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An Assessment of the Effectiveness of the Unfair Prejudice Remedy in UK Company Law: How can we Guarantee Appropriate Judicial Discretion?

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ABSTRACT

In the UK, members of a company can petition the court for a remedy in respect of conduct by other members that unfairly prejudices their interests under section 994 of the Companies Act 2006. Indeed, the breadth of interpretive judicial discretion concerning the core wording of s 994 (for example, the reference to 'unfairly prejudicial' and 'interest') determines the extent to which the section can act as a shield for shareholders. Since minority shareholders are vulnerable to oppression by the majority in private companies, the courts tend to show a pro-minority attitude when hearing unfair prejudice cases. Therefore, the s 994 petitions are popular with the minority shareholders. Notably, while the court's open-ended interpretation of s 994 provides a reliable safeguard for the minority shareholders' interests, it may indirectly encourage their opportunistic behaviour of abusing unfair prejudice actions. In practice, the rapidly growing number of s 994 petitions have led to this type of proceeding becoming more burdensome, thereby increasing the financial and time burden on both the petitioner and the court. Moreover, the expansive discretion has resulted in an overlap in jurisdiction between s 994 petitions, which traditionally represent personal relief, and derivative claims, which represent corporate relief. This probably opens the floodgates for minority shareholders to bring malicious claims to interfere with the affairs of the company. In this sense, the unfair prejudice

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remedy regime may run counter to the objectives of 'efficiency' and 'fairness' in the area of shareholder remedies law. Consequently, this article will attempt to explore the promising direction for improving the effectiveness of the s 994 petitions. Taking into account the legislative basis of the section, a guiding framework on the construction of appropriate judicial discretion will be proposed to better balance shareholder protection and corporate autonomy.

Keywords: unfair prejudice; interest; efficiency; fairness; judicial discretion

I. INTRODUCTION

Minority shareholder remedies are one of the hottest topics in UK company law, as a robust minority shareholder protection regime helps to build investors' confidence in their companies and the overall stock market, thus creating investment incentives.[1] In particular, the unfair prejudice remedy regime under section 994 of the Companies Act 2006 (CA 2006)[2] has been subject to considerable academic scrutiny due to its frequent use. In reality, the main target of protection under this legislation is the minority in private companies.[3] At present, the vast majority of companies registered under company law in the UK are private companies (also commonly referred to as small businesses).[4] It can therefore be argued that the unfair prejudice remedy plays an essential role in the area of shareholder remedies law in the UK.

Courts examining s 994 petitions are often mindful of the mixed commercial and personal attributes of private companies. At the inception of a private company, there is generally a tacit arrangement among the members that they will not only enjoy the profits of the company in proportion to their respective shareholdings, but will also manage the company jointly as directors.[5] Nonetheless, disagreements inevitably arise during the company operation, because shareholders usually looking out only for their own interests.[6] In such circumstances, the majority shareholders tend to vote to remove the minority from the board of directors in order

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1 Law Commission, 'Shareholder Remedies Consultation' (1996) *Law Com No 142*, para 1.13 < https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/cp142_Shareholder_Remedies_Consultation.pdf> accessed 1 September 2021.

2 Companies Act 2006, s 994.

3 Law Commission, (n 1) para 14.5.

4 Department for Business, Energy and Industrial Strategy, 'Business population estimates for the UK and regions 2020: statistical release' (8 October 2020) <https://www.gov.uk/government/statistics/business-population-estimates-2020/business-population-estimates-for-the-uk-and-regions-2020-statistical-release-html> accessed 27 August 2021.

5 MA Iqbal, 'The Effectiveness of Shareholder Dispute Resolution in Private Companies under UK Companies Legislation: An Evaluation' (*PhD, Nottingham Trent University* 2008), 32-33.

6 DD Prentice, 'Protecting Minority Shareholders' Interests' in D. Feldman and F. Meisel (eds), Corporate and Commercial Law: Modern Developments (*Informa UK Ltd,* 1996), 80.

to eliminate dissenting voices in the management of the company.[7] Furthermore, due to the illiquidity of the share capital of private companies, the minority shareholders cannot easily exit the company to recover their investment.[8] Understandably, without limiting the absolute control of the company of the majority shareholders, they are very likely to flex their muscles for their self-interests at the expense of the minority.[9] In this regard, the s 994 petition can highlight its value in maintaining the delicate balance between the legitimate business decisions of the majority shareholders and the reasonable interests of the minority shareholders.

Given the sympathy for vulnerable groups, the wording of s. 994, such as the wording of 'unfairly prejudicial', has been designed to be very extensive to provide greater protection for minority shareholders. This has set a foundation for judicial practice in the exercise of the court's broad interpretive discretion.[10] However, unfettered judicial discretion may turn the umbrella of the minority shareholders into a tool that shakes the rightful dominance of the majority shareholders and interferes with corporate autonomy.[11] Such a trend has been confirmed in the case law. Firstly, the court's expansive interpretation of s 994 has encouraged the minority shareholders to submit wide-ranging and complex factual material at the pleading stage,[12] which has increased the time and cost of s 994 proceedings. Secondly, this approach to interpretation has allowed for some extension of the application of s 994 petitions from traditional personal to corporate remedies.[13] That is to say, there has been an overlap of jurisdiction between s 994 claims and derivative claims and hence a potential increased risk of abuse of s 994 petitions. Accordingly, the English Law Commission discussed these difficulties in its latest report[14] on shareholder remedies. Nevertheless, some of the relevant recommendations *(*such as the two statutory presumptions) made by the Law Commission were not adopted to improve the efficiency of s 994 proceedings. Nor did these proposals address how to mitigate the problems created by the overlap between s 994 and derivative claims. In this way, unfair prejudice remedies still have a long way to go before they become good laws.

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7 AD Spratlin Jr, 'Modern Remedies for Oppression in the Closely Held Corporation' (1990) 60 *Mississippi Law Journal* 405, 406-408.

8 N Flourentzou, 'Minority Shareholders: Applicability of Unfair Prejudice' (*Shambartas*, 2014) <http://www.mslawyers.eu/images/publication_documents/Minority_Shareholders-_Applicability_of_Unfair_Prejudice.pdf > accessed 2 July 2021.

9 A Hicks and SH Goo, *Cases and Materials on Company Law* (8th edn, Oxford University Press 2008), 425.

10 PI Roberts and J Poole, 'Shareholder Remedies - Efficient Litigation and the Unfair Prejudice Remedy' (1999) 2 *Journal of Business Law* 38, 41-45.

11 J Mukwiri, 'Using s.459 as an Instrument of Oppression?' (2004) 25 Company Lawyer 282, 282-284.

12 Law Commission, (n 1) paras 1-11.

13 Law Commission, (n 1) paras 2.1-2.26.

14 Law Commission, 'Shareholder Remedies Report' (1996) Law Com No 246 <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc246_Shareholder_Remedies.pdf> accessed 15 September 2021.

Obviously, there are two main routes to reform the unfair prejudice remedy regime, namely to amend the language of s 994 or to adjust the judicial discretion regarding s 994. However, the Law Commission persuasively argues against the former, as it would significantly limit the scope of remedies available to the minority.[15] From this logic, this article will focus on constructing a feasible judicial discretion framework to help achieve a balance between the flexibility and certainty of s 994 petitions. Under this framework, an effective unfair prejudice remedy would be the result of efficiency and fairness after considering the interests of all parties. To achieve this research objective, this article will be divided into four main sections. Following the introduction, Section II will describe the theoretical underpinnings and legislative background of the unfair prejudice remedy to explain what role the remedy needs to play in commercial life, or rather, what standards legislators expect a truly effective remedy to meet. Then, Section III will examine in detail the statutory framework of the unfair prejudice remedy system, which will give a clear picture of how much room there is for the courts' interpretive discretion to be exercised. This section will also reflect the fact that the courts' discretion is broad enough to cover most oppression of minority shareholders and to grant them appropriate remedies. Arguably, the s 994 petition is successful in terms of protecting minority shareholders. After that, Section IV will critically analyse the undesirable consequences of overly wide judicial discretion, such as the length of s 994 proceedings and the jurisdictional intersection of s 994 with derivative claims. Finally, Section V will propose an authoritative framework for guaranteeing appropriate discretion to address the above-mentioned currently unresolved difficulties. Basically, two approaches are included within the framework. The first focuses on boosting efficiency - agreeing to the statutory presumption approach proposed by the Law Commission. This article will demonstrate the feasibility of this reform measure, which was once criticised and not approved. The second approach aims to clarify the blurred line in practice between s 994 claims and derivative claims to ensure that s 994 petitions are fair to all parties.

[15] Law Commission, (n 14) para 4.3-4.13.

II. The Legislative Context and Objectives of the Unfair Prejudice Remedy

A. Background: shareholder oppression in private companies

In general, the phenomenon of 'unfair prejudice' is triggered by competing positions between the majority and minority shareholders, and such conflicts are more intense in the context of private companies.

Primarily, economic theory can be used as a starting point for discussing the relationship among members of the company. In business practice, to maximise individual welfare, rational people tend to allocate their limited resources to those who can add greater value to the utility of that resource through the mutually beneficial exchange.[16] Thus, it has been maintained that the company can be understood as being seen as the nexus of a series of contractual relationships.[17] The contracting parties (for example, the shareholders and directors of the company) agree on how to distribute the profits invested in the business in accordance with the contractual arrangements.[18] Nonetheless, the majority rule,[19] the internal governance mechanism of the company, sets the stage for conflicts between the majority shareholders and the minority shareholders. Specifically, as providers of equity capital to the company, shareholders have the right to vote on important corporate matters, such as the appointment and removal of directors[20] and the approval of major corporate transactions.[21] Compared with the minority shareholders, the majority shareholders hold a controlling stake, which means that they can determine the ultimate direction of corporate decisions.[22] As opportunism encourages people to seek as much welfare as possible for themselves in business activities, majority shareholders may abuse their dominant position to 'squeeze out' minority shareholders.[23] This phenomenon is typically described as the 'oppression' of the minority by the majority.[24]

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16 H Atwal, 'Self-Interest, Justice and Reciprocity in Unfair Prejudice' (2004) 2004 UCL Jurisprudence Review 270, 272.

17 CRT O'Kelley, 'Coase, Knight, and the Nexus-of-Contracts Theory of the Firm: A Reflection on Reification, Reality, and the Corporation as Entrepreneur Surrogate' (2011) 35 *Seattle University Law Review* 1247, 1247-1248.

18 J Parkinson, 'Models of the Company and the Employment Relationship' (2003) 41 *British Journal of Industrial Relations* 481, 485.

19 *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] 1 All ER 354 at 357-358.

20 B Hannigan, *Company Law* (5th edn, Oxford University Press 2018), ch 17, 439-440; Companies Act 2006, s 168.

21 ibid s 190.

22 C Fan, *Bringing Controlling Shareholders to Court: Standard-Based Strategies and Controlling Shareholder Opportunism* (Eleven International Publishing 2013), ch 2, 11.

23 ibid ch 1, 1-3.

24 DK Moll, 'Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective' (2000) 53 *Vanderbilt Law Review* 749, 757.

Essentially, the degree of oppression suffered by minority shareholders depends to a large extent on the type of company. In UK, common forms of companies include private companies and public companies. In fact, minority shareholders in private companies may be weaker to oppression than those in public companies. Firstly, a private company is a business organisation where there is "a more intimate and intense relationship exists between capital and labour",[25] which indicates that shareholders probably expect to be substantially involved in the running of the company as directors or employees. In other words, the return on investment that shareholders want in a private company is not limited to money, but also the opportunity to manage the affairs of the company themselves.[26] In contrast, in a public company, the shareholder usually acts only as an independent investor, contributing neither labour nor management responsibilities to the company.[27] Consequently, the expected return on investment of minority shareholders in private companies may be more seriously threatened if the majority shareholders take oppressive actions such as excluding the minority from the company management or giving excessive remuneration to the controlling director.[28] Secondly, in the absence of a readily available stock market like that of public companies, it may be more difficult for dissatisfied minority shareholders in private companies who wish to exit voluntarily, as they are not free to sell their shares to outside investors.[29] In this case, the minority will be 'locked in' the company.[30] Considered the lack of ability of minority shareholders in private companies to effectively rescue their investments, legislators have been exploring a reliable mechanism to protect such shareholders.

B. HISTORY OF DEVELOPMENT: FROM 'OPPRESSION' TO 'UNFAIRLY PREJUDICIAL' – A GRADUALLY EXPANSION OF JUDICIAL DISCRETION

To date, the English Law Commission has had three reform discussions targeting minority shareholder protection measures. Since general guidance standards could not be applied in every case, the courts are considered to be given a sufficiently wide discretion to ensure that the most appropriate relief can be granted to minority shareholders.[31] As a result,

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25 RB Thompson, 'The Shareholder's Cause of Action for Oppression' (1993) 48 *The Business Lawyer* 699, 702.
26 JJ Chapman, 'Corporate Oppression: Structuring Judicial Discretion' (1996) 18 *Advocates' Quarterly* 170, 172.
27 DK Moll, (n 24).
28 P Paterson, 'A Criticism of the Contractual Approach to Unfair Prejudice' (2006) 27 *Company Lawyer* 204, 206-209.
29 B Hannigan, (n 20) ch 19, 503–504.
30 P Paterson, (n 28) 208–209.
31 Cohen Committee, 'Report of the Committee on Company Law Amendment' (1945) Cmd 6659, para 60 <http://reports.mca.gov.in/Reports/17-

the relevant defining term in the minority shareholder relief law evolved from 'oppression' to 'unfairly prejudicial', leaving room for expansive interpretation by the courts in dealing with shareholder disputes.

Initially, minority shareholders faced with oppressive behaviour by the majority shareholder could merely apply to the court in limited circumstances for a just and equitable winding up as a remedy.[32] Nevertheless, the winding-up order was criticised as a radical approach because it would directly end the life of the company and deprive other shareholders of the opportunity to profit.[33] Against this background, in 1945, the Cohen Committee in its report emphasised the introduction of a statutory regime that would give the court the power to impose a just and equitable solution on the parties to a dispute.[34] Therefore, s 210 of the Companies Act 1948 (CA 1948) was introduced to focus this judicial discretion on the term 'oppressive'—if the affairs of the company were oppressive to some of the members, the members were entitled to apply to the court and the court might, at its discretion, grant such remedies as it thinks fit.[35]

Although s 210 of the CA 1948 pioneered the discretionary power given to the courts in reviewing shareholder oppression, the litigation threshold of the provision was considered too stringent to be fully utilised.[36] In 1962, the Jenkins Committee explained that the restrictive interpretation of the word 'oppression' was what made the application of s 210 too narrow.[37] A typical example is *Scottish Co-operative Wholesale Society Ltd v Meyer*, where Lord Simmonds interpreted the word 'oppression' only literally as "burdensome, harsh and wrongful",[38] meaning that unfair conduct that did not rise to the level of actual illegality was not protected by s 210.[39] In this sense, the Jenkins Committee recommended that the language of s 210 be amended to further cover more oppressive conduct.[40] Accordingly, s.75 of the Companies Act 1980[41] (later s 459 of the Companies Act 1985[42]) replaced the term 'oppression'

Justice%20Cohen%20committee%20report%20of%20the%20committee%20on%20company%20law%20amendment,%201943.pdf> accessed 10 September 2021.

32 Insolvency Act 1986, s 122(1)(g).

33 Cohen Committee, (n 31).

34 ibid.

35 Companies Act 1948, s 210(1).

36 Only two examples of successful application: *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324; *Re H.R. Harmer Ltd* [1959] 1 WLR 62.

37 Jenkins Committee, 'Report of the Company Law Committee' (1962) *Cmnd 1749*, para 201 <https://www.takeovers.gov.au/content/Resources/other_resources/downloads/jenkins_committee_v2.pdf> accessed 1 September 2021.

38 *Scottish*, (n 36) at 342.

39 Jenkins Committee, (n 37) paras 203–212.

40 ibid, para 206.

41 Companies Act 1980, s 75.

42 Companies Act 1985, s 459.

with the term 'unfairly prejudicial'. Clearly, 'unfairly prejudicial' is a broader and more general concept than 'oppression', creating favourable conditions for judges to interpret s 459 flexibly to meet the specific circumstances of different cases.[43]

In 1996, however, the open-ended approach to the interpretation of s 459 raised concerns in the Law Commission about the effectiveness of unfair prejudice actions.[44] Significantly, the Law Commission referred to the warning of Hoffmann J in *Re A Company (No 007623 of 1984)* - although giving the courts a wide discretion can safeguard the availability of s 459 petitions, such petitions might in turn become a device of oppressing majority shareholders if the breadth of jurisdiction was not carefully controlled.[45] That is to say, appropriate judicial discretion is likely to be beneficial in preventing the floodgates from opening in the jurisdiction of unfair prejudice remedies. Nonetheless, some of the creative reforms proposed by the Law Commission were set aside by the Company Law Reform Steering Group (CLRSG). This is because the CLRSG preferred to take a conservative approach in the area of company law requiring legal and practical certainty.[46] Hence, the CA 2006 does not make any changes to s 459. However, this does not demonstrate that the theme of reform in the three Law Commission reports - judicial discretion - is no longer worthy of attention. Instead, shaping appropriate interpretive discretion around the legislative objective of unfair prejudice relief may be a useful approach to preserve the effectiveness of the regime.

C. THE 'EFFECTIVENESS' OF THE UNFAIR PREJUDICE REMEDY: TWO GUIDING CRITERIA

The English Law Commission, in its review of the unfair prejudice remedy regime, correctly stated that the law needed to strike a balance between safeguarding the interests of minority shareholders and respecting legitimate business decisions of companies.[47] For one thing, a good remedy can boost the confidence of shareholders, particularly minority shareholders.[48] For another thing, corporate autonomy should not be subject to arbitrary judicial interference, given that experienced directors are in a better position than the courts to exercise

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43 *Re Macro (Ipswich) Ltd* [1994] 2 BCLC 354, at 404.
44 Law Commission (n 1), paras 11.1–11.3.
45 *Re A Company (No 007623 of 1984)* [1986] BCLC 362, at 367.
46 Department of Trade and Industry, Final Report (2001) Vol I, para 7.41 <https://publications.parliament.uk/pa/cm200203/cmselect/cmtrdind/439/439.pdf> accessed 20 September 2021.
47 Law Commission (n 1) para 1.13.
48 ibid.

reasonable judgement on commercial matters in the best interests of the company.[49] To achieve a balance between these two competing objectives, this article agrees with Bahls - a viable unfair prejudice remedy should meet both the 'efficiency' and 'fairness' criteria.[50] Arguably, identifying the guiding criteria will help to examine how to improve the effectiveness of the S 994 petitions.

(i) Efficiency

Indeed, the 'efficiency' of shareholder remedies has been a key concern of the Law Commission.[51] 'Efficiency' generally stresses the need to minimise the overall waste of costs by the most reasonable solution without prejudice to the interests of any party.[52] In this regard, it will be necessary to reduce the administrative and transaction costs associated with the resolution of shareholder disputes.[53] These costs typically include the judicial costs of the courts, the litigation costs of the petitioner and the operating costs of the company.

Firstly, efficient remedies should free the courts from complex fact-finding or onerous assessments when resolving disputes, so that the costs of dispute resolution are commensurate with the benefits.[54] This would not only help to reduce the burden on the judicial system, but would also stop petitioners from struggling through lengthy proceedings. After all, the high cost of justice probably leads to a corresponding increase in the cost of litigation. In this way, minority shareholders who already lack bargaining power are more likely to shy away from litigation.[55] Secondly, from the perspective of the company's interests, unfair prejudice petitions must not be pursued at the expense of the value of the corporate assets.[56] Rather, there is a need to ensure that judicial intervention has minimal impact on the day-to-day operations of the company and that the company is not caught up in litigation that wastes money and time.[57]

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49 ibid, para 14.11.

50 SC Bahls, 'Resolving Shareholder Dissension: Selection of the Appropriate Equitable Remedy' (1990) 15 *Journal of Corporation Law* 285, 318.

51 Law Commission, (n 1) paras 14.11–14.14.

52 SC Bahls, (n 50) 318-319.

53 ibid, 327.

54 HY Chiu, 'Contextualising Shareholders' Disputes - A Way to Reconceptualise Minority Shareholder Remedies' (2006) 5 *Journal of Business Law* 312, 314.

55 SC Bahls, (n 50) 327.

56 A Schultz, 'Finding the Right Remedy in Minority Shareholder Oppression Law: A Transnational Analysis of Solutions in Closely Held Corporations' (2017) 26 *Transnational Law and Contemporary Problems* 499, 505.

57 Law Commission, (n 1) para 14.11.

(ii) Fairness

Another guiding standard to be followed in achieving effective shareholder relief is 'fairness', *i.e.,* protecting the reasonable expectations of all parties.[58] 'Fairness' can inject a degree of flexibility into company law, so that the pursuit of efficiency is not too rigid a rule. In general, the history and structure of a particular company may lead shareholders to reasonably expect certain outcomes in the event of a dispute.[59] This usually involves a proper understanding of the conflicting interests of the majority and minority within a company, particularly in the context of private companies.[60] As mentioned earlier, minority shareholders would reasonably expect that the majority would not hinder their participation in the management of the company. The majority shareholder also would expect that justice would not interfere with the normal business decisions of the company. More critically, assuming that there is a genuine need for the court to intervene in the affairs of the company, such jurisdiction should be exercised with caution so that it is not, in turn, abused by unreasonable minority shareholders.[61] In other words, fair remedies will not threaten normal corporate governance when applied.

III. The Heart of the Unfair Prejudice Remedy: Broad Judicial Discretion

The statutory framework for the unfair prejudice petition in the UK is set out in s 994 and s 996 of the CA 2006. The courts are given wide-ranging discretion to determine what conduct unfairly prejudices the petitioner under s 994[62] and what relief should be granted to the petitioner under s 996.[63] In this sense, it has been suggested that the effectiveness of the unfair prejudice remedy regime depends on the creativity of judges in interpreting and applying s 994 and s 996.[64] Thus, Section 3 of this article will review how the court's interpretive discretion has worked from the perspective of s 994 and s 996 respectively.

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58 DK Moll, 'Shareholder Oppression and the New Louisiana Business Corporation Act' (2015) 60 *Loyola Law Review* 461, 465.

59 *Thomas v H W Thomas Ltd* (1984) 1 NZLR 686.

60 ibid at 694–695.

61 *Re Ring Tower (No 2)* [1989] BCLC 427.

62 Companies Act 2006, s 994.

63 Companies Act 2006, s 996.

64 J Lowry, 'The pursuit of effective minority shareholder protection: s.459 of the Companies Act 1985' (1996) 17 Company Lawyer 67, 67.

A. SECTION 994 of CA 2006: BROAD SCOPE OF APPLICATION

Section 994 of the CA 2006 provides that the grounds for a petition are that "the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members".[65] The scope of application of this provision primarily relates to how the courts interpret the interrelated concepts of 'unfairly prejudicial' and 'interest'.[66] The wording itself seems sufficiently open to leave room for extensive interpretation, but the case law can reflect efforts to balance the discretion of the courts with legal certainty.

(i) Term: Unfairly Prejudicial

To ensure the flexibility of s 994, the CA 2006 does not make a comprehensive definition of 'unfairly prejudicial', but its guiding principles have been developed in the case law.[67] Nevertheless, before discussing how the term has been interpreted, it is necessary to note that the court needs to rely on the standard of objectivity in determining whether the act complained of has been unfairly prejudicial.[68] This standard does not require the petitioner to prove that the respondent had a malicious intent to cause harm.[69] Instead, the court tends to focus on the actual impact of the misconduct on the petitioner.[70] On this basis, the complained conduct must satisfy both the 'unfairness test' and the 'prejudice test'.

In the first place, the 'unfairness test', centres on assessing whether the principles of equality and good faith can be superimposed on the exercise of legal rights.[71] In most situations, the corporate structure consisting of the Companies Act and the articles of association is adequate and exhaustive,[72] and the latter in particular are deemed to be the result of prior bargaining between the parties over the efficient use of resources.[73] Given the importance of commercial practice emphasising compliance with commitments and agreements, equitable considerations cannot often easily override the articles of association or subsidiary agreements between members of a company.[74] As a consequence, a judge typically shapes the concept of

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65 Companies Act 2006, s 994(1).
66 Law Commission, (n 1) para 9.17.
67 Z Fan, 'Unfair prejudice in United Kingdom Company Law' (2021) 9 Asian Journal of Humanities and Social Studies 27, 28.
68 N Flourentzou, (n 8).
69 *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, at 31.
70 DD Prentice, 'The Theory of the Firm: Minority Shareholder Oppression: Sections 459-461 of the Companies Act 1985' (1988) 8 Oxford Journal of Legal Studies 55, 78.
71 JJ Chapman, (n 26) 179.
72 *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492, at 500.
73 BR Cheffins, *Company Law: Theory, Structure and Operation* (Oxford University Press 1997), 274–275.
74 *Re Saul D Harrison,* (n 69) at 18.

'fairness' from a judicial perspective based on the 'reasonable principle' rather than making any order that he considers fair based on his own value judgement.[75]

Notably, *O'Neill v Phillips*, the only case on the unfair prejudice clause currently before the House of Lords, involved a convincing explanation of the 'reasonable principle'.[76] Specifically, Lord Hoffmann has developed a framework for the 'unfairness test': the first step is to determine whether the applicant has breached agreed terms for the conduct of the company's affairs (for example, the articles of association or any collateral agreements between shareholders); if not, the second step is to judge whether the respondent has acted in a manner contrary to the principles of good faith relevant to equity (*i.e.,* equitable considerations may in some circumstances render unfair the exercise of strict legal powers under the company's constitution).[77] Fundamentally, without eliminating contractual arrangements between members, the 'unfairness test' provides opportunities to moderate or limit the exercise of contractual rights when enforcement of those rights would be unconscionable.[78] Accordingly, members are likely to petition against a strict infringement of a legal right or an unfair use of power.[79] This indicates that the concept of 'fairness' under s 994 cuts across the distinction between acts of legality and illegality.[80]

Nonetheless, an issue that must be mentioned is whether the 'clean hands' rule affects the 'unfairness test', *i.e.,* whether the petitioner's own misconduct would prevent the application of established equitable principles.[81] As noted earlier, unfair prejudice is an objective matter of judgment, so in theory the petitioner is not required to come to court with clean hands. However, a court probably denies relief to a petitioner if his conduct was grossly improper[82] or if his conduct was closely related to the respondent's unfair prejudice.[83] Therefore, the 'clean hands' rule is a consideration for the court when examining the concept of 'fairness', which may, to some extent, limit the potential abuse of the term.

In the second place, as reliance on the 'unfairness test' alone may lead to over-protection of minority shareholders by the law, the 'prejudice test', which requires the petitioner to suffer some form of loss before relief can be obtained, provides a reasonable basis for judicial

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75 *O'Neill v Phillips* [1999] 1 WLR 1092, at 1098.
76 ibid.
77 ibid.
78 *Richard Moxon v Litchfield, Cook, Kulesza* [2013] EWHC 3957.
79 FF Ma, 'A Comparative Analysis of Minority Shareholders' Remedies in Anglo-American Law and Chinese Law: Lessons to be Learnt' (*PhD, University of the West of England* 2009), 178.
80 *Re A Company (No. 8699 of 1985)* [1986] BCLC 382 at 387.
81 B Hannigan, (n 20) ch 19, 508.
82 *Interactive Technology Company Limited v Jonathan Ferster and Ors* [2016] EWHC 2896, at 318–325.
83 *Re A Noble & Sons (Clothing) Ltd* [1983] BCLC 273.

intervention.[84] Nevertheless, the notion of 'prejudice' is equally broad, with its division into financial and non-financial prejudice. On the one hand, economic prejudice usually means that the value of a member's shares in a company has been seriously jeopardised by the actions of those who have substantial control over the company.[85] Financial prejudice is also likely to include other financial losses connected with the petitioner's status as a member.[86] For instance, where a member has an equitably recognised right to the management of the company, the exclusion of that member from the corporate management and the resulting loss of income or profits from the company in the form of remuneration would constitute prejudice.[87] On the other hand, if a member's rights are disregarded, the 'prejudice test' may be triggered, even if there are no financial consequences.[88] Taking *Quinlan v Essex Hinge Co Ltd*[89] as an example, the minority shareholder Mr. Quinlan was dismissed as a director by the controlling shareholder Mr. Reid. Then, Mr. Quinlan repeatedly asked Mr. Reid about the reasons for his removal but received no response, which could be understood as non-financial prejudice from Mr. Reid.[90]

(ii) Term: Interest

The 'interest' that s 994 seeks to protect is not every interest of the petitioner, but his interest as a member of the company.[91] Nonetheless, the legislator's use of the word 'interest' rather than 'right' creates scope for members to accommodate a wider range of complaints than those based on strict legal rights.[92] Consequently, simply asking about the identity of the actor is not sufficient to clarify the meaning of 'interest', which needs to be considered in conjunction with the notion of 'fairness'.[93] In an equitable position, individual members' "rights, expectations and obligations inter se which are not necessarily submerged in the company structure[94]". In this way, 'interests' include not only the legal rights of minority shareholders

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84 PMC Koh, 'A Reconsideration of the Shareholder's Remedy for Oppression in Singapore' (2013) 42 *Common Law World Review* 61, 74.

85 *Re A Noble & Sons,* (n 83) at 290-291.

86 V Joffe QC, D Drake, G Richardson, D Lightman QC, and T Collingwood, 'Unfair Prejudice: The Statutory Remedy' in *Minority Shareholders: Law, Practice, and Procedure* (6th edn, Oxford University Press 2018), ch 6, 330.

87 *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch), [630], [2013] 2 BCLC 583.

88 ibid.

89 *Quinlan v Essex Hinge Co Ltd* [1996] 2 BCLC 417.

90 ibid.

91 Law Commission, (n 1) para 9.20.

92 AO Nwafor, 'Unfair Prejudice Remedy: A Relief for the Minority Shareholders - A Comparative Perspective' (2011) 22 *International Company and Commercial Law Review* 285, 289–290.

93 ibid.

94 *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, at 379.

by virtue of the company's constitution or shareholders' agreement, but also their 'legitimate expectations'.[95]

Legitimate expectations commonly "arise out of a fundamental understanding between the shareholders which formed the basis of their association but was not put into contractual form".[96] That is to say, in determining legitimate expectations, the court should concentrate on the relationship between the shareholders and the existence of informal agreements or arrangements outside the constitution.[97] Significantly, legitimate expectations are considered more likely to exist in the 'quasi-partnership', namely family-owned businesses with strong private attributes.[98] In this regard, Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* enumerated three essential features of a 'quasi-partnership' - (1) a personal relationship of mutual trust as the basis of a business association; (2) an agreement, commitment or understanding that members will participate in the management; and (3) a restriction on the transfer of shares to prevent members leaving.[99] These elements correspond to a large extent to the private companies mentioned earlier in Section 2.1. Most private companies are formed in an atmosphere of partnership and trust, so that shareholders develop a reasonable reliance on obtaining a return on their investment and participating in the management of the company, even though these matters may not be spelled out in the articles or other subsidiary agreements. In this sense, s 994 petitions are welcomed by members of such companies, as legitimate expectations probably cover anything beyond the strict language of the contract.[100]

Nevertheless, Lord Hoffmann in *O'Neill* refused to rely on 'legitimate expectations' as a basis for a claim because s 994 does not offer the court the general power to assess the fairness of the conduct by majority shareholders.[101] Considering the risk that the liberal position represented by 'legitimate expectations' would open the floodgates for s 994 petitions,[102] he preferred to use 'equitable considerations' to describe the foundation for judicial intervention against unfairly prejudicial conduct.[103] Technically, building on the *Ebrahimi* rule, the *O'Neill* decision stresses the importance of the traditional equitable principles and contractual doctrine

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95 Law Commission, (n 1) paras 9.17–9.20.
96 *Re Saul D Harrison*, (n 69) at 18–19.
97 DD Prentice, (n 70) 59.
98 *Re A company (No 00477 of 1986)* [1986] BCLC 376, at 378.
99 *Ebrahimi*, (n 72).
100 JJ Chapman, (n 26) 207.
101 D Ohrenstein, 'Minority Shareholders & Unfair Prejudice' (*Radcliffe Chambers*, 2011) <https://radcliffechambers.com/wp-content/uploads/2019/11/Minority_Shareholders_and_Unfair_Prejudice_Lecture-DO.pdf> accessed 28 July 2021.
102 B Clark, 'Unfairly Prejudicial Conduct' (1999) 38 Scots Law Times 321, 323.
103 *O'Neill v Phillips* [1999] 2 BCLC 1, at 11.

to assess whether there has been some infringement of the petitioner's formal or informal rights.[104] Arguably, this restriction of the concept of 'legitimate expectations' expresses concern about the overly broad discretion of the courts and reflects the move towards greater certainty in s 994 petitions.[105]

B. SECTION 996 OF CA 2006: DIVERSIFIED REMEDIES

If the court is satisfied that the unfair prejudice petition presented is well-founded, it may make such order under s 996 of the CA 2006 as it thinks fit to provide relief to the petitioner.[106] In exercising that discretion, the court should consider all relevant factors that may affect the relief.[107] Basically, a remedy must be proportionate to the unfair prejudice found.[108] If the consequences of the unfairly prejudicial conduct are not severe, it is relatively inappropriate to enforce some potentially drastic remedies.[109] Moreover, in considering the interests of litigants, the court cannot turn a blind eye to the interests of stakeholders or the company itself, although the weight to be given to their interests will depend on the circumstances.[110] In VB *Football Assets v Blackpool Football Club (Properties) Ltd*, for instance, the interests of the football club were deemed to be a crucial consideration in the court's decision as to what type of order to make under s 996.[111] In *Re Asia Television Ltd*, in the context of a provision equivalent to s 994, Harris J held that where the nature of the company's activities is public in nature, it is necessary to take into account the interests of the company as a whole, its creditors, its employees and the public in granting relief.[112]

S 996(2) provides a detailed list of the types of remedies available to the court, including buy-out orders, regulation of the affairs of the company, and injunctive relief, etc.[113] Essentially, buy-out orders[114] and authorisation for shareholders to bring derivative actions[115] are two common ways in which courts and shareholders are concerned. In the case of buy-out orders (*i.e.,* requiring the company or respondent to purchase the petitioner's shares), the Law

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104 C Newington-Bridges, 'A Practical Guide to Unfair Prejudice Petitions and their interaction with Derivative Claims' (*St John's Chambers*, 2016) <https://www.stjohnschambers.co.uk/wp-content/uploads/2018/07/Unfair-prejudice-petitions-and-derivative-actions.pdf> accessed 10 July 2021.

105 MA Iqbal, (n 5) 184.

106 Companies Act 2006, s 996(1).

107 *Grace v Biagioli* [2006] 2 BCLC 70, at 73.

108 V Joffe QC, D Drake, G Richardson, D Lightman QC, and T Collingwood, (n 86) ch 7, 422.

109 *Re Phoenix Office Supplies Ltd* [2003] 1 BCLC 76, at 51.

110 V Joffe QC, D Drake, G Richardson, D Lightman QC, and T. Collingwood, (n 86) ch 7, 425.

111 *VB Football Assets v Blackpool Football Club & Ors* [2017] EWHC 2767 (Ch) at 447.

112 *Re ATV Television Ltd* [2015] 1 HKLRD 607, at 55–56.

113 Companies Act 2006, s 996(2).

114 ibid s 996(2)(e).

115 ibid s 996(2)(c).

Commission found it to be the most attractive remedy after a statistical survey of unfair prejudice cases.[116] The advantage of this approach is that it provides a judicially created exit for the shareholder, allowing him to recover the capital he has invested in the business without dissolving the company.[117] From this perspective, a buy-out order is a desirable measure to safeguard the interests of the petitioner, the respondent and the company.

However, the court's power to authorise the petitioner to bring a separate derivative action under s 996(2)(c) is a controversial topic. Shareholders have been subject to the proper plaintiff rule highlighted in *Foss v Harbottle* and therefore cannot allege in their own name that a member has committed a wrong against the company[118], unless they satisfy the requirements of a statutory derivative action under Part 11 of the CA 2006.[119] In theory, the effect of s 996(2)(c) is to enable the petitioner to overcome some of the obstacles inherent in bringing a derivative action.[120] Nevertheless, the petitioner must first incur additional costs and time to prove the existence of unfair prejudice before obtaining the court's authorization.[121] In such circumstances, it is difficult to see why two sets of procedures would be more cost-effective than a court granting relief directly to the company.[122] In addition, unlike most other orders that might be made under s 996, a derivative action authorised under s 996(2)(c) would ultimately benefit the company, not the individual shareholder.[123] Hence, the application of s 996(2)(c) may be limited in practice.

IV. The Existing Dilemma of the Unfair Prejudice Remedy: Confused by the Uncertainty of Judicial Discretion?

The flexibility of unfair prejudice remedies is evidenced by the expansive interpretation of certain terms in s 994 and the wide range of remedies provided by s 996, which are considered to provide adequate protection to minority shareholders.[124] Also, given the potential for cunning and opportunistic use of s 994 by minority shareholders, the court was mindful of the need to adopt a more measured response to interference in the affairs of the company.[125] Nonetheless,

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116 Law Commission, (n 14) para 3.3.
117 *Grace*, (n 107) at 75.
118 *Foss v Harbottle* (1843) 2 Hare 461.
119 Companies Act 2006, part 11.
120 V Joffe QC, D Drake, G Richardson, D Lightman QC, and T Collingwood, (n 86) ch 7, 429.
121 Law Commission, (n 1) paras 10.8-10.9.
122 J Payne, 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 Cambridge Law Journal 647, 653.
123 V Joffe QC, D Drake, G Richardson, D Lightman QC, and T Collingwood, (n 86) ch 7, 430.
124 N Flourentzou, (n 8).
125 J Mukwiri, (n 11) 283–284.

the inherent vagueness of the language of s 994 leaves the courts with uncertainty in the exercise of their judicial discretion. This has led not only to lengthy procedures for s 994 petitions, but also to an overlap between s 994 and Pt 11 jurisdiction of the CA 2006. Section 4 of this article will critically analyse how these two adverse consequences prevent the unfair prejudice remedy system from achieving the goals of 'efficiency' and 'fairness' referred to in the previous Section 2.3.

A. THE BURDENSOME PROCEEDINGS FOR S 994 PETITIONS: A TIME-CONSUMING AND COSTLY PROCESS

Due to the broad scope of s 994, a petitioner may raise any fact relevant to the management of a company's business.[126] This is likely to cause "complex, often historical, factual investigations" and "costly, cumbersome litigation".[127] In short, the time and cost challenges of unfair prejudice proceedings can place additional burdens on courts, litigating shareholders, stakeholders and companies.

Firstly, as Hoffmann J noted in *Re Unisoft Group Ltd (No 3)*, unfair prejudice petitions are 'notorious', particularly for the courts and potential parties to such proceedings, because of the length and unpredictability of the management of these cases, which often incur appalling judicial costs.[128] In practice, if the petitioner proves that the *Ebrahimi* test is satisfied, the likelihood of success will increase.[129] This seems to encourage the parties to provide a detailed account of the history of the company and the understandings and agreements reached between them.[130] However, examining matters that may have occurred many years ago can be problematic for the court, especially in the case of *Re Macro (Ipswich) Ltd* which involved a historical investigation into the affairs of the company spanning approximately 40 years.[131] Furthermore, the large amount of relevant evidence probably has contributed to the vagueness and imprecision of the petition, and some of the matters alleged were not even within the scope of s 994, which largely prolonged the court's consideration of the case.[132] Likewise, litigating shareholders are probably subject to financial pressure. For example, in *Re Elgindata Ltd*, the

126 *Re Sam Weller & Sons Ltd* [1990] Ch 682 (Ch).
127 Law Commission, (n 1) para 14.5.
128 *Re Unisoft Group Limited (No 3)* [1994] 1 BCLC 609, at 611.
129 B Hannigan, (n 20) ch 19, 517–519.
130 Law Commission, (n 1) para 11.10.
131 *Re Macro*, (n 43).
132 *Re Unisoft Group,* (n 128).

hearing lasted 43 days, cost £320,000, and the petitioner's shares were valued at £24,600, down from £40,000 at the time of purchase.[133]

Secondly, it is important to mention that companies and stakeholders are possibly caught up in the onerous proceedings of s 994 petitions. In the case of companies, for one thing, prolonged hearings are likely to distract the company's management and thus adversely affect the company's day-to-day operations.[134] For another, the company's reputation may be corroded as its assets and operations may be frozen or severely restricted during the proceedings.[135] Additionally, the financial hardship caused to the company by a s 994 petition could expose stakeholders to potential losses. For instance, other shareholders who do not file a petition may find that their profits and stock prices fall, or that creditors may find it hard to collect amounts normally due from the company.

B. OVERLAPPING JURISDICTION BETWEEN SECTION 994 AND STATUTORY DERIVATIVE CLAIMS: CORPORATE WRONG

A subject of concentrated academic debate at present is whether an action for unfair prejudice under s 994 should be used to deal with corporate wrongs.[136] Traditionally, corporate claims have fallen within the scope of statutory derivative jurisdiction,[137] whereas s 994 is a personal remedy for individual shareholder claims.[138] Nevertheless, recent case law has revealed a trend where alleged breaches of directors' duties can establish a claim under s 994.[139] This indicates that s 994 petitions may not be limited to claims of a personal nature and thus their jurisdictional scope may have been further expanded. While this expansive approach to interpretation provides greater convenience to minority shareholders from an efficiency perspective, it probably increases the risk that they will abuse s 994 to pursue vexatious claims against the company.[140]

It is necessary to clarify that the remedy of authorising derivative claims under s 996(2)(c), as described in Section 3.2 above, is different from bringing a corporate claim under s 994, as discussed in Section 4.2 of this article. The former is the result of a successful unfair

133 ibid.
134 Z Fan, (n 67) 36.
135 Law Commission, (n 1) para 11.2.
136 PI Roberts and J Poole, (n 10).
137 A Gray, 'The Statutory Derivative Claim: An outmoded superfluousness?' (2012) 33 Company Lawyer 296, 298.
138 J Payne, 'Shareholders' Remedies Reassessed' (2004) 67 Modern Law Review 500, 501–503.
139 For example, *Re Cumuana Ltd* [1986] BCLC 430; *Re McCarthy Surfacing Ltd* [2009] 1 BCLC 622.
140 FF Ma, (n 79) 184.

prejudice action, whereas the latter emphasises that corporate wrong are construed as the cause of such action.

(i) Personal and Corporate Relief: A Progressively Blurred Boundary

In the context of English company law, directors owe a fiduciary duty to the company, so a breach of a director's duties is regarded as a wrong committed against the company rather than the shareholder.[141] If a shareholder wishes to sue a director for wrongdoing, it will need to commence derivative proceedings under Pt 11 of the CA 2006 to exercise the company's rights.[142] In contrast, the core of s 994 lies in the personal rights of shareholders.[143] As highlighted by Millet J in *Re Charnley Davies Ltd (No 2)*, a clear distinction needs to be maintained between corporate remedies, which can be obtained through derivative proceedings, and individual remedies, which can be obtained through unfair prejudice proceedings.[144]

Recently, however, courts have tended to adopt a more liberal interpretation in favour of using s 994 to seek corporate relief. For example, Lord Hoffmann in *Re A Company (No. 005287 of 1985)* considered the situation where a successful unfair prejudice petition denied corporate relief and authorised the plaintiff to commence a derivative action at that stage.[145] He claimed that this could lead to unnecessary duplication of litigation.[146] In particular, in the landmark case of *Clark v Cutland*, the Court of Appeal confirmed that minority shareholders are permitted to use the unfair prejudice clause to obtain substantive relief for corporate wrongs.[147] It is fair to say that this decision blurs the traditional boundary between corporate wrongs remedied by derivative actions and personal wrongs remedied by s 994 actions.[148]

Indeed, the *Cutland* decision is to some extent logical and cost-effective. Firstly, the language of s 994 does not limit its application exclusively to unfair prejudice in the form of infringement of the individual rights of shareholders.[149] As noted earlier in Section 3.1.2, 'interest' under s 994 is a broad and flexible term. The term makes it clear that any wrongful conduct prejudicial to the interests of a member of a company, including a breach of a director's

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141 *Percival v Wright* [1902] 2 Ch 421.
142 Companies Act 2006, (n 120).
143 *Re Saul D Harrison*, (n 69).
144 *Re Charnley Davies (No 2)* [1990] BCLC 760, at 784.
145 *Re A Company (No 005287 of 1985)* [1986] 1 WLR 281.
146 ibid, at 284.
147 *Clark v Cutland* [2003] 4 All ER 733.
148 C Hirt, 'In what Circumstances should Breach of Director's Duties Give Rise to A Remedy under ss 459–461 of the Companies Act 1985?' (2003) 24 Company Lawyer 100, 106-109.
149 DD Prentice, n (70) 66.

duties or other wrongful conduct towards the company, will be governed by s 994.[150] Similarly, there is no a priori reason to exclude company-related relief from unfair prejudice petitions. For instance, although the payment of excessive director's remuneration[151] and the improper transfer of the company's business[152] both involve a breach of a director's duty to the company, case law recognises these acts as unfairly prejudicial. Secondly, since the court can authorise derivative actions under s 996(2)(c), corporate relief is in principle the appropriate outcome of an unfair prejudice petition, even though such a remedy is procedural rather than substantive in form.[153] In this sense, it is demanding to explain why allegations of corporate wrong should be permitted while denying appropriate relief to the corporation.[154] Besides, applying s 994 to corporate wrongs would allow individual shareholders to bypass the procedural requirements of derivative claims and therefore save their time and costs. In summary, there appears to be good reason to support an unfair prejudice action to redress the wrongs done to the company.

(ii) Minority Shareholders versus Companies and Majority Shareholders: A Tilted Balance of Interests

While the flexible *Cutland* approach has widened the scope of shareholder relief, it still leaves substantial uncertainty and ambiguity.[155] In exercising the judicial discretion regarding s 994 petitions, the importance of preserving the proper balance between the interests of minority shareholders and corporate autonomy needs to be borne in mind. Also, an acceptable remedy for unfair prejudice cannot be at the expense of the reasonable interests of the majority shareholder. Nonetheless, the overlap of jurisdiction between s 994 and derivative claims may tip the judicial scales in favour of minority shareholders. This raises alarm as to whether minority shareholders may abuse the sympathies of the court and cause unnecessary problems for the company and the majority shareholders.

In the first place, the procedural limitations of s 994 itself do not offer sufficient protection for companies as compared to derivative actions.[156] In essence, the unfair prejudice remedy regime focuses on resolving disputes between shareholders and does not provide a basis for determining whether it is in the best interests of the company to pursue a claim on its behalf

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150 R Cheung, 'Corporate Wrongs Litigated in the Context of Unfair Prejudice Claims: Reforming the Unfair Prejudice Remedy for the Redress of Corporate Wrongs' (2008) 29 *Company Lawyer* 98, 101–103.
151 *Re Cumana Ltd* [1986] BCLC 430.
152 *Re Stewarts (Brixton) Ltd* [1985] BCLC 4.
153 R Cheung, (n 150).
154 PI Roberts and J Poole, (n 10) 120.
155 FF Ma, (n 79) 189.
156 ibid, 190.

under s 994.[157] Rather, derivative proceedings designed to do justice to companies, as evidenced by its well-designed leave threshold[158] and two-stage procedural threshold[159] to avoid opening the floodgates. Thus, in contrast to derivative actions, s 994 lacks a sophisticated mechanism for conducting or controlling litigation relating to corporate remedies. As an example of the treatment of malicious cases, in derivative claims, the court would exercise strike-out jurisdiction at the leave stage. However, in s 994 petitions, it is unclear whether the court would strike out frivolous claims at an early stage or a full trial, depending on whether the defendant files a motion to strike out.[160] Moreover, s 994 jurisdiction does not require the court to consider factors such as whether the misconduct has been approved[161] or whether an independent body within the company wishes to bar the action.[162] Obviously, the s 994 means of screening out improper conduct is essentially inadequate to protect companies from malicious interference by petitioners.

In the second place, when the petitioner seeks to seek personal relief for corporate wrongs under s 994, the respondent may be at risk of double recovery.[163] In fact, this argument relates to the applicability of the 'no reflective loss' principle to s 994 claims.[164] The principle is based on derivative claims, which preclude shareholders from bringing a personal claim for a reduction in the value of their shareholding as a result of a director's wrongful conduct towards the company.[165] This is because the affected shareholders can recover their losses when the company exercises its right to relief under the *Foss* rule.[166] Hence, the application of the 'no reflective loss' principle helps to avoid shareholders receiving double compensation for wrongdoing directors. Nevertheless, in the context of unfair prejudice, *Atlasview Ltd v Brightview Ltd*[167] set a precedent for the admissibility of personal remedies for corporate wrongs. The High Court in *Atlasview*, after reviewing past jurisprudence, held that there was no valid basis for stating that the 'no reflective loss' argument created a barrier to the relief sought in an unfair prejudice petition.[168] Nonetheless, it is debatable to what extent the fact that

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157 J Payne, (n 122) 660.
158 Companies Act 2006, s 261(1).
159 ibid s 263(2)-(4).
160 J Payne, (n 122) 659.
161 Companies Act 2006, s263(2)(c).
162 ibid, s 263(4).
163 S Perera, 'Reconceptualising Shareholder Remedies to Mitigate the Problems Caused by the Overlap between Section 994 and Part 11 Companies Act 2006' (2019) 8 *UCL Journal of Law and Jurisprudence* 1, 9.
164 FF Ma, (n 79) 189.
165 Prudential, (n 19) at 366–367.
166 ibid.
167 *Atlasview Ltd v. Brightview Ltd* [2004] 2 BCLC 191, at 208.
168 ibid.

the argument was 'not raised in the past' is a compelling reason for a court to refuse to apply the argument to a s 994 action.[169] Furthermore, the *Atlasview* judge relied heavily on pre-*Johnson v Gore Wood* precedents[170] which did not address the issue of reflective loss.[171] Notably, the *Johnson* decision, in which the circumstances of reflective loss were fully considered by the House of Lords, was not paid attention.[172] Accordingly, the line of reasoning of the *Atlasview* court may be less than appropriate. At least, If accepted as authority, the *Atlasview* decision is a troubling sign for the controlling directors, suggesting that a s 994 petition could be a shortcut to double damages for shareholders. In this way, unfair prejudice claims may become a tool for the minority to oppress the majority.

V. Reform of the Unfair Prejudice Remedy: Guaranteeing the Appropriateness of Judicial Discretion

Given the complex interpersonal relationships that exist in private companies, judicial intervention is inevitable and its uncertainty is a fair price to pay for providing flexible remedies to combat the opportunistic behaviour of shareholders.[173] Nonetheless, too much ambiguity would allow the scope of unfair prejudice remedies to be extended so far that it could subsume the whole corporate law.[174] Therefore, the challenge for s 994 petitions is to keep the court's discretion within reasonable limits to balance cost-effectiveness and equity considerations. Based on two guiding criteria mentioned in Section 2 above and the dilemma of s 994 petitions mentioned in Section 4 above, Section 5 of this article aims to aims to propose a framework for judicial discretion in two respects: firstly, by creating a statutory presumption method in relation to the determination of unfair prejudicial conduct, which is conducive to reducing the time and cost of s 994 proceedings; and secondly, by making a conditional distinction between s 994 action and derivative action jurisdiction, which is conducive to striking a balance between the interests of shareholders and those of the company.

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169 J Payne, (n 122) 669.
170 For example, *Re A Company (No 003843 of 1986)* [1986] BCLC 68; Saul D Harrison, (n 69).
171 J Payne, (n 122) 669.
172 ibid.
173 S Miller, 'How should UK and US Minority Shareholder Remedies for Unfairly Prejudicial or Oppressive Conduct be Reformed?' (1999) 36 American Business Law Journal 579, 613.
174 JJ Chapman, (n 26) 171.

A. APPROACHES TO PROMOTING EFFICIENCY: TWO STATUTORY PRESUMPTIONS

To help the courts address the length, complexity and cost problems of unfair prejudice actions, the English Law Commission recommended the adoption of two rebuttable statutory presumptions - treating the exclusion of shareholders from management as unfairly prejudicial and granting specific relief where certain conditions will be met.[175] However, these recommendations were rejected by the CLRSG and are thus not reflected in the CA 2006. Against this background, this article challenges the CLRSG's opposing position and argues that the presumption approach is largely a reasonable measure to inject appropriate certainty into an excessively flexible judicial discretion.

The statutory presumption method is primarily aimed at private companies in which all or almost all members are directors.[176] Particularly, members who hold at least 10% of the voting rights in their own name will be eligible to petition.[177] Since the removal of a shareholder from management and a buy-out order are the most common causes of action for unfair prejudice and the most commonly sought remedy respectively,[178] the proposed approach falls into two main presumptions: firstly, where a shareholder is excluded from the management of a company, for example, if he is removed as a director or otherwise prevented from performing the functions of a director, the act will be presumed to unfair prejudice unless there is evidence to the contrary.[179] Secondly, if the first presumption is not rebutted and the court is satisfied that it is necessary to order the respondent to buy out the petitioner's shares, the shares should be valued pro rata unless the court orders otherwise.[180]

As discussed in Section IV – Subsection A, courts frequently have to consider a large number of factual allegations in unfair prejudice petitions. In such cases, the Law Commission stated that using the statutory presumptions would provide greater certainty to the parties at the time of litigation, thereby allowing the case to be dealt with more quickly.[181] For instance, where circumstances arise in relation to the first presumption, the defendant may rebut it through introducing evidence to which the presumption should not apply, thus limiting the scope of the court's historical inquiry.[182] However, the CLRSG was concerned that the reform

175 Law Commission, (n 14) para 3.30.
176 ibid, para 3.48.
177 ibid, paras 3.45–3.47.
178 ibid, para 3.3.
179 ibid, para 3.56.
180 ibid, para 3.62.
181 ibid, para 3.28.
182 ibid.

measure probably encourages litigation.[183] Under the proposed conditions, as it may be imprudent to directly presume that a decision to remove a shareholder from management is unfair or to treat a buyout order directly as an appropriate remedy, the CLRSG questioned the potential for abuse of the proposed statutory presumptions.[184]

Unfortunately, the CLRSG is likely to exaggerate the shortcomings of the statutory presumption approach. Firstly, the CLRSG may overlook the fact that the greatest strength of the approach is that it is founded on 'structural' factors rather than on vague 'expectations or understandings' between the parties.[185] These 'structural' matters, such as the petitioner's shareholding and the fact that he is a director, can be readily determined by reference to the recent position.[186] Hence, there is an opportunity for the court to be freed from the cumbersome fact-finding process, which probably facilitates the efficiency of the hearing of a s 994 petition. Also, lawyers representing the parties can tell their clients with greater certainty about their prospects of success.[187] As a consequence, Boyle correctly argues that the presumption approach probably provides a more predictable process to increase the cost-effectiveness of the court and the parties.[188] Significantly, the statutory presumptions would prompt more unfair prejudice claims to be settled out of court or before the hearing, without opening the floodgates to such claims.[189] Secondly, the proposed presumptions do not lose flexibility by adding certainty to s 994 petitions.[190] While the presumptions built on 'structural' factors may seem somewhat arbitrary, if a case does not meet the conditions under which the presumptions arise, the application of s 994 is not affected by the absence of the presumptions.[191] Additionally, even if the presumption applied, the court might still find that it was not unfair to exclude the petitioner from management, or allow the respondent to purchase the petitioner's shares at a discount, if the respondent adduced evidence to the contrary.[192] In other words, the statutory presumptions merely provide a potential way to alleviate the difficulties of lengthy and costly s 994 litigation, but the court still has full discretion to determine the existence of unfairly

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183 Department of Trade and Industry, Developing the Framework (2000) *URN 00/656*, para 4.104 <https://webarchive.nationalarchives.gov.uk/ukgwa/+/http://www.berr.gov.uk/whatwedo/businesslaw/co-act-2006/clr-review/page25086.html> accessed 20 September 2021.

184 ibid.

185 Law Commission, (n 14) para 3.37.

186 ibid.

187 R Cheung, 'The Statutory Minority Remedies of Unfair Prejudice and Just and Equitable Winding up: the English Law Commission's Recommendations as Models for Reform in Hong Kong' (2008) 19 International Company and Commercial Law Review 156, 162–163.

188 AJ Boyle, Minority Shareholders' Remedies (Cambridge University Press 2002), 125–126.

189 ibid.

190 FF Ma, (n 79) 205.

191 Law Commission, (n 14) para 3.37.

192 ibid.

prejudicial conduct and to decide what remedy should be granted. Overall, the benefits of the statutory presumptions for the efficiency of unfair prejudice actions probably outweigh its limitations.

B. APPROACHES TO PROMOTING FAIRNESS: A REASONABLE DISTINCTION BETWEEN THE JURISDICTION OF S 994 AND DERIVATIVE ACTIONS

The fundamental contradiction in the overlap of jurisdiction between s 994 of the CA 2006 and derivative actions is that the former does not have the appropriate procedural thresholds and 'no reflection loss' principles to screen out frivolous and worthless shareholder actions that the latter does. If s 994 were to be broadly extended to cover corporate remedies, fair legal mechanisms would need to be put in place to ensure that s 994 is not abused by minority shareholders.[193] Nevertheless, the Law Commission has not fully addressed this issue in its review of shareholder remedies.[194] Therefore, Section 5.2 of this article will attempt to present a legal framework that applies to the overlapping dilemma.

(i) Scenario 1: Using s 994 to Obtain Corporate Relief on A Corporate Claim

The opening statement of Section 5.2.1 is that the *Cutland* approach which allowed the court to automatically order corporate relief after determining the criteria for a petition, should be abandoned.[195] Instead, the court should have absolute discretion to deny substantive relief to the company where it is appropriate to do so.[196] Consequently, it is necessary to place some procedural hurdles or considerations in a s 994 petition so that the court can decide in advance whether to enable shareholders to bring claims on behalf of the company through s 994.

Firstly, the two-step framework summarised by Perera in light of *Charnley Davies*[197] and *Chime Corp*[198] decisions is informative. Lord Millett's comments in *Charnley Davies* is the starting point for the court's jurisdiction to distinguish between unfair prejudice claims and derivative claims.[199] The first step of the framework requires the court to examine all the elements of the claim at the pleading stage.[200] Specifically, the court is tasked with determining whether the content of the unfair prejudice petition is essentially 'misconduct' or

193 R Cheung, (n 150) 103–104.
194 PI Roberts and J Poole, (n 10) 44.
195 S Perera, (n 163) 21.
196 R Cheung, (n 150) 104.
197 *Charnley,* (n 144) at 783.
198 *Chime Corp, Re* [2004] 7 HKCFAR 546, at 62–63.
199 S Perera, (n 163) 21.
200 *Charnley,* (n 144), at 783.

'mismanagement'.[201] Lord Millett explains that the difference between the two lies in the 'nature of the complaint' and the 'appropriate remedy'.[202] In terms of the 'nature of the complaint', 'misconduct' refers only to unlawful conduct, such as breach of directors' duties, whereas 'mismanagement' relates to a broader category of unlawful conduct (*i.e.,* potentially including misconduct 'in part but not in whole').[203] Arguably, if the court is satisfied that the petition presented satisfies the elements of 'misconduct', then the derivative claim must apply.[204] On the contrary, if the petitioner has suffered loss as a result of the directors' mismanagement, then in principle personal, rather than corporate, relief can be sought under an unfair prejudice petition.[205] Although Lord Millett recognises that two separate claims can be created on the same facts, the 'nature of the complaint' and the 'appropriate remedy' are different in the two cases.[206]

Next, the second step can be found in Lord Scott's statement in the Hong Kong case of *Chime Corp*.[207] The legal background of that case is comparable to that of s 994. Basically, Lord Scott endorsed Lord Millett's distinction between 'misconduct' claims and 'mismanagement' claims.[208] More critically, he further adds to the framework of this categorisation by arguing that the court may exercise discretion in dealing with 'mismanagement' claims to allow the petitioner to obtain corporate relief subject to overcoming these two hurdles: firstly, the need to establish the value of directors' liability at the pleading stage.[209] Secondly, the relief ordered needs to be consistent with the remedy available if a derivative claim is established.[210]

While the legal framework consisting of the above two steps has not been formally applied, it can be justified in some cases where relief has been ordered for companies on petitions under s 994.[211] In the context of 'misconduct' claims, *Anderson v Hogg*[212] and *Bhullar v Bhullar*[213] are illustrations where the petitioners both alleged breaches of duty by the controlling directors of the company. Clearly, derivative claims could be applied in both cases.

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201 ibid.
202 ibid.
203 *Chime Corp,* (n 198).
204 *Charnley,* (n 144).
205 ibid, at 783.
206 ibid, at 784.
207 S Perera, (n 163) 22.
208 *Chime Corp,* (n 198).
209 ibid.
210 ibid.
211 B Hannigan, 'Drawing boundaries between derivative claims and unfairly prejudicial petitions' (2009) 6 *Journal of Business Law* 606, 624.
212 *Anderson v Hogg* [2002] BCC 923.
213 *Bhullar v Bhullar* [2003] EWCA Civ 424, 2 BCLC 241.

On the other hand, the case of *Cutland*[214], referred to in Section 4.2, may serve as a typical example of a claim for 'mismanagement'. Where that case triggers the *Chime Corp* criteria, quantifying the damage caused to the company by the wrongful acts of the directors and determining the value of liability could be a complex and time-consuming exercise. Nonetheless, Hannigan reasonably countered this point because in *Cutland*, identifying how much money was flowing into the directors' pockets was an essential part of the court's assessment of the affairs of the company at the pleading stage.[215] Following this logic, the step of quantifying directors' liability would not necessarily add to the workload of the courts. Accordingly, the legal framework set out in *Charnley Davies* and *Chime Corp* would provide a potentially desirable approach of drawing the boundary between s 994 and derivative jurisdiction at a relatively small cost.

Besides, the concept of unfair prejudice could be adjusted to take into account the collective interests of all shareholders when the courts assess whether corporate actions in relation to s 994 should continue.[216] In reality, the textual basis for allowing the expansion of the concept is the broad wording of s 994, especially the wording of 'of its members generally'.[217] It is thus feasible to adjust the scope of the interpretation of unfair prejudice to accommodate the broader collective concept.[218] In this regard, Payne persuasively maintains that the ratification and the views of independent bodies within the company are central tools in class proceedings to protect companies from unnecessary litigation.[219] Although these complex collective concepts conflict with the personal nature of traditional unfair prejudice remedies, they are largely relevant if such remedies are to be used to redress corporate wrongs.[220] In this sense, the concept of unfair prejudice with the inclusion of collective interest considerations may be more conducive to maintaining a balance between the interests of shareholders and the company.

(ii) Scenario 2: Using s 994 to Obtain Personal Relief on A Corporate Claim

As previously analysed in Section 4.2.2, the 'no reflective loss' principle may be set aside by the courts when a shareholder seeks personal relief for corporate wrongs based on an unfair prejudice petition. Nevertheless, Section 5.2.2 of this article argues that the basic position of

214 *Cutland*, (n 147).
215 B Hannigan, (n 211) 625.
216 J Payne, (n 122) 660.
217 ibid.
218 ibid.
219 ibid.
220 ibid.

prohibiting unfair prejudice clauses from being a means for shareholders to recover reflective loss should be firmly established to discourage double recovery by defendants, unless two exceptions are involved. As the 'no reflective loss' principle applies strictly to derivative claims, this section will refer to some extent to the case law relating to such claims.

Notably, before discussing whether shareholders can use s 994 to seek personal remedies for corporate wrongs, it is necessary to distinguish between those for whom the director is liable.[221] In terms of a s 994 petition, firstly, where the director is liable only to the company, the court should either require the company to bring a corporate claim under *Foss* rule[222] or allow the shareholder to assert the company's rights once the thresholds in Pt 11 of the CA 2006 are met, but limit the shareholder's recovery of reflective loss. Secondly, where the director is liable only to the shareholder, it would be reasonable to grant personal relief. Thirdly, the applicability of the 'no reflection loss' argument should be further analysed in situations where directors may be liable to both the company and the shareholders. Understandably, some complex facts probably blur the boundaries of directors' liability between the company and the shareholders. However, if this distinction is ignored, a shareholder's claim for a breach of his personal rights is likely to be interpreted in general terms as falling within the scope of derivative jurisdiction,[223] which may undermine the availability of s 994.

After clarifying to whom the directors are responsible, the court can scrutinise two situations where the 'no reflection loss' doctrine is breached. The first situation is that the directors are liable for the company's loss but the company lacks a cause of action.[224] In this circumstance, the petitioner's actions are unlikely to reduce the value of the company's assets or to harm the interests of other members.[225] The respondent would also not face a dual claim from both the company and the petitioner. Furthermore, it is important to mention that the mere fact that the company decided not to pursue a claim against the directors is not sufficient grounds for recovery by the shareholders.[226] For instance, in *Giles v Rhind*, the company was unable to afford security for costs due to the serious misconduct of the wrongdoer.[227] That is to say, the severity of the directors' wrongdoing towards the company may be an essential factor in determining whether the company has a cause of action.

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221 S Perera, (n 163) 12-13.
222 *Foss*, (n 118).
223 DD Prentice, (n 70) 67.
224 *Johnson v Gore Wood* [2002] 2 AC 1, [2001] 1 All ER 481, at 35.
225 *Lee v Sheard* [1956] 1 QB 195–196.
226 *Gardner v Parker* [2004] EWCA Civ 781, [2005] BCC 46 [49] (Neuberger LJ).
227 *Giles v Rhind* [2002] EWCA Civ 1428.

The second exception to the application of the 'no reflective loss' principle is that a director is liable to both the company and the shareholder, but the petitioner can prove that his loss is 'separate and distinct' from that of the company.[228] In this regard, the controversial issue is whether the diminution in the value of the petitioner's shareholding resulting from a breach of directors' duties is a personal loss independent of the company's loss.[229] Some past precedents suggest that shareholders have a direct interest in the profits of the company, so shares can be regarded as the personal property of shareholders.[230] In this sense, the reduction in the value of the shares amounts to an impairment of the shareholders' property.[231] Nevertheless, Lord Millett correctly points out that personal losses relating to the value of the shares are usually reflected in the losses of the company, which indicates that it is more appropriate to recover the shareholder's losses through corporate relief.[232] In this way, the shareholder's personal loss is possibly not 'separate and distinct' from the company's loss. In contrast, *Prudential Assurance v Newman Industries (No 2)*[233] is a relevant template. In *Prudential*, the directors had called a meeting by fraudulent circular and the shareholders were allowed to recover any losses suffered as a result.[234] Although the directors' fraudulent conduct also caused a loss to the company,[235] the shareholders' loss could be visibly distinguished from the company's loss and therefore the application of the 'no reflection loss' principle could be excluded. Nonetheless, the shareholders and the company can only recover for the losses they have suffered separately. It should be borne in mind that obtaining two recoveries from the defendant is not tolerated by the principles of equity.

VI. Conclusion

Due to the closely-held and owner-managed nature of private companies, minority shareholders typically expect to enjoy the profits and participate in the management of the company, but they may easily be excluded from management by the majority shareholders using their overwhelming voting power. Therefore, how to enhance the minority shareholder protection in private companies has been a common topic in the study of the unfair prejudice remedy regime.

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228 Johnson (n 224) at 35–36.
229 S Perera, (n 163) 14–15.
230 *Bligh v Brent* (1837) 2 Y&C 268, at 408.
231 JLS Lin, 'Barring recovery for diminution in value of shares on the reflective loss principle' (2007) 66 Cambridge Law Journal 537, 542.
232 Johnson (n 224) at 66.
233 Prudential (n 19).
234 ibid.
235 ibid.

Within the framework of the unfair prejudice remedy, the scope of application under s 994 and the scope of the remedy under s 996 is very broad due to the uncertainty and ambiguity of the wording of the statute itself. Thus, judicial discretion will be a significant means of giving specific meaning to the regime in each case.

Notably, excessive court sympathy for minority shareholders probably results in judicial discretion cutting across the reasonable interests of the majority shareholder and the company, which is likely to adversely affect normal corporate governance. The argument advanced here is that a s 994 petition is not intended to simply protect minority shareholders from any unfair and abusive behaviour by the majority shareholder, but rather to maintain the proper balance of interests of the parties in the company. This requires that the relevant judicial discretion be exercised in a manner consistent with the criteria of 'efficiency' and 'fairness' to maximise the effectiveness of the unfair prejudice remedy system. In general, economically efficient shareholder remedies will minimise the cost to the parties (including the court, the petitioner and the company) of engaging in litigation to achieve redress. In addition, under the guiding standard of fairness, the court will need to be careful to determine whether the protection afforded to minority shareholders by a s 994 petition is likely to swallow up the legitimate interests of majority shareholders. In other words, s 994 cannot be deliberately used as a weapon by devious minority shareholders to break the majority rule.

A review of recent case law in this article reveals that the courts have taken a flexible approach to the interpretation of s 994, which has had a positive impact on protecting minority shareholders' confidence in their investments. However, the pro-minority shareholder judicial approach poses other potential difficulties. In the first place, the overly wide scope of unfair prejudice remedies brings with it extensive fact-finding, which increases the length and unpredictability of such cases. In this way, not only the courts and minority shareholders, but also companies and stakeholders may be drawn into such inefficient proceedings, wasting their time and costs. In the second place, the broad interpretation of s 994 goes beyond traditional personal relief, so shareholders have the opportunity to bring s 994 petitions to get around the substantive ('no reflective loss' principle) and procedural (the leave proceeding and the two-stage proceeding) hurdles in derivative actions. As the s 994 actions lack a reliable threshold for screening frivolous claims and a position prohibiting recovery of reflective loss, they are open to abuse. In this sense, both the effective functioning of the company and the dominance of the majority shareholder may be challenged, which is contrary to the objectives that the unfair prejudice remedy is intended to achieve.

As a consequence, the effectiveness of a s 994 petition and the appropriate judicial discretion are closely linked. While the court's interpretative discretion is a source of vitality for the unfair prejudice remedy regime, there is still a need to clarify its uncertainty to some extent to avoid over-protection of minority shareholders. In order to increase legal certainty and maintain the flexibility of the courts to grant relief to shareholders, there is a need to restructure the judicial discretionary framework concerning s 994 petitions. There are two potential solutions to the above dilemmas. For one thing, the two statutory presumptions proposed by the English Law Commission should be re-adopted to facilitate a more expeditious finding of unfair prejudice and the granting of the corresponding remedies. This article analyses the critical views of the CLRSG on these reform measures, but finds them unconvincing. For another, when examining a corporate claim on a s 994 petition, the court should divide the petitioner's request into corporate and personal relief. In the case of corporate relief, the court may follow the basic line of interpretation embodied in *Charnley Davies* and *Chime Corp*, and consider collective factors that probably affect the company as a whole prior to a full trial. In terms of personal relief, the court may make appropriate reference to the application of the 'no reflective loss' principle to derivative claims, subject to the categorisation of those for whom the directors are responsible.