority’s power, in the absence of such express provisions, may be apt to confer an unbargained-for veto power on the minority (It is therefore doubtful whether the Australian case of Gambotto v WCP Ltd (1995) 127 ALR 417, HCA, in which a more interventionist approach was adopted, should be followed: see Citco Banking Corporation NV v Pusser’s Ltd [2007] 2 BCLC 483, at [19]-[20]).

The Companies Act 2006, section 994, also gives minority shareholders the right to petition the court in the event that the affairs of the company are being managed in a fashion which is ‘unfairly prejudicial’ to their interests, and to ask for an injunction or a buy-out order under section 996. This remedy, first introduced in 1980 (Companies Act 1980, s 75), is couched in terms of protecting the ‘interests’ of the members, envisaged as a broader concept than members’ ‘rights’ (Board of Trade, Report of the Company Law committee (the Jenkins Report) Cmnd 1749 (1962), at paras 203-204; see also D Prentice, ‘Theory of the Firm: Minority Shareholder Oppression: Sections 459-461 of the
Companies Act 1985’ (1988) 8 OJLS 55). The provision has been interpreted as imposing an equitable gloss on the corporate contract as expressed in the company’s constitution, akin to the operation of the doctrine of promissory estoppel (O’Neill v Phillips [1999] 2 All ER 961, 966-970, [1999] 2 BCLC 1, 7-11. This interpretation draws on earlier case law applying the Insolvency Act 1986, s 122(1)(g), which provides for the winding-up of a company where the court concludes it is ‘just and equitable’ to do so: Ebrahimi v Wetbourne Galleries Ltd [1973] AC 360). What is ‘unfair’ is to be understood by reference to the content of the formal and informal agreements between all the members upon which detrimental reliance was made, as by making an investment. Four notable consequences flow from this. First, relief may be granted where a majority shareholder exercises control rights consistently with the formal constitution of the company, but in breach of an informal understanding amongst the shareholders: the conduct is not unlawful, but is nevertheless unfair (Re Saul D Harrison & Sons plc [1994] BCC 475, 489-491, 499-500. Compare Re Elgindata Ltd, n 277, at 993-994 (simple mismanagement does not constitute unfair prejudice) with Re Macro (Ipswich) Ltd [1994] 2 BCLC 354, 393-395, 404-407 (misappropriation of assets); Bhullar v Bhullar, [2003] EWCA Civ 424, [2003] 2 BCLC 241 (misappropriation of corporate assets by respondent shareholder); Re Tobian Properties Ltd [2012] EWCA Civ 998 (excessive remuneration of director).

The extent of the members’ liability for the company’s debts

The Insolvency Act 1986, section 74(2)(d), provides that when a company limited by shares is wound up, no member is liable to make a larger contribution to its assets than the amount (if anything) which remains unpaid on his shares.

Minority shareholders

The position of a minority shareholder who seeks to complain as to the course or conduct of a Company’s affairs is, in principle, a weak one for three main reasons. First, the Company’s various legal claims and rights are vested in, and are thus are generally enforceable by, it and therefore in principle not in or by its shareholders. Second, it is the board of directors (themselves electable or removable by a majority shareholder vote) who control the conduct of the Company including decisions to launch or proceed with litigation. Third, while the Company, and the board, are subject to the Company’s Articles (and to some extent to shareholder resolutions) amendment of the Articles (and other shareholder resolutions) are not within the control of the minority. These principles also give rise to the "reflexive loss" limitation preventing a shareholder from bringing claims for loss in the form of devaluation of their shareholding resulting from a wrong done to the Company where the company
has some right of action of its own in relation to that wrong. From early times, these consequences, and the resultant potential for a "tyranny of the majority", have been recognised by the courts as flowing from the concept of the company as an independent legal entity, owning its own property, managed by its board, and (to an extent) overseen by a body of shareholders acting on the basis of an agreement between them contained in the Articles as to the taking of the body's decisions but in default of "one share, one vote". However, recognition of the difficulties and potential oppression to which all this can give rise (for example by enabling the majority to prevent claims being pursued against a fraudulent or negligent director or to require the Company to act in manner biased to their own benefit), has led to a number of mechanisms: commercial, judge-developed, and statutory; by which the minority shareholder may seek recourse contrary to the wishes of the majority. This Article seeks to give an overview of the most important mechanisms various of which may be explored in detail in sub-Articles. It should be noted that common-law rights can have particular importance in relation to foreign registered companies who will not be subject to the same statutory regime as those registered in England and Wales.

The seminal decision in *Foss v Harbottle 67 E.R. 189* confirmed the general rule that, as all shareholders were taken to have agreed to their rights being regulated by the Articles, and as the Articles placed the Company's management in the board and provided for the general majority of shareholders to bind "even a reluctant minority", in principle a minority shareholder could neither in their own name, nor compel the Company to, bring a claim of misconduct even against allegedly fraudulent directors. However, a series of judicial decisions, statutes and legal drafting of corporate articles and contractual agreements, have sought to mitigate this consequence and afford protection for the minority.

The main rights of the minority shareholder can be categorised in various different ways, although all tend to involve the law (common-law or statute) recognising that the minority shareholder has some form of legitimate expectation (which may be derived from a personal agreement, the Articles or statute) that the affairs of the Company will be conducted in (or not in) particular manners (including to benefit all shareholders). However, this may well have to be balanced against the interests of the majority, in whom control of the Company has effectively been vested, and to which control the minority shareholder will have, in principle through having acquired shares governed by the Articles (and by right of a sufficient majority to change the Articles), agreed.

Particular mechanisms which have been developed by which a minority shareholder may have or make rights and claims are:
a. A shareholder agreement granting contractual rights against the other shareholders and/or the Company.

b. An action to enforce the existing Articles of the Company against the directors and/or other shareholders.

c. An action to enforce statutory provisions against the Company or the directors and/or other shareholders.

d. An action to seek to invalidate alterations or implementations/enforcement of the Articles on the basis that they are a “fraud on the minority” or similar abuse.

e. A derivative action by which the shareholder brings a claim in the name in the Company against others.

f. A petition under Pt 30 of the Companies Act 2006 by which the minority shareholder complains against others that the affairs of the company are or have been or will be conducted in a manner which is unfairly prejudicial to their interests.

g. A petition under s.122 of the Insolvency Act 1986 in particular on ground (f) being that it is just and equitable that the Company should be wound-up.

There various mechanisms are considered in more detail individually below.

Routes to minority shareholders obtaining remedies: The mechanism of a shareholders’ agreement is designed to give the minority shareholder direct obligations owed in the law of contract by the majority shareholders as to the conduct of the affairs of the Company; for example, as to its business being conducted properly, as to levels of external borrowing, declarations of dividend, and nomination of directors by each shareholder. A breach of obligation may result in damages, but, perhaps more importantly, in the obtaining of an injunction or specific performance to compel the majority shareholder to vote their shares to pass resolutions in accordance, and so as to compel the Company to act in accordance, with the agreement (although a breach can also assist in justifying statutory remedies as set out below). Often the Company is made a party to the agreement, although it is unclear to what extent the agreement can be enforced directly
against the Company which in any event cannot be required to act contrary to either statute or the provisions of its Articles.

The Articles may themselves confer rights and protections upon the minority shareholders, and applications can be made by the shareholders to enforce them against other shareholders (for example, in the context of pre-emption rights where majority shareholders may have to offer their shares to the minority before selling or transferring their shares) or the directors (for example, where the Articles place a specific duty upon the directors) or both (for example in relation to the conduct of shareholder and/or board meetings). However, a sufficient majority (usually 75%) of the shareholders can seek to negate these protections by changing the Articles (although arguments exist as to the extent to which they can do so with retrospective effect) and then issues arise as to whether there is a limit as to their right to do so or as to whether their doing so is itself "unfair prejudice" for the purposes of Pt 30 of the Companies Act 2006.

The minority may also seek to enforce various shareholder rights which are conferred upon them by statute expressly (for example to have a meeting called under s.303 of the Companies Act 2006). What is less clear is the extent to which the minority can bring claims simply with regard to preventing (or even undoing) contraventions of statute where no right is expressly conferred upon a shareholder to bring a claim, as it can be said that these are matters for the Company itself acting by its board or in general meeting. In many instances, it is likely that the minority would have a recourse by using one of the statutory mechanisms set out below.

The majority may, of course, use their voting power to seek to change and/or use the articles, or to use statutory provisions, against the minority (including in extreme cases to enable an expropriation of the minority's shares from them). Prior to the development of the statutory unfair prejudice remedy, the courts imposed limitations on the extent to which this can be done, using the old equity concept of “fraud on a power" to develop a principle that both the majority voting power to change the articles and the articles themselves could not be used so as to commit "a fraud on the minority" and that powers conferred by articles or statute had to be used for a proper purpose. In particular, powers can only be used "in good faith" and "for a proper purpose" and not so as to involve "oppression", although all these terms are vague. Eclairs Group Ltd v JKX Oil & Gas Plc
[2013] EWHC 2631 (Ch); [2014] Bus. L.R. 18 is a recent example of a majority being unable to use a statutory power to the intent of frustrating a minority.

However, the courts recognise that the minority has impliedly accepted the existence of the majority's powers (including that the majority could change the articles), and all the more so when the articles were in the relevant form (which might have included provisions which the majority is now seeking to enforce) when the minority acquired their shares. Thus in Charterhouse Capital Ltd, Re [2015] EWCA Civ 536 the Court of Appeal, while still recognising that there is some implied limitation upon the majority, summarised the general position as being that the exercise of the power is valid (i) if this is done in good faith for what a reasonable person might or could (not "would") consider to be in the interests of the company even if it prejudices the minority and (ii) even if not done in the interests of the company (but rather to benefit the majority) as long as it is not does not amount to oppression of the minority or is otherwise unjust or is fraudulent or with an improper motive, and subject to it being within the scope of the power.

The doctrine is thus limited, and an unfair prejudice petition tends to be a more obvious mechanism for the minority shareholder to adopt.

One particular mechanism previously open to the majority, that of passing a company resolution to ratify misconduct of a director, has been somewhat restricted by s.239 of the Companies Act 2006 which prevents the votes of directors and persons connected to them being counted in relation to such a resolution; nevertheless such a resolution may still be passed contrary to the wishes of a minority but who may then seek to bring an unfair prejudice petition.

The minority may consider that the Company has a claim against particular targets (for example, defaulting directors or even majority shareholders) which the Company, under the control of its board and thus the directors (and the majority), is failing to pursue (but has not ratified - but see above regarding s.239 of the Companies Act 2006). In order to enable the minority to protect the Company's position from those who controlled it, case-law gave a right to the minority under what was known as "the rule in Foss v Harbottle" to bring a "derivative action" in and using the name of the Company in certain circumstances (being in general that there was a prima facie case of some equitable wrong, including but not limited to fraud, having been done to the company and that the
wrongdoers were in control of it, although subject to judicial discretions). This judge-made rule has now been generally superseded by a statutory right for the minority to bring, or to continue (if the company or another member has brought a claim originally), a "derivative action" in the name of the company under Ch.1 of Pt 11 of the Companies Act 2006, by a procedure now governed by Civil Procedure Rules rr.19.9, 19.9A and 19.9E, and CPR Practice Direction 19C. This provides for there to be a discretion in the Court (which will be considered at an early stage) to allow the minority to continue the claim, and also to the have the Company fund the legal costs, even, potentially, in the face of opposition from the majority or neutrals (although their attitude and reasoning may very well influence the Court).

However, while relevant factors are set out in s.263 of the Companies Act 2006 (including in particular the views of independent members), the circumstances necessary for the discretion to be exercised has been described as "exceptional" in some of the relatively few modern cases, and it is unclear as to when it will be exercised. The strength of the claim and the resultant view of a hypothetical independent director together with the fact that the claimant was both acting in good faith and funding the litigation tipped the scales in Cullen Investments Ltd v Brown [2015] EWHC 473 (Ch). In the analogous (and thus only persuasive) case of Abouraya v Sigmund [2014] EWHC 277 (Ch), it was held that (i) there must be (a) actual financial loss to the claimant shareholder, and (b) either fraud or ultra vires or benefit to the alleged wrongdoer from the wrong and (ii) the claimant must not have an ulterior purpose or have been involved in the alleged wrongdoing and (iii) a key question is what a reasonable board of directors could consider to be appropriate for the company to do in all the circumstances (and which involves the court forming some view of the strength of what must be at least a prima facie case - Bhullar v Bhullar [2015] EWHC 1943 (Ch)). As a consequence, the minority may prefer to bring an unfair prejudice petition where one of the potential remedies, if unfair prejudice (which might include an apparent proper claim not being pursued) is proven, is permission for the minority to bring a derivative claim. The derivative action does have the advantage that the court has a further power to order the company either at the trial or even on a full or limited pre-emptive basis at an earlier time to indemnify the minority shareholder against costs they incur or are ultimately ordered to pay but the court will exercise considerable care in granting such very advantageous relief - see Bhullar (above) for a statement of the modern principles. However, this new statutory derivative action provision does not seem to permit the bringing of a "multiple derivative action" i.e. where minority shareholders in a
holding company wish to take proceedings in the name of its subsidiary, but it has been held recently, albeit only at first instance, in Fort Gilkicker Ltd, Re [2013] EWHC 348 (Ch); (2013) 163 N.L.J. 268 and also in Abouraya (above) and, without adverse argument, in Bhullar (above) that the common-law procedure is still available in such circumstances. In Novatrust Ltd v Kea Investments Ltd [2014] EWHC 4061 (Ch) it was held that while those decisions supported the High Court still having common-law jurisdiction to consider derivative claims in relation to foreign companies, such could only be pursued if any requirements of foreign company law (e.g. foreign court sanction) were satisfied.

The mechanism most often used by the dissatisfied minority is that of an unfair prejudice petition under Pt 30 of the Companies Act. This requires:

- the petitioner to be (or be entitled to be) a member of the Company (and which may cause difficulties if there is a trust/nominee relationship or even an expropriation of shares);
- the affairs of the Company (which is construed very widely) to have been or to be proposed to be conducted in a particular manner (including by omission);
- such conduct to be prejudicial to the minority's interests (even if also prejudicial to the general body of shareholders) and which may involve interests other than as shareholder (e.g. as to employment, management involvement or benefits expected to be provided to them);
- the prejudice to be "unfair" (and whether or not it is consistent with an express or implied shareholder agreement or understanding will be very relevant) and;
- the court to exercise a discretion to grant a remedy.

Although there are various remedies which the Court can grant, the most usual is to order that, usually the minority but possibly the majority, be "bought-out" at an appropriate valuation of the worth of their shareholding and, possibly, with interest and/or compensation arising from the unfair prejudice which has occurred. In the seminal decision of O'Neill v Phillips [1999] 1 W.L.R. 1092, the House of Lords laid down as a general principle that Pt 30 does not give a simple right to a dissatisfied minority to force the majority to compulsorily acquire their shareholding, but rather there must be true "unfair prejudice" at least in the form of some "legitimate expectation" of the minority (including to have the company conducted in accordance with statute and its articles) having been denied to it, and there are many examples
in the case-law as to what may or may not be sufficient. The majority is not, usually, allowed to use the company's assets to fund their defence of the petition. A particularly important subsidiary question can be whether the Company is a "quasi-partnership" (generally the corporate form of what would otherwise be a business partnership of individuals) in which case:-

- it may be sufficient for "unfair prejudice" that the majority has acted in a way to destroy a relationship of "trust and confidence" with the minority and
- the valuation of the minority's share will generally not to be discounted (as would be likely, although not certain, otherwise to occur) for the limitations attendant upon its being a minority interest. Modern case-law may now suggest that articles can insist upon such a dispute being subject to arbitration.

A final mechanism which can be available to the minority is to petition to wind-up the Company under ss.122(1)(f) and 124 of the Insolvency Act 1986 on the grounds that it is "just and equitable" to do so, which can cover a variety of circumstances but usually requires the "substratum" i.e. the foundation of the Company's reason for existence (and which may be a relationship between its shareholders), to have disappeared or be illegal or to be impossible. Further, the minority will normally have to show that they would expect to receive a share in a surplus (after payment of liabilities) in a liquidation, as otherwise the Court will regard their applying to wind-up as pointless, and the Court will generally not make an order if a satisfactory alternative, for example often a fair buy-out, is made available. However, there are exceptions to this, for example if the Company's business is illegal, or perhaps impossible. Although winding-up is also a possible remedy in an unfair prejudice context, the Insolvency Act route has been held to continue to be available as a separate remedy although the court may be concerned that such a petition is being used as an instrument of oppression.