

RELIEF FROM OPPRESSIVE OR PREJUDICIAL CONDUCT

IN TERMS OF THE SOUTH AFRICAN

COMPANIES ACT 71 OF 2008

by

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submitted in accordance with the requirements

for the degree of

DOCTOR OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROF JT PRETORIUS

JULY 2019

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RELIEF FROM OPPRESSIVE OR PREJUDICIAL CONDUCT IN TERMS OF THE SOUTH AFRICAN COMPANIES ACT 71 OF 2008

I declare that the above thesis is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

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I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.



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SUMMARY

This thesis critically examines the statutory unfair prejudice remedy provided for in section 163 of the Companies Act 71 of 2008 ('the Act'). Section 163 is evaluated against its equivalents in England, Australia and Canada. Section 163 is considered against its predecessors to determine whether problems associated with the formulation and application of its predecessors have now been eradicated. It is argued that although it is important to ensure that company legislation is able to provide protection of an international standard to shareholders to be able to attract capital investment in a competitive market, one has to be cautious of slavishly following legislative trends in foreign jurisdictions. The South African legislature indiscriminately incorporated only parts of the Canadian unfair prejudice remedy in section 163. This approach also resulted, amongst others, in the introduction of foreign concepts. The legislature further failed to take cognisance of the unique historical developments relating to the unfair prejudice remedy in South Africa. This has led to the reintroduction of problems experienced with previous formulations of the statutory unfair prejudice remedy in South Africa and left certain problems relating to the interpretation and application of the statutory unfair prejudice remedy unresolved. Consideration is also given to the interrelationship between section 163 and some of the statutory remedies in the Act. Section 163 is also assessed in the context of the Constitution of the Republic of South Africa, 1996. In conclusion, recommendations for possible legislative amendments are made and an interpretational framework for the interpretation and application of the statutory unfair prejudice remedy in section 163 is provided.

This thesis includes the law as at **1 May 2019** as found in sources available in South Africa.

KEY TERMS

Companies Act 71 of 2008; commercial unfairness; oppression remedy; prejudice; shareholder protection; shareholder remedies; unfair prejudice.

ACKNOWLEDGEMENTS

I would like to acknowledge all those who supported me during the writing of this thesis. In particular, I acknowledge:

- My supervisor and mentor, Emeritus Professor Jopie Pretorius, for not only sharing his wealth of knowledge and wisdom but also for his patience, guidance and encouragement for which I am extremely grateful.
- My parents, Willem and Maritha Swart, for their unconditional love and support.
- My friends, Philip and Chrizzell Stoop, Marianne Lombard and Judith Geldenhuys for their advice and for all their encouragement.
- Every member of the Mercantile Law department for their understanding, indulgence and support in the finalisation of this thesis.
- I also would like to thank Professor Chris Nagel for his valueable input during the finalisation of this thesis.

LIST OF ABBREVIATIONS

A	Appellate Division Reports
ABCA	Alberta Court of Appeal
ABCQB	Alberta Court of Queen's Bench
ABQB	Alberta Court of Queen's Bench [Neutral Citation]
AC	Law Reports, Appeal Cases (Third Series)
AC	Law Reports, Appeal Cases (Third Series)
ACLC	Australian Company Law Cases
ACLR	Australian Company Law Reports
ACN	Australian Company Number
ACSR	Australian Corporations and Securities Reports
ACWS	All Canada Weekly Summaries
All ER	All England Law Reports
All SA	All South African Law Reports
ALR	Australian Law Reports (Period: 1973 -)
Alta LR	Alberta Law Reports
AQ No	The Advocates' Quarterly (Canada)
ASIC	Australian Securities and Investments Commission
AWLD	Alberta Weekly Law Digest
BCC	British Company Cases (Period: 1990 -)
BCC	British Company Law Cases (Period: 1983-1989)
BCCA	British Columbia Court of Appeal
BCJ	Quicklaw's British Columbia Judgments

BCLC	Butterworths Company Law Cases
BCLR	British Columbia Law Reports
BCSC	British Columbia Supreme Court [Neutral Citation]
BCWLD	British Columbia Weekly Law Digest
BLR	Business Law Reports
C	Cape Provincial Division
<i>Can Bus LJ</i>	<i>Canadian Business Law Journal</i>
CarswellAlta	Carswell Alberta Cases (WL Can)
CarswellBC	Carswell British Columbia Cases (WL Can)
CarswellMan	Carswell Manitoba Cases (WL Can)
CarswellNat	Carswell New Brunswick Cases (WL Can)
CarswellNS	Nova Scotia Supreme Court (WL Can)
CarswellOnt	Carswell Ontario Cases (WL Can)
CarswellQue	Carswell Quebec Cases (WL Can)
CarswellSask	Carswell Saskatchewan Cases (WL Can)
CBCA	Canadian Business Corporations Act
CC	Constitutional Court
CCEL	Canadian Cases on Employment Law
Ch	Law Reports, Chancery Division (3 rd Series)
CLD	Company Law Digest
CPC	Carswell Practice Cases
CPR	Canadian Patent Reporter
CRISA	Code for Responsible Investing in South Africa

CRR	Canadian Rights Reporter
CSIH	Scotland Court of Session, Inner House (Neutral Citation)
CSOH	Scottish Court of Session, Outer House [Neutral Citation]
CTC	Canadian Tax Cases
D	Durban & Coast Local Division
DLR (3d)	Dominion Law Reports, 3rd Series (Period: 1969-1984)
DLR (4th)	Dominion Law Reports, 4th Series (Period: 1984 -)
ECG	Eastern Cape High Court, Grahamstown
EngR	English Reports
ER	English Reports
EWCA Civ	Court of Appeal (Civil Division) [Neutral Citation]
EWHC	England & Wales High Court (Administrative Court) [Neutral Citation]
FB	Free State High Court, Bloemfontein
FCA	Federal Court of Australia [Neutral Citation]
FCAFC	Federal Court of Australia: Full Court [Neutral Citation]
FCR	Federal Court Reports, Australia
FLR	Federal Law Reports
GG	<i>Government Gazette</i>
GJ	Gauteng Local Division, Johannesburg
GN	Government Notice
GNP	North Gauteng High Court, Pretoria
GP	Gauteng Division, Pretoria

GSJ	South Gauteng High Court, Johannesburg
Hare	Hare's Chancery Reports
HL	House of Lords, English and Irish Appeals (1866-75) (UK)
IoDSA	Institute of Directors South Africa
JCCL&P	<i>Journal of Corporate and Commercial Law & Practice</i>
JDR	Juta's Daily Reporter
JJS	<i>Journal for Juridical Science</i>
JOL	Judgments Online (LexisNexis)
K	Kaapse Provinsiale Afdeling
KZD	KwaZulu-Natal High Court, Durban
MBCA	Manitoba Court of Appeal
MBQB	Manitoba Court of Queen's Bench
NI	Northern Ireland Law Reports
NLCA	Newfoundland and Labrador Court of Appeal
NSSC	Nova Scotia Supreme Court
NSWCA	New South Wales Court of Appeal [Neutral Citation]
NSWLR	New South Wales Law Reports (Period: 1971 -)
NSWR	New South Wales Reports (Period: 1960-1970)
NSWSC	New South Wales Supreme Court [Neutral Citation]
NTSC	Northern Territory Supreme Court [Neutral Citation]
NZHC	High Court of New Zealand Decisions
NZLR	New Zealand Law Reports
NZULR	New Zealand Universities Law Review

OAC	Ontario Appeal Cases
OJ	Quicklaw's Ontario Judgments (Canada)
ONCA	Ontario Court of Appeal
ONCJ.GD	Court of Justice General Division
ONSC	Ontario Superior Court of Justice ONSC [Neutral Citation]
Ont CA	Court of Appeal for Ontario
Ont HC	Supreme Court of Ontario, High Court of Justice
OntHCJ	Ontario High Court of Justice / Ontario Supreme Court, High Court of Justice
OR	Ontario Reports
<i>Oxford J of Legal Stud</i>	<i>Oxford Journal of Legal Studies</i>
PC	Privy Council
<i>PER/PELJ</i>	<i>Potchefstroom Electronic Law Journal</i>
QB	Law Reports, Queen's Bench (Third Series)
QCA	Queensland Supreme Court: Court of Appeal [Neutral Citation]
QCCA	Quebec Court of Appeal
QCCS	Cour supérieure du Québec / Quebec Superior Court [Neutral Citation]
QCSC	Quebec Superior Court
QJ No	Quicklaw Quebec Judgments
QSC	Queensland Supreme Court [Neutral Citation]
RJQ	Quebec Law Reports / Recueil de Jurisprudence du Quebec
RSBC	Revised Statutes of British Columbia

RSC	Revised Statutes Canada
<i>SA Merc LJ</i>	<i>South African Mercantile Law Journal</i>
SA	South African Law Reports 1947 -
<i>SALJ</i>	<i>South African Law Journal</i>
SASC	South Australia Supreme Court [Neutral Citation]
SC	Supreme / Superior Court
SCA	Supreme Court of Appeal
SCC	Supreme Court of Canada
ScotCS	Scottish Court of Session Decisions [Neutral Citation]
SCR	Canada Supreme Court Reports (Period: 1970 -) / Supreme Court Reports, Canada
SI	Statutory Instruments
SKCA	Saskatchewan Court of Appeal
SKQB	Saskatchewan Court of Queen's Bench
SLT	Scots Law Times
<i>Stell LR</i>	<i>Stellenbosch Law Review</i>
T	Transvaal Provincial Division
<i>THRHR</i>	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i>
<i>TSAR</i>	<i>Tydskrif vir die Suid-Afrikaanse Reg</i>
UCL	University College London
UKHL	United Kingdom House of Lords [Neutral Citation]
UKPC	United Kingdom Privy Council [Neutral Citation]
UKSC	United Kingdom Supreme Court [Neutral Citation]

VSC	Victoria Supreme Court (1998 -) [Neutral Citation]
VSCA	Victoria Court of Appeal [Neutral Citation]
W	Witwatersrand Local Division
WAR	Western Australian Reports (Period: 1960 -)
WASC	Western Australian Supreme Court [Neutral Citation]
WASCA	Western Australia Supreme Court: Court of Appeal [Neutral Citation]
WCC	Western Cape High Court, Cape Town
WL	Westlaw Transcripts
WLR	Weekly Law Reports
WWR	Western Weekly Reports
ZAECGHC	South Africa: Eastern Cape High Court, Grahamstown [Neutral Citation]
ZAGPJHC	South Africa: South Gauteng High Court, Johannesburg [Neutral Citation]
ZAGPPHC	South Africa: North Gauteng High Court, Pretoria [Neutral Citation]
ZAWCHC	South Africa: Western Cape High Court, Cape Town [Neutral Citation]

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CHAPTER 1
INTRODUCTION AND CHAPTER OVERVIEW

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1.1 Introduction

The protection of shareholders, more specifically minority shareholders, is one of the characteristics of a well-developed and sophisticated company law regime. Shareholder remedies play an essential role in the corporate governance of a company. Company law regimes that provide adequate shareholder remedies have the ability to create investors' confidence which leads to the ability to attract capital investments at lower costs. This seems to be a reality that is recognised by the Companies Act 71 of 2008 ('the Act') as it states that one of the purposes of the Act is to 'create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk'.¹ A further purpose of the Act is to 'promote innovation and investment in South African markets'.²

The Act replaced the Companies Act 61 of 1973 ('the previous Act') and became operational on 1 May 2011. As with its predecessor, the Act contains various provisions aimed at the protection of shareholders and other stakeholders of a company.³ The Act provides for very specific remedies.⁴ Some of these remedies are similar to those found in the Companies Act 61 of 1973 but the Act now contains some additional remedies and features that may impact on the interpretation and application of some of these remedies. The focus of this thesis is on one of these specific remedies in the Act, namely, section 163 of the Companies Act 71 of 2008.⁵ Section

¹ Companies Act 71 of 2008, s 7(g).

² Companies Act 71 of 2008, s 7(c).

³ See Chapter 7 of the Companies Act 71 of 2008.

⁴ See Part B of Chapter 7 of the Companies Act 71 of 2008.

⁵ Institutional investors may play an important role by formally and/or informally exerting pressure on companies to adopt appropriate corporate governance practices. This can be done by influencing the agenda of the company through the use their voting rights at general meetings to adopt proposed resolutions that will reduce the investment risks to which investors in the company are exposed. This may in turn create direct value for the investors in a company and, in some cases, indirect value for the

163 is a specific remedy in the Act in terms of which relief may be obtained against oppressive or prejudicial conduct.

1.2 The purpose of this study

The purpose of this study is to evaluate section 163 to determine whether the provision in its current form addressed the criticisms raised against predecessors of the remedy.⁶ Section 163 is also evaluated to establish whether the formulation and application of the provision are aligned with developments in other comparable jurisdictions such as England,⁷ Australia⁸ and Canada.⁹ Based on the evaluation of the formulation, interpretation and application of the statutory personal remedy in the last mentioned jurisdictions, recommendations are made in the form of proposals for legislative reform and an interpretational framework is provided for a principle-based interpretation of section 163 within the relevant parameters of the Constitution.¹⁰ It is submitted that the proposals for legislative intervention and the interpretational framework will promote 'a predictable and effective environment for the efficient

beneficiaries of institutional investors. As this thesis primarily focuses on section 163 of the Act, the role of institutional investors is excluded. For insightful views on the role of institutional investors in companies see SJ Naudé *Die Regsposisie van die Maatskappydirekteur met Besondere Verwysing na die Interne Maatskappyverband* (1969) (unpublished LLD thesis; University of South Africa) 421-35. More recently the voluntary Code for Responsible Investing in South Africa (CRISA) was published with an effective date of 1 February 2012 which encourages institutional investors to play a more active role in the governance of the companies they invest in through actively using their rights as investors.

⁶ See 5.2.4.3 below for criticism raised by academic authors against the provisions of section 252 of the previous Act. Section 252 was the predecessor and equivalent of section 163 of the Act. For criticism of the common law position see 5.2.2.5 below.

⁷ See Chapter 2 below.

⁸ See Chapter 3 below.

⁹ See Chapter 4 below.

¹⁰ See 6.3 below for the proposed legislative interventions and 6.4 below for a principle-based interpretational framework.

regulation of companies'¹¹ while balancing 'the rights and obligations of shareholders and directors within companies'.¹²

The provisions of section 163 are also considered in the context of other provisions of the Act. These provisions include section 76 which contains a partial codification of the duties of directors,¹³ section 161 which deals with the protection of the rights of securities holders¹⁴ and an order for the declaration of directors as delinquent or under probation in terms of section 162,¹⁵ 164¹⁶ and 165.¹⁷

1.3 The need for and importance of the study

The remedy in section 163 is worded in open and flexible terms.¹⁸ The purpose of formulating section 163 in this manner is to provide courts with a broad discretion to apply the remedy to a wide variety of circumstances.¹⁹ This formulation creates uncertainties in relation to the interpretation and application of the remedy.²⁰ These uncertainties are further exacerbated by the fact that section 163 is an equitable remedy based on fairness.²¹

¹¹ Companies Act 71 of 2008, s 7(l).

¹² Companies Act 71 of 2008, s 7(i).

¹³ See 5.4.3.4 (a) below.

¹⁴ See 5.9.12.3 (c) below.

¹⁵ See 5.9.7.2 below.

¹⁶ See 5.10 below.

¹⁷ See 5.9.15 below.

¹⁸ See 5.7.2.1 below.

¹⁹ See 5.7.2.1 below.

²⁰ See 5.7.2.1 below. For a discussion of the legal requirements for standing for purposes of section 163 of the Act see 5.7.1 below. For uncertainties relating to the jurisdictional grounds and requirements see 5.7.2 and 5.7.3 below. For interpretational issues relating to the relief a court may grant see 5.9 below.

²¹ See 5.7.3, and more specifically 5.7.3.5 below.

The concept of unfairness has to be determined in a manner that is not dependent on the views of a specific individual that has to establish the unfairness of conduct for purposes of section 163.²² In order to apply the concept of unfairness consistently it has to be established in a principled manner having regard to the specific facts and circumstances of each case.²³ The issue and problems associated with shareholder protection are complex as the protection of shareholders, and in particular minority shareholders, often creates conflict between established corporate law principles, the constitutive documents of a company and providing and giving effect to the agreements between shareholders while providing for the protection of shareholders against unfairness.²⁴ Creating remedies aimed at the protection of shareholders further requires a delicate balance between the company, shareholders and shareholders *inter se* to prevent these remedies from being abused or used as instruments unjustifiably to avoid the consequences of the application of trite company law principles.²⁵ Section 163 of the Act has to be applied in the context of fundamental company law principles such as the principle of majority rule and the separate legal personality of a company.²⁶

²² See also the discussion of the concept of 'fairness' in the context of the law of contract in 5.6 and the relevance thereof for the application of section 163 of the Act in 5.6.6 below.

²³ See 5.7.3 below.

²⁴ See also *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [64] where the court held that the starting point to determine the fairness or unfairness of conduct is the constitutive documents of a company and the principle of majority rule.

²⁵ Companies Act 71 of 2008, s 7(i). See also *Grancy v Grancy Property Limited v Manala and Others* [2013] 3 All SA 111 (SCA) [32] where it was remarked that remedies such as section 163 must not be used as an instrument of oppression as a shareholder is bound to the principle of majority decision-making.

²⁶ See 5.4.3 read with 5.7.3 below.

Despite the fact that the provisions of section 163 are cast in wide and open terms, the starting point for the correct application of the remedy remains the wording of the Act.²⁷ In this respect the purposes²⁸ and objectives of the Act read with the interpretational provisions²⁹ of the Act is of vital importance. The Constitution³⁰ also contains very specific provisions relating to the interpretation of legislation such as the Act.³¹

The Constitution³² is not only important in relation to the interpretation of the provisions of section 163, but is also influential in the role that fairness plays in the enforcement of contracts, agreements and understandings.³³ This is directly applicable to company law as the Memorandum of Incorporation is regarded as creating contractual relationships between parties and section 163 also applies to shareholder agreements.³⁴

The fact that section 163 forms part of a relatively new Act justifies a study of this nature for a few important reasons. Firstly, the interpretation and application of the provisions of section 163 must be considered in light of the Constitution.³⁵ Secondly, major studies such as that of Hurter³⁶ did not have the opportunity to consider

²⁷ See 5.7.3.6 below.

²⁸ Companies Act 71 of 2008, s 7(a). See 5.12.1 below.

²⁹ Companies Act 71 of 2008, s 5. See also 5.4.4 below.

³⁰ Constitution of the Republic of South Africa, 1996.

³¹ See 5.5.1 read with 5.5.2.4 below.

³² Constitution of the Republic of South Africa, 1996.

³³ See 5.6 below.

³⁴ See 5.5.3 below.

³⁵ See 5.5 below.

³⁶ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa). It should be noted that Hurter's thesis

important judgments on aspects of section 252 of the previous Act that may still be relevant to section 163 of the Act.³⁷ Thirdly, the Act contains some novel provisions that were not necessarily present in the previous Act. Examples of such provisions include the partial codification of the duties of directors and the business judgment rule in section 76(4).³⁸ Also included is the relationship between section 163 and other remedies such as section 161, section 162, the appraisal remedy in section 164 and the derivative action in section 165 of the Act. The relevance of English law has to be reconsidered in light of the fact that the South African legislature's adopted wording that is substantially similar to the wording of the Canadian equivalent of section 163.³⁹

The provisions of section 163 are applicable to all companies registered in terms of the Act. From a practical point of view, it is important to take note of legislation and regulations that require companies to meet certain prescribed thresholds in relation to the compilation or structure of their shareholders and/or directors. Often the purpose of such legislation is the economic empowerment of previously disadvantaged individuals. These forms of legislation have as consequence the formation of companies which comprise of previously disadvantaged individuals and/or black economic

considered the statutory protection of minority shareholders in general. The thesis did not specifically and only focus on section 252 of the previous Act.

³⁷ See, for example, the judgment of the Supreme Court of Appeal in *Bayly and Others v Knowles* 2010 (4) SA 548 (SCA) and judgments such as *McMillan NO v Pott* 2011 (1) SA 511 (WCC).

³⁸ For a discussion of the partial codification of the duties of directors see L Coetzee and JL van Tonder 'Advantages and disadvantages of partial codification of directors' duties in the South African Companies Act 71 of 2008' (2016) 41:2 *JJS* 1. See also the commentary on section 76 by PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018); FHI Cassim *et al Contemporary Company Law* (2nd ed, 2012) 507; Michael M Katz 'Governance under the Companies Act 71 of 2008: Flexibility is the keyword' 2010 *Acta Juridica* 248.

³⁹ See below Chapter 4 for the Canadian position and Chapter 5 for the South African position.

empowered companies that hold the majority shareholding in the company.⁴⁰ This structurally-created imbalance in the shareholding and/or board of a company heightens the potential for conflict between the holders of the majority stake in a company and its minority shareholders. This is especially the case when the interests of the shareholders in the company differ, for example, when the minority shareholders have contributed the majority of the capital in the company. Section 163 is an important mechanism for these minority shareholders to protect their interests in a company and, where justified, to withdraw their investment from the company. Although the focus is not specifically on the impact of section 163 of the Act on transactions related to black economic empowerment, one needs to be aware of current business practices in this regard, which emphasise the need for a remedy which balances the interests of shareholders within a company.⁴¹

1.4 Relevance of previous and similar studies

Prior to section 163 of the Act the personal rights of a shareholder were protected by section 252 of the Companies Act 61 of 1973 ('the previous Act'). This section was preceded by section 111 *bis* of the Companies Act 46 of 1926. Both section 252 of the previous Act and section 111 *bis* of the Companies Act 46 of 1926 were scrutinised by various academic authors and law commissions.⁴² Two of most important studies in

⁴⁰ See, for example, *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ).

⁴¹ See, for example, *Kudumane Investment Holdings Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ) and *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) where the structure and/ or conduct of the relevant companies were influenced by considerations such as black economic empowerment.

⁴² See 5.2.3 below for a discussion of the provisions of section 111 *bis* of the Companies Act 46 of 1926 and 5.2.4 below for a discussion of section 252 of the previous Act.

this regard are the law commission report of the Van Wyk De Vries Commission⁴³ and the doctoral thesis of Hurter.⁴⁴ Although section 163 does differ materially from its predecessors in certain respects, studies conducted and case law developed under section 252 of the previous Act and section 111bis of the Companies Act 46 of 1926 are still significant for purposes of an accurate evaluation of section 163.⁴⁵ Knowledge and understanding of the historic development of the statutory personal remedy in South Africa is imperative for a critical evaluation of the current form of the remedy against the criticisms raised against its predecessors.⁴⁶

1.5 Structure of study and chapter overview

This thesis is divided into six chapters. While chapter 1 and 6 contain the introduction and conclusions of the thesis respectively, chapters 2, 3, 4 and 5 provide the evaluations of the statutory personal remedy in England, Australia, Canada and South Africa. Each of these chapters can broadly be divided into three main sections or parts dealing with the provisions of the statutory personal remedy in each jurisdiction. These three sections or parts deal with provisions dealing with the persons who enjoy standing in terms of the remedy, the jurisdictional requirements of the remedy and aspects in relation to the relief that can be granted in terms of the remedy.

1.5.1 Chapter 02

It is very important to consider English jurisprudence as English company law

⁴³ Main Report of the Commission of Enquiry into the Companies Act (RP 45/1970).

⁴⁴ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa).

⁴⁵ See 5.2.4.2 below.

⁴⁶ See 5.2 below.

substantially influenced South African company law.⁴⁷ Although South Africa has its own company laws and English law is only persuasive, the influence of English law remains and is evident from the reading of South African judgments.⁴⁸

⁴⁷ See *Fisheries Development Corporation of SA Ltd v Jorgensen; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd* 1980 (4) SA 156 (W) for an example where the court relied on English law for guidance on the South African position under the Companies Act 61 of 1973. This was based on the similarity between the English and South Africa law principles on a specific aspect of company law. See also 5.2.4.2 below for a brief discussion of the relevance of English law for the interpretation of section 163 of the Companies Act 71 of 2008. It is important to note that although English law may still be relevant to interpreting section 163, the wording of the latter section is almost identical to section 241 of the Canada Business Corporations Act 1985, c C-44 and therefore one should be prudent not to focus only on the English position in this regard. See Chapter 4 below for a discussion of the Canadian equivalent of the 'unfair prejudice remedy'.

⁴⁷ This provision is the predecessor of section 163 of the Companies Act 71 of 2008.

⁴⁸ In *Trust Bank van Afrika Bpk v Eksteen* [1964] 3 All SA 507 (A) 510-11 the court also warned against the danger of the adoption or application of foreign legal principles into South African law by emphasising that English precedents are of persuasive value only. See also *D-Jay Corporation CC v Investor Management Services (Pty) Ltd* 2000 (2) SA 755 (W) 761-62 where the court dealt with the persuasive value of English decisions in the interpretation of identical legislative provisions taken over from England. It was cautioned that, when interpreting a provision adopted from a foreign statute, it does not necessarily follow that the legislature has also adopted the interpretation and meaning given by the foreign courts to the specific adopted provision. However, the use of the exact words of an adopted provision from legislation of a foreign jurisdiction such as England is a strong indication that the same meaning is to be attributed to the South African equivalent of the provision, but South African courts should be alive to the differences between the English law and the South African common law. Companies are creatures of statute, as the early South African common law did not deal with the law pertaining to companies. In such circumstances, there are no differences between the South African legal system and the English law, and in particular, the judgments of the higher courts in England. In instances where the South African common law does regulate or impact on a particular question of law, the courts are bound to give effect to the common law, unless legislation provides otherwise, and then the law of England is of persuasive value only. See further *Sentraal-Suid Koöperasie Bk v Bessemer Steel Construction (Pty) Ltd* 2004 (3) SA 552 (W) 556 where the court confirmed that English company law is comparable to South African company law and therefore has important persuasive force, but cautioned that South African legal principles and provisions should not be ignored. See HS Cilliers and ML Benade *et al Corporate Law* (3rd, 2000) 19-20 who noted that our courts refuse to adopt principles from the English law that are in conflict with the South African legal system. However, where the South African common law does not provide guidance on a particular aspect of company law, South African

Furthermore, the South African courts have placed much reliance on the judgments delivered in terms of section 252 of the Companies Act 61 of 1973 in the application and interpretation of section 163.⁴⁹ The judgments delivered in terms of section 252 of the Companies Act 61 of 1973 have been influenced substantially by English law and reference to these judgments when dealing with section 163 of the Companies Act 71 of 2008 indirectly maintains the influence of the English law in the development of the personal remedy in section 163. In some instances, courts have referred directly to foreign law, such as English law, in the interpretation and application of section 163.⁵⁰

A study of the English law pertaining to the statutory personal remedy is also important as the early development of the statutory personal remedies in Australia and Canada has also been influenced by English law.⁵¹ Australian and Canadian courts often have to consider the relevance and value of English decisions in the interpretation and application of aspects of the statutory personal remedy in their own

courts sought guidance from the English law and precedents. The authors (20) pointed out the movement of England to align English company law with other member states of the European Union and the reform of South African company law in light of the Constitution of the Republic of South Africa, 1996 as factors that may create differences between English and South African company law. See 5.5 and 5.6 below for a discussion of the impact of the Constitution on the interpretation of legislation and the development of the common law principles of the law of contract.

⁴⁹ See 5.2.4.2 below.

⁵⁰ For example, see footnote 8 in *Grancy v Grancy Property Limited v Manala* [2013] 3 All SA 111 (SCA). See also *Peel v Hamon J&C Engineering (Pty) Ltd* 2013 (2) SA 331 (GSJ) [43]; *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* [2013] 2 All SA 190 (GNP) [17.4]; *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd* 2014 (5) SA 179 (WCC). See also 5.4.2.3 below regarding the consideration of foreign law in terms of the Constitution of the Republic of South Africa, 1996.

⁵¹ See 3.3 below for the development of the Australian remedy and see 4.2 for the development of the Canadian equivalent of the remedy.

jurisdictions.⁵²

Section 994 of the Companies Act 2006 contains the statutory personal remedy (or commonly referred to as ‘the oppression or unfair prejudice remedy’) in the English law. Chapter 2 provides an analysis of the position relating to the statutory unfair remedy in England. Research on the English equivalent of the statutory personal action is valuable to South African jurists as it may provide insight on the reforms contained in section 163 of the Companies Act 71 of 2008.⁵³ Thus despite the wording of section 163 of the Companies Act,⁵⁴ South African courts are still heavily reliant on English law for guidance.⁵⁵

1.5.2 Chapter 03

Chapter 3 contains an analysis of the Australian position relating to the oppression or unfair prejudice remedy. South African courts have occasionally referred to Australian case law for guidance on the interpretation and application of the provisions of section

⁵² See 3.10 below for the application of case law in England to fair offers in the context of the Australian remedy. For example, see also 4.14 below where Canadian courts considered case law in England pertaining to the arbitration of unfair or oppression disputes and the role and function of reasonable offers.

⁵³ Section 163 of the Companies Act 71 of 2008 contains the South African form of the statutory unfair prejudice remedy and is analysed and discussed in detail in Chapter 5 below.

⁵⁴ 71 of 2008.

⁵⁵ See *Grancy v Grancy Property Limited v Manala* [2013] 3 All SA 111 (SCA) 119, 123. See further *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd* [2012] 4 All SA 203 (GSJ) 213-14; *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* [2013] 2 All SA 190 (GNP) 206; *Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd* 2014 (5) SA 179 (WCC) [60]-[62], [67]; *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 (3) SA 146 (WCC) [5]-[9]; *De Villiers v Kapela Holdings (Pty) Ltd* 2016 JDR 1942 (GJ) [68] and more specifically n 33. See also 5.2.4.2 below for a discussion of the relevance of the English law on the interpretation of section 252 of the Companies Act 61 of 1973 and section 163 of the Companies Act 71 of 2008.

163 of the Act.⁵⁶

1.5.3 Chapter 04

The Canadian unfair prejudice remedy is considered in chapter 4. Although jurists may agree that the developments in English company law may be of importance in understanding, interpreting and applying company law principles in South Africa the formulation of section 163 of the Companies Act 71 of 2008 poses an interesting conundrum. The wording of section 163 is almost identical to its equivalent in section 241 of the Canada Business Corporations Act, RSC.⁵⁷ The question that needs to be considered in relation to section 163 of the Companies Act,⁵⁸ is whether the legislature deliberately followed this approach to cut the legalistic umbilical cord between South African company law and English company law by replacing the latter with Canadian principles.⁵⁹ Canadian jurisprudence is of specific importance because of the close relationship between the wording of the Canada Business Corporations Act and section 163 of the Act. This emphasises the desirability and compatibility of the Canadian approach to the statutory personal remedy in South Africa. Specific reliance is placed on the interpretation and application by courts of federal legislation, but also of incorporated legal position in various provinces in Canada where federal legislation and/or jurisprudence does not provide clear guidance.

⁵⁶ See, for example, *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) and *Peel v Hamon J&C Engineering (Pty) Ltd* 2013 (2) SA 331 (GSJ).

⁵⁷ 1985, c C-44.

⁵⁸ 71 of 2008.

⁵⁹ See Chapter 4 below for a discussion of the Canadian unfair prejudice remedy.

1.5.4 Chapter 05

Section 163 is critically analysed in Chapter 5. This analysis is done against the background of the criticism raised in previous studies against predecessors of the section. The interpretations and application of the provisions of this section are then further evaluated in light of the approach taken in England,⁶⁰ Australia⁶¹ and Canada.⁶²

1.5.5 Chapter 06

Chapter 6 contains conclusions and recommendations based on the research in preceding chapters. This chapter demonstrates that some of the terms and concepts used in section 163 are unusual in light of the historic developments of the remedy in South Africa.⁶³ The formulation of section 163 in similar terms as its Canadian equivalent is also problematic as this approach ignores or overwrites the historic developments of the remedy in South Africa.⁶⁴ This approach further introduced terminology that is foreign to South Africa law into some of the provisions of section 163.⁶⁵ The evaluation further reveals that the persons who enjoy standing for purposes

⁶⁰ See Chapter 2 below.

⁶¹ See Chapter 3 below.

⁶² See Chapter 4 below.

⁶³ See for example 6.3.2 below.

⁶⁴ See the extrajudicial criticism of Binns-Ward J in AG Binns-Ward 'Lost in Translation: The Need for the Judicious Use of Comparative Law' (2017) 2 *JCCL&P* 1, 2 regarding the judicial approach to the application of comparative law. Binns-Ward J argues that 'notwithstanding the common basis that many Commonwealth jurisdictions have in their company law, transplantability is an issue that has to be approached with careful attention to context if the foreign law is not to be misplaced locally, with potentially dislocating effects on our own company law'. In his address Binns-Ward highlights (12-13) a similar problem in the context of the provision of section 165 of the Act. See also 6.3.3. below.

⁶⁵ In this regard it appears that the legislature has stepped into the exact trap against which AG Binns-Ward warned in his address to the International Symposium on Company Law published under the title 'Lost in Translation: The Need for the Judicious Use of Comparative Law' (2017) 2 *JCCL&P* 1, 1 where

of the remedy are too narrowly defined.⁶⁶ This position is further exacerbated by the fact that early indications are that a person has been unfairly prejudiced in the capacity as shareholder or director.⁶⁷

Some aspects relating to the relief that may be granted in terms of section 163(2) are also problematic as in some instances there is a disconnect between the standing requirements in section 163(1) and the type of relief that is available in section 162(2).⁶⁸ In other instances, the nature of some of the forms of relief available in terms of section 163(2) is not appropriate in light of the nature and purpose of the remedy.⁶⁹ Based on the conclusions reached in this chapter certain recommendations are made that include proposed amendments to the wording of section 163 and other related sections of the Act. In some instances, legislative amendments are proposed to legislation other than the Act. The chapter further contains a framework for the interpretation of the provisions of section 163.

1.6 The use of terminology

Section 163 and its predecessors are the statutory response to the criticisms levelled against the strict application of the common law principles in *Foss v Harbottle*.⁷⁰ This response took the form of the statutory personal action and the statutory derivative action.

he remarked that '[t]he quickest way to lose credibility in the application of the law is by importing legal concepts that have no relevance to the context within which they are applied'.

⁶⁶ See 6.3.3 below.

⁶⁷ See 6.3.3 below.

⁶⁸ See 6.3.3 read with 6.3.5 below.

⁶⁹ See 6.3.5 read with 6.3.5.2 below.

⁷⁰ *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189.

The statutory personal action is also known as the statutory personal remedy, oppression remedy or the unfair prejudice remedy. Although all these terms and concepts are often used as synonyms it appears that the use of the term unfair prejudice remedy is preferred in the context of section 994 of the Companies Act 2006 to emphasise the fact that only unfair prejudice, in contrast with oppression, is required to seek relief in terms of the latter provision. In the context of the statutory personal action in Australia, Canada and South Africa the terms or concept oppression remedy and unfair prejudice remedy are used interchangeably although these jurisdictions only require proof of unfair prejudice to entitle a court to exercise its discretion to grant appropriate relief, despite the fact that the provisions of these jurisdictions also still expressly refer to conduct that is oppressive as a ground of relief. Unless, otherwise indicated the same approach is adopted in this thesis.

The terms statutory derivative action and statutory derivative remedy are also used interchangeably.

CHAPTER 2
ENGLAND

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ENGLAND

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2.1 Introduction

The purpose of this chapter is to provide a detailed analysis of the statutory unfair prejudice remedy in England.* In this chapter the specific focus is on the Companies Act 2006¹ and the interpretation and application of sections 994-996 of the Act by the English courts. The English statutory unfair prejudice remedy is evaluated against the background of its historic development,² established corporate law principles,³ other common law principles relating to the law of contract⁴ and the law of damages,⁵ and its relationship (or potential relationship) with other remedies such as the liquidation of companies on 'just and equitable' grounds⁶ and the statutory derivative action.⁷ The application of the statutory unfair prejudice remedy in arbitration proceedings also receives attention later on in the chapter.⁸ The chapter concludes with an evaluation of the English statutory unfair prejudice remedy.⁹ The findings contained in the conclusion are used to measure and critically evaluate the statutory unfair prejudice remedy of section 163 of the Companies Act 71 of 2008.¹⁰

* Reference to case law is mainly made to the neutral citations of cases followed by an abbreviation indicating the court or division. The citation to the best report is also included where available. Cases decided prior to 1865 are cited by providing the details of the nominate report and the English reports.

¹ Hereinafter referred to as 'the Act' for purposes of this chapter.

² See 2.3 below.

³ See 2.2 below.

⁴ See for example 2.2 and 2.6.5 below.

⁵ See 2.10.6 below.

⁶ See 2.9 below.

⁷ See 2.10.3 below.

⁸ See 2.11 below and more specifically 2.11.3 below.

⁹ See 2.12 below.

¹⁰ See Chapter 5 below for an evaluation of section 163 of the Companies Act 71 of 2008.

2.2 The basic principles of English company law¹¹

A company is a separate juristic person distinct from its members.¹² The principle of separate legal personality is strictly upheld by the courts.¹³ The relationship between the members and the company is a contractual one.¹⁴ This relationship entails that the members join a company on a voluntary basis and accept the terms and conditions of its constitution.

The principle of majority rule is a further principle that is strictly enforced. By becoming a member of a company, a member is bound to the decisions of the majority.¹⁵ To evaluate the fairness of conduct complained of, the constitution of a

¹¹ For a discussion of the relevant principles of South African company law see 5.2 below.

¹² *Salomon v Salomon & Co Ltd* [1896] UKHL 1; [1897] AC 22. See also Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 29.

¹³ Only in exceptional circumstances will the separate juristic personality of a company not be upheld. The separate juristic personality will be lifted or pierced in circumstances where it is abused. For a discussion of the lifting and/or piercing of the corporate veil see Chapter 8 of Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016). See also the application of this principle in the context of groups of companies in 2.7 below.

¹⁴ Section 33 of the Companies Act 2006 provides that '(1) The provisions of a company's constitution bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions'. Section 33(2) further provides that '[m]oney payable by a member to the company under its constitution is a debt due from him to the company'. See also *Saul D Harrison & Sons plc, Re* [1995] 1 BCLC 14, 17; [1994] BCC 475. See further Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 61-62 where it is explained that the constitution of a company is a particular form of contract between the members and the company. See also *Wootliff v Ruston-Turner* [2017] EWHC 3129 (Ch). See 5.4.1 for the South African position where the position is currently uncertain.

¹⁵ See the Companies Act 2006, ss 282 and 283. The Companies Act 2006 provides for the adoption of ordinary resolutions in terms of section 282 and special resolutions in terms of section 283. Ordinary resolutions are adopted by a simple majority vote while special resolutions are adopted by a minimum of 75% of the persons voting on such resolutions. See 5.2.1 below for the position in South Africa.

company is the point of departure.¹⁶ The constitution of the company contains the agreements between the members of a company and the company.¹⁷ The honouring of agreements between parties is an element of commercial fairness.¹⁸ Traditionally courts were reluctant to intervene in the internal affairs of a company or the contractual relationship between parties.¹⁹ The purpose of the strict enforcement of the above-mentioned principles is to achieve legal certainty.

However, various examples can be provided where the strict enforcement of basic company law principles may lead to unfair consequences.²⁰ The fact that a company could be wound up on just and equitable grounds is a recognition of the individuals that comprise a company.²¹ These individuals often hold certain 'rights, expectations and obligations' that are not necessarily contained in the articles of association of the company.²²

¹⁶ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 667 and 669. See also 2.6.3 below.

¹⁷ Companies Act 2006, s 33.

¹⁸ *Saul D Harrison & Sons plc, Re* [1995] 1 BCLC 14, 18; and [1994] BCC 475. See also Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 669; Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 72.

¹⁹ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 665. See 2.6.5 below.

²⁰ See the discussion of the development of the statutory personal remedy in 2.3 below for examples.

²¹ *Croly v Good* [2010] EWHC 1 (Ch), [2010] All ER 177 [7]. See also *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (HL) 379, [1972] 2 All ER 492. See further *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1099. See 2.3.2 below.

²² *Croly v Good* [2010] EWHC 1 (Ch), [2010] All ER 177 [7]. See also *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (HL) 379; *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1099. See further Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 72 who argues that the concept of contractual incompleteness was recognised in *Saul D Harrison & Sons plc, Re* [1995] 1 BCLC 14, [1994] BCC 475. See also 2.6.5 below.

To remedy the unfair consequences that may flow from the strict enforcement of the company law principles moved the legislature to adopt or create remedies to prevent and/or remedy these unfair consequences.²³ One such example of legislative intervention is the introduction of the statutory personal action.²⁴

2.3 An overview of the development of the statutory personal remedy in England

2.3.1 The rule in *Foss v Harbottle*²⁵

2.3.1.1 Introduction

Although the rule in *Foss v Harbottle*²⁶ was abolished by the Companies Act 2006, a brief overview of the rule is important to facilitate the understanding of the development of the statutory personal action, and the statutory derivative action in England. The purpose of the statutory reform of these common law remedies was to address the shortcomings of the rule in *Foss v Harbottle*.²⁷ The rule is further important as it also applied to South African company law.²⁸

2.3.1.2 The rule

The question in *Foss v Harbottle*²⁹ was whether the shareholders of a company

²³ See 2.3 below for an overview of the historical development of the statutory personal action or unfair prejudice remedy.

²⁴ See Companies Act 2006, ss 994-996. See also 2.4 below. For an overview of the historical development of the common law and statutory unfair prejudice remedy see 2.3 below.

²⁵ (1843) 2 Hare 461, 67 ER 189.

²⁶ (1843) 2 Hare 461, 67 ER 189.

²⁷ (1843) 2 Hare 461, 67 ER 189.

²⁸ See 5.2.2 below.

²⁹ (1843) 2 Hare 461, 67 ER 189.

could institute legal proceedings for and on the behalf of the company based on a cause of action that vested in the company as a separate and distinct legal entity.³⁰ The court held that the individual shareholders or members of a company do not have the right to institute legal proceeding on behalf of the company as the right to institute such legal proceedings vested in the company and not in the individual shareholders or members.³¹ This enforces the legal principle that a company has a separate and distinct legal personality from its shareholders or members of the company.³² In the context of wrongs committed against the company by the directors of a company, company law further acknowledges that directors owe their duties to the company and not to the individual shareholders or members.³³

Based on ‘the proper plaintiff rule’ the default position was that when a wrong is committed against a company, it is the company, and not the shareholders or members of the company that should institute legal proceedings for and on behalf

³⁰ *Foss v Harbottle* (1843) 2 Hare 461, 490-91; 67 ER 189. In this case, two of the company's shareholders instituted legal proceedings against the directors of the company who allegedly sold a property at an undisclosed profit. The directors were entrusted with the duty and power to act in the interests of the company.

³¹ *Foss v Harbottle* (1843) 2 Hare 461, 490; 67 ER 189; *Burland v Earle* [1902] AC 83 (PC) 93; *Edwards v Halliwell* [1950] 2 All ER 1064 (CA) 1066-67. See also KW Wedderburn ‘Shareholders’ Rights and the Rule in *Foss v Harbottle*’ (1957) 15 *Cambridge Law Journal* 194, 194-95. This aspect of the rule is known as ‘the proper plaintiff principle’. See DD Prentice ‘Exception to the Rule in *Foss v Harbottle*’ (1972) 35 *Modern Law Review* 318, 318.

³² *Foss v Harbottle* (1843) 2 Hare 461, 490-91; 67 ER 189. See also KW Wedderburn ‘Shareholders’ Rights and the Rule in *Foss v Harbottle*’ (1957) 15 *Cambridge Law Journal* 194, 196; Julia Tang ‘Shareholder Remedies: Demise of the Derivative Claim?’ (2012) 1:2 *UCL Journal of Law and Jurisprudence* 178, 179. See further Paul L Davies and Sarah Worthington *Gower and Davies’ Principles of Modern Company Law* (10th ed, 2016) 595-96 who state that the rule protects the company from excessive involvement in litigation driven or motivated by the personal objectives of members. See also 2.2 above and 2.3.13 below.

³³ KW Wedderburn ‘Shareholders’ Rights and the Rule in *Foss v Harbottle*’ (1957) 15 *Cambridge Law Journal* 194, 196.

of the company.³⁴ The courts were very reluctant to deviate from this rule or principle without good cause.³⁵

2.3.1.3 The justification of ‘the proper plaintiff rule’ and ‘the internal management principle’

(a) *The legal personality of a company*

The rule that was laid down in *Foss v Harbottle*³⁶ gives effect to the principle of separate legal personality³⁷ and the fact that companies are governed by majority decisions.³⁸ A court does not have the jurisdiction to intervene in the internal affairs of a company when the company has acted within its powers.³⁹

³⁴ *Foss v Harbottle* (1843) 2 Hare 461, 493; 67 ER 189; *Edwards v Halliwell* [1950] 2 All ER 1064 (CA) 1066-67. In Law Commission ‘Shareholder Remedies’ (Law Com No 246 Cm 3769, 1997) [1.4] the rule is described as the company acting accordance with the will of the majority shareholders or members.

³⁵ *Foss v Harbottle* (1843) 2 Hare 461, 493; 67 ER 189. See also KW Wedderburn ‘Shareholders’ Rights and the Rule in *Foss v Harbottle*’ (1957) 15 *Cambridge Law Journal* 194. In *Edwards v Halliwell* [1950] 2 All ER 1064 (CA) 1067 the court stated that the rule is not inflexible ‘and will be relaxed where necessary in the interest of justice’. See also 2.3.1.4 below for a discussion of the exceptions to the rule.

³⁶ (1843) 2 Hare 461, 493; 67 ER 189.

³⁷ KW Wedderburn ‘Shareholders’ Rights and the Rule in *Foss v Harbottle*’ (1957) 15 *Cambridge Law Journal* 194, 196. See also 2.2 and 2.3.1.2 above.

³⁸ KW Wedderburn ‘Shareholders’ Rights and the Rule in *Foss v Harbottle*’ (1957) 15 *Cambridge Law Journal* 194, 194 and 198. See also Julia Tang ‘Shareholder Remedies: Demise of the Derivative Claim?’ (2012) 1:2 *UCL Journal of Law and Jurisprudence* 178, 179.

³⁹ *Burland v Earle* [1902] AC 83 (PC) 93. Courts are reluctant to intervene in the decisions of a company’s organs as this is often viewed by courts as a usurpation of powers. See KW Wedderburn ‘Shareholders’ Rights and the Rule in *Foss v Harbottle*’ (1957) 15 *Cambridge Law Journal* 194, 196. The author (197-98) further explains that the internal affairs of a company are determined by the organs of a company by majority vote to which the minority is bound. This aspect of the rule in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189 is known as ‘the internal management principle’. In this regard see DD Prentice ‘Exception to the Rule in *Foss v Harbottle*’ (1972) 35 *Modern Law Review* 318, 318.

One of the functions of the rule in *Foss v Harbottle*⁴⁰ is to protect companies or corporations from being involved in excessive levels of litigation.⁴¹ The rule further protects a company against the institution of legal proceedings which might not necessarily be in the best interests of the company.⁴² Because minority shareholders or members often have little to gain, especially financially, from the outcome of litigation, the institution of legal proceedings on behalf of the company by individual shareholders or members of a company may not necessarily be in the best interests of the company and may rather be motivated by the personal objectives of the individual(s) involved.⁴³

Circumstances may arise where a wrong is committed against a company by its directors, shareholders or members, and where the company would be left without any redress unless the remaining members or shareholders take steps to enforce and protect the rights of the company, depending on whether or not they are allowed to institute proceedings on the behalf of the company.⁴⁴ Considerations other than the technical rules enforcing the rights of a company to exercise its rights to institute legal proceedings may prompt a court to relax the rule in *Foss v*

⁴⁰ (1843) 2 Hare 461, 493; 67 ER 189.

⁴¹ KW Wedderburn 'Shareholders' Rights and the Rule in *Foss v Harbottle*' (1957) 15 *Cambridge Law Journal* 194, 195. See also Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 595.

⁴² Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 595.

⁴³ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 595.

⁴⁴ *Foss v Harbottle* (1843) 2 Hare 461, 493; 67 ER 189.

Harbottle.⁴⁵ However, this is seldom done.⁴⁶

(b) *The law of partnership and the reluctance of the courts to intervene in the internal affairs of a company*

The principles underlying the rule in *Foss v Harbottle*⁴⁷ should be understood against the background of the principles in the law of partnership in England.⁴⁸ In terms of the law of partnership courts refused to interfere in the relations between partners.⁴⁹ The courts extended this principle to the English company law.⁵⁰ The effect of this approach is that courts justify their reluctance to intervene in the affairs of company based on this principle.⁵¹ However, a more appropriate stance in this regard would rather be that companies are governed by majority decisions.⁵²

(c) *The ratification of irregularities*

In terms of the rule in *Foss v Harbottle*⁵³ irregularities that could have been ratified

⁴⁵ *Foss v Harbottle* (1843) 2 Hare 461, 493; 67 ER 189.

⁴⁶ *Foss v Harbottle* (1843) 2 Hare 461, 493; 67 ER 189. See also KW Wedderburn 'Shareholders' Rights and the Rule in *Foss v Harbottle*' (1957) 15 *Cambridge Law Journal* 194.

⁴⁷ (1843) 2 Hare 461, 67 ER 189.

⁴⁸ KW Wedderburn 'Shareholders' Rights and the Rule in *Foss v Harbottle*' (1957) 15 *Cambridge Law Journal* 194, 195.

⁴⁹ KW Wedderburn 'Shareholders' Rights and the Rule in *Foss v Harbottle*' (1957) 15 *Cambridge Law Journal* 194, 196-97.

⁵⁰ KW Wedderburn 'Shareholders' Rights and the Rule in *Foss v Harbottle*' (1957) 15 *Cambridge Law Journal* 194, 197.

⁵¹ See KW Wedderburn 'Shareholders' Rights and the Rule in *Foss v Harbottle*' (1957) 15 *Cambridge Law Journal* 194, 197 who argues that the application of this principle was inappropriately extended to company or corporations law. See also 2.3.1.3 (a) above.

⁵² See also 2.3.1.3 (c) below.

⁵³ *Foss v Harbottle* (1843) 2 Hare 461, 493; 67 ER 189.

by the majority are placed beyond the jurisdiction of the court.⁵⁴ The effect of the application of this principle is that it is the company, and not the individual members or shareholders, that must institute legal proceedings when a wrong is committed against a company.⁵⁵ In the event that the majority decides not to institute such proceedings, the shareholders or members of the company do not have a cause of action on which they can rely.⁵⁶

2.3.1.4 The 'exceptions' to the rule in *Foss v Harbottle*⁵⁷

The strict enforcement of the rule in *Foss v Harbottle*⁵⁸ may lead to injustices. Therefore, the scope of its strict application must be carefully considered.⁵⁹ Wedderburn argues that the principle of majority control never intended to provide protection to the controllers of a company that committed wrongs against the company.⁶⁰

⁵⁴ *Edwards v Halliwell* [1950] 2 All ER 1064 (CA) 1066. See also KW Wedderburn 'Shareholders' Rights and the Rule in *Foss v Harbottle*' (1957) 15 *Cambridge Law Journal* 194, 197-198. Wedderburn argues (198) that the principle of majority decision-making was used to justify the reluctance of courts to intervene in the internal affairs of companies.

⁵⁵ See 2.3.1.2 above.

⁵⁶ *Edwards v Halliwell* [1950] 2 All ER 1064 (CA) 1066. See also KW Wedderburn 'Shareholders' Rights and the Rule in *Foss v Harbottle*' (1957) 15 *Cambridge Law Journal* 194, 198.

⁵⁷ *Foss v Harbottle* (1843) 2 Hare 461, 493; 67 ER 189.

⁵⁸ (1843) 2 Hare 461; 67 ER 189.

⁵⁹ *Edwards v Halliwell* [1950] 2 All ER 1064 (CA) 1066-67. In Law Commission 'Shareholder Remedies' (Law Com No 246 Cm 3769, 1997) [1.4] where it is reported that although provision is made for exceptions to the rule, these exceptions are difficult to understand and are in some respects 'rigid, old fashioned and unclear'. It was recommended (paras 1.11 and 1.13) that the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 be replaced with a more modern and simplified procedure to reduce the costs of litigation and to provide for mechanisms to resolve disputes without court intervention. See also para 2.3.1.3 (a) above.

⁶⁰ KW Wedderburn 'Shareholders' Rights and the Rule in *Foss v Harbottle*' (1957) 15 *Cambridge Law Journal* 194, 200. See also *Burland v Earle* [1902] AC 83 (PC) 93.

The court in *Edwards v Halliwell*⁶¹ recognised that the rule in *Foss v Harbottle*⁶² is not absolute and leaves room for deviation in certain 'exceptional' circumstances. For instance, the rule will not apply when a contract or transaction is *ultra vires* to the company, or if the conduct is illegal.⁶³ The rule further does not apply where the conduct complained of can only be authorised by a special resolution.⁶⁴ The rule further does not bar a member to institute legal proceedings to protect his or her membership or personal rights.⁶⁵ A court would allow a shareholder or member (or a minority of shareholders or members) to institute legal proceedings on behalf of the company, where the company is wronged by the controllers of the company, and where the controllers of the company use their power to prevent the company from seeking redress against them.⁶⁶ This situation

⁶¹ [1950] 2 All ER 1064 (CA) 1067.

⁶² (1843) 2 Hare 461, 67 ER 189.

⁶³ KW Wedderburn 'Shareholders' Rights and the Rule in *Foss v Harbottle*' (1957) 15 *Cambridge Law Journal* 194, 203-04. The rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 does not apply as the majority cannot ratify *ultra vires* or illegal conduct. See also *Edwards v Halliwell* [1950] 2 All ER 1064 (CA) 1066-67.

⁶⁴ *Edwards v Halliwell* [1950] 2 All ER 1064 (CA) 1066-67. See also KW Wedderburn 'Shareholders' Rights and the Rule in *Foss v Harbottle*' (1957) 15 *Cambridge Law Journal* 194, 207-09. The author argues (209) that rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 does not apply to situations where a special resolution is required to authorise or ratify specific conduct or transactions. This approach is based on the enforcement of the contract between the members and the company. This is further illustrated by the power of a member to approach a court to prevent a company to do anything in breach of its articles of association. This weakens the argument that the rule is based on the principle that courts should not interfere with the internal affairs of a company. See also the examples of rights given by Wedderburn (211-12) on which a member can rely to seek relief.

⁶⁵ *Edwards v Halliwell* [1950] 2 All ER 1064 (CA) 1067. See also KW Wedderburn 'Shareholders' Rights and the Rule in *Foss v Harbottle*' (1957) 15 *Cambridge Law Journal* 194, 209-15. The author (210) points out that there may be various sources of these personal membership rights. These rights may be found in the articles of association of a company while others may be statutory.

⁶⁶ *Burland v Earle* [1902] AC 83 (PC) 93. See also Julia Tang 'Shareholder Remedies: Demise of the Derivative Claim?' (2012) 1:2 *UCL Journal of Law and Jurisprudence* 178, 180.

is commonly referred to as ‘fraud on the minority’.⁶⁷

Wedderburn argues that it is not always technically correct to refer to the ‘exceptions’ to ‘the proper plaintiff rule’.⁶⁸ According to Wedderburn one should rather distinguish between situations where the rule applies on the one hand, and, on the other hand, situations or circumstances where the rule does not find application at all.⁶⁹ For example, the rule does not find application where a member institutes legal proceedings to protect his or her membership rights, while a court may allow members to institute legal proceedings on behalf of a company in order to prevent ‘fraud on a minority’.⁷⁰ Occasionally, courts also do not enforce the rule in *Foss v Harbottle*⁷¹ when it was in the interest of justice to do so.⁷²

2.3.1.5 The problems with the rule in *Foss v Harbottle*⁷³

The effect of adopting the rule in *Foss v Harbottle*⁷⁴ was that courts refused to

⁶⁷ KW Wedderburn ‘Shareholders’ Rights and the Rule in *Foss v Harbottle*’ (1957) 15 *Cambridge Law Journal* 194, 203. In Law Commission ‘Shareholder Remedies’ (Law Com No 246 Cm 3769, 1997) [1.13] it was recommended that the exception of ‘fraud on the minority’ should be replaced by a simplified derivative action.

⁶⁸ KW Wedderburn ‘Shareholders’ Rights and the Rule in *Foss v Harbottle*’ (1957) 15 *Cambridge Law Journal* 194, 203-04.

⁶⁹ KW Wedderburn ‘Shareholders’ Rights and the Rule in *Foss v Harbottle*’ (1957) 15 *Cambridge Law Journal* 194, 203-04.

⁷⁰ *Edwards v Halliwell* [1950] 2 All ER 1064 (CA) 1066-67. See also KW Wedderburn ‘Shareholders’ Rights and the Rule in *Foss v Harbottle*’ (1958) 16 *Cambridge Law Journal* 93 where the author argues that the ‘fraud on a minority’ exception is the only true exception to the rule.

⁷¹ (1843) 2 Hare 461, 67 ER 189.

⁷² See OA Osunbor ‘A Critical Appraisal of “the Interests of Justice” as an Exception to the Rule in *Foss v Harbottle*’ (1987) *International and Comparative Law Quarterly* 1-13. The author emphasises that the recognition of this exception as an additional ‘exception’ is controversial and is too vague to be applied with certainty.

⁷³ (1843) 2 Hare 461, 493; 67 ER 189.

⁷⁴ (1843) 2 Hare 461, 493; 67 ER 189.

intervene in the internal of affairs of a company.⁷⁵ First, courts were of the view that full effect had to be given to the separate legal personality of a company ('the proper plaintiff principle') and the decisions of the majority ('the internal management rule').⁷⁶ The reluctance of the courts to interfere with the internal affairs was further based on an incorrect application of the law of partnerships to company law.⁷⁷ As a result of the courts' recognition that the rule in *Foss v Harbottle*⁷⁸ may in some circumstances lead to injustices, exceptions were developed where the rule would not find application. These exceptions created more problems than solutions. These exceptions were criticised for being too vague and difficult to determine.⁷⁹

Many of the scenarios where the courts found an 'exception' to the rule in *Foss v Harbottle*,⁸⁰ were in circumstances where the rule did not find application at all.⁸¹ From the explanation above of the rule in *Foss v Harbottle*⁸² the need for legislative intervention is evident. It is demonstrated in the discussion below, that legislative intervention took the form of a statutory derivative action and a statutory personal action.⁸³ The main focus of this discussion is specifically on the statutory personal action (or remedy) and related aspects. However, the interrelationship between the statutory derivative action and the statutory personal action is

⁷⁵ See 2.3.1.3 (b) above.

⁷⁶ See 2.3.1.3 above.

⁷⁷ See 2.3.1.3 (b). See also KW Wedderburn 'Shareholders' Rights and the Rule in *Foss v Harbottle*' (1957) 15 *Cambridge Law Journal* 194, 197-98.

⁷⁸ *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189.

⁷⁹ Law Commission 'Shareholder Remedies' (Law Com No 246 Cm 3769, 1997) [1.4].

⁸⁰ *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189.

⁸¹ See 2.3.1.4 above.

⁸² *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189.

⁸³ See 2.3.3 and 2.5 below.

considered.⁸⁴ A brief overview of the legislative response to the problematic aspects of the rule in *Foss v Harbottle*⁸⁵ in respect of the personal action is provided below.⁸⁶

2.3.2 The company as an association of individuals

Although a company enjoys separate juristic personality⁸⁷ the individuals behind the company structure cannot be ignored.⁸⁸ The relationship between these individuals, the company and its organs are regulated by the Act, the articles of association and, if applicable, shareholder agreements. In addition to the rights and obligations contained in the Act and the articles of association, individuals may have 'rights, expectations and obligations *inter se*' that may not be articulated in the articles of association or constitution of a company.⁸⁹

In appropriate circumstances, a court may restrict the exercise of legal rights to equitable considerations.⁹⁰ In theory, the relationship between the parties to a company is of a commercial nature, but in some instances the relationship between them can be of a personal nature.⁹¹ The personal relationship between the individuals

⁸⁴ See 2.10.3 below

⁸⁵ (1843) 2 Hare 461, 67 ER 189.

⁸⁶ The overview in 2.3.3 – 2.3.5 below focuses on the statutory provisions that preceded s 994 of the Companies Act 2006. An in-depth analysis of section 994 of the Companies Act 2006 is conducted from 2.4 onwards.

⁸⁷ See 2.2 above.

⁸⁸ *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (HL) 379; [1972] 2 All ER 492.

⁸⁹ *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (HL) 379; [1972] 2 All ER 492. See 2.6.5 below.

⁹⁰ In dealing with s 459 of the Companies Act 1985 the court in *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1099 adopted the reasoning of the court in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (HL) 379; [1972] 2 All ER 492 regarding the winding-up of companies on a 'just and equitable' basis.

⁹¹ This may be the case in the context of family-owned companies and where parties to a partnership may decide to conduct their business through a company structure. See also 2.6.5.4 below regarding 'quasi-partnerships'.

of a company is one factor that may justify the restraint of legal rights based on equitable considerations.⁹²

2.3.3 Section 210 of the Companies Act 1948

2.3.3.1 The need for an alternative remedy⁹³

Prior to 1948 shareholders – especially minority shareholders – had no redress in circumstances where the majority shareholders used their power in or control of the company in a manner that oppressed other shareholders. The winding-up of companies on ‘just and equitable’ grounds were also found to be an unsatisfactory response to oppressive conduct towards minority shareholders.⁹⁴

When a company is wound-up, the assets are sold at a break-up value.⁹⁵ The break-up value of the assets is usually low and often provides the party or parties responsible for the oppressive conduct with the opportunity to purchase the relevant assets.⁹⁶ This emphasised the need for the courts to have the discretion to provide parties to an oppression dispute with an alternative remedy to the winding-up a company on ‘just and equitable’ grounds.⁹⁷ It was clear that this discretion of the courts had to be wide and flexible enough to be able to cater for a wide variety of circumstances.⁹⁸

⁹² *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (HL) 379; [1972] 2 All ER 492.

⁹³ See also 2.9 below.

⁹⁴ See also 2.9 below.

⁹⁵ Report of the Committee on Company Law Amendment (Cmd 6659, 1945) para 60.

⁹⁶ Report of the Committee on Company Law Amendment (Cmd 6659, 1945) para 60.

⁹⁷ Report of the Committee on Company Law Amendment (Cmd 6659, 1945) para 60.

⁹⁸ Report of the Committee on Company Law Amendment (Cmd 6659, 1945) para 60.

2.3.3.2 The provisions of section 210 of the Companies Act 1948

The Companies Act 1948 provided for the statutory protection of minorities in section 210.⁹⁹ In terms of this provision, a member could approach the court on the basis that the *affairs* of a company were conducted in a manner that is *oppressive*¹⁰⁰ to the particular member and/or 'some part of the members' of the company.¹⁰¹

When a court found that the affairs of a company have been conducted in a way that is oppressive towards the member and some part of the members of the company, but that the granting of an order for the liquidation of the company on 'just and equitable' grounds would be inappropriate, it has the discretion to make any other order it deemed fit in the circumstances.¹⁰² Section 210 also contained some miscellaneous provisions relating to orders altering the memorandum or articles of a company.¹⁰³

2.3.3.3 The criticism against section 210 of the Companies Act 1948

The main criticism against section 210 of Companies Act 1948 was that the courts

⁹⁹ See 3.3.2 below for the influence of section 210 of the Companies Act 1948 on the development of the statutory personal remedy in Australia.

¹⁰⁰ See 2.6.3.2 below for a discussion of the use of the term 'unfairly prejudice' in stead of 'oppressive'.

¹⁰¹ Companies Act 1948, s 210(1). See 2.3.3.1 above.

¹⁰² Companies Act 1948, ss 210(1)(a) and (b). The orders a court may grant include the regulation of the future conduct of the affairs of the company; the purchase of shares of members of the company by other members of the company or by the company self; and an order for the reduction of the company's capital. Section 210(3) of the Companies Act 1948 implies that a court order may also be made which has the effect of altering the relevant company's memorandum or articles. See also 2.9 below for a discussion of the relationship between the unfair prejudice remedy and an order for liquidation based on 'just and equitable' grounds.

¹⁰³ Companies Act 1948, s 210(4).

interpreted the provision as being too restrictive.¹⁰⁴ Courts were criticised for adopting interpretations to section 210 that limited the scope of the provision without the wording of the section justifying such a narrow interpretation.¹⁰⁵ Further, the provisions required that the conduct complained of should have been of a continuous nature.¹⁰⁶ The section also did not provide for or applied in the event of isolated events or conduct that was of an oppressive nature.¹⁰⁷ The conduct complained of should also have affected some parts of the members of the company. Also, relief could be granted only if the petitioner could convince the court that it was justified to wind-up the company on 'just and equitable' grounds.¹⁰⁸

2.3.3.4 The Jenkins Commission and section 210 of the Companies Act 1948

In 1962 the Jenkins Commission considered section 210 of the Companies Act 1948 and made some recommendations pertaining to its reform. The report recommended that the remedy should clearly be extended to cover both oppressive and unfairly prejudicial conduct.¹⁰⁹ The reason for this recommendation was that oppressive conduct implied that the intention of the oppressor plays a role in determining whether the conduct complained of meets the criteria for intervention

¹⁰⁴ Report of the Company Law Committee (Cmnd 1749, 1962) para 203. See also 2.3.3.4 below.

¹⁰⁵ For example, courts restricted the application of the remedy to unlawful conduct which denied a member relief from conduct that was only unfair. Courts were further reluctant to recognise that a member could be prejudiced based on conduct affecting a member in a capacity only related to his or her membership. See also 2.3.3.4 below.

¹⁰⁶ Report of the Company Law Committee (Cmnd 1749, 1962) para 202.

¹⁰⁷ Report of the Company Law Committee (Cmnd 1749, 1962) paras 202 and 204.

¹⁰⁸ See *Fulham Football Club (1987) Ltd v Richards & Anor* [2011] EWCA Civ 855, [60]; [2012] 1 All ER 414 where the court discussed the legal position under section 210 of the Companies Act 1948 and how the position differs from the current position. See also 2.9 below.

¹⁰⁹ Report of the Company Law Committee (Cmnd 1749, 1962) paras 203 and 212.

as stated in section 210 of the Companies Act 1948.¹¹⁰ This would further extend the remedy to apply to conduct that is not necessarily illegal or infringe on the legal rights of a member.¹¹¹ The report further recommended that section 210 be amended to state clearly that the provision not only covers particular conduct that is oppressive to or is unfairly prejudicial to the interests of a member, but also conduct that has the same effect.¹¹²

2.3.4 Section 75 of the Companies Act 1980

Section 75 of the Companies Act 1980 contained amendments to section 210 of the Companies Act 1948.¹¹³ The amendments were aimed at the restrictive approach of the courts to the interpretation of the remedy. One of the important changes brought about by section 75 was the introduction of the concept 'unfairly prejudicial'.¹¹⁴ Secondly, the legislature broke the direct link that existed between the granting of relief in terms of the unfair prejudice remedy and the liquidation of a company on the basis that it is 'just and equitable'.¹¹⁵

2.3.5 Section 459 of the Companies Act 1985

The remedy was further refined with the introduction of section 459 of the Companies Act 1985. An important feature of section 459 was that a petitioner had

¹¹⁰ Report of the Company Law Committee (Cmnd 1749, 1962) para 203.

¹¹¹ Report of the Company Law Committee (Cmnd 1749, 1962) para 203.

¹¹² Report of the Company Law Committee (Cmnd 1749, 1962) para 204.

¹¹³ See 2.3.3 above for a discussion of section 210 of the Companies Act 1948.

¹¹⁴ Report of the Company Law Committee (Cmnd 1749, 1962) paras 202 and 204. See also 2.3.3.3 above and 2.6.3.2 below.

¹¹⁵ *Fulham Football Club (1987) Limited v Richards* [2011] EWCA Civ 855, [60]; [2012] 1 All ER 414. See 2.9 below for a detailed discussion of the unfair prejudice remedy as an alternative to the winding-up of a company on 'just and equitable' grounds.

to be a *member* of the company to rely on the provisions of the section.¹¹⁶ However, it remained uncertain whether a member had to prove that he or she suffered unfair prejudice in his or her capacity as member.¹¹⁷

One of the criticisms against the remedy provided for in sections 459 to 461 of the Companies Act 1985 was the ‘the efficiency and cost’ of the exercise of the remedy.¹¹⁸ It was identified as a problem especially in the context of smaller companies. In relation to this issue, the Law Commission made, amongst others, the following recommendations:¹¹⁹

- The court should participate in the case management of the matter to curb the length and costs relating to proceedings under section 459 of the Companies Act 1985.¹²⁰
- Section 459 should provide for specific presumptions to assist with the adjudication of matters relating to the remedy. The first presumption would deal with conduct that would be presumed to be unfairly prejudicial.¹²¹ The second presumption would deal with the value of

¹¹⁶ Companies Act 1985, s 459(1). See 2.6, more specifically 2.6.1, below for a discussion of the relevance of membership for purposes of section 994 of the Companies Act 2006.

¹¹⁷ See 2.6.2.2 below for a discussion of whether a member could rely on the remedy only in his or her capacity as member. See also 5.2.4.3 below for criticism of the requirement that a member should be unfairly prejudiced in his capacity as member under section 252 of the Companies Act 61 of 1973.

¹¹⁸ Law Commission ‘Shareholder Remedies’ (Law Com No 246 Cm 3769, 1997) [1.5] and [1.6].

¹¹⁹ Law Commission ‘Shareholder Remedies’ (Law Com No 246 Cm 3769, 1997) [1.23].

¹²⁰ See 2.11 below regarding the management of litigation in terms of the statutory unfair prejudice remedy.

¹²¹ For purposes of section 994 of the Companies Act 2006 see also 2.3.2 below for a discussion of prejudice and 2.6.3 below for a discussion of the concept of unfairness.

shares that is subject to a purchase order.¹²² The presumption would have the effect that shares would be valued on a *pro rata* basis.¹²³

- The introduction of limitation of the period within which proceedings can be brought.
- Provision should be made for the winding-up of a company as a remedy under section 459 of the Companies Act 1985.¹²⁴
- To avoid potential disputes between parties, draft regulations should be included in Table A.
- The assessment criteria for the institution of a derivative action should be modernised.¹²⁵
- The Commission found that there is no need for reform pertaining to the enforcement of the rights of shareholders under the articles of association.

2.4 The statutory unfair prejudice remedy in the Companies Act 2006

The statutory unfair prejudice remedy is contained in sections 994 to 999 in Part 30 of the Companies Act 2006. These sections contain the main provisions relating to the statutory unfair prejudice remedy. Sections 997 to 999 are known as the supplementary provisions to the statutory unfair prejudice remedy. This chapter

¹²² See 2.10.5.3 below for a discussion of the valuation of shares subject to a purchase order.

¹²³ See 2.10.5 below regarding the valuation of shares subject to a buy-out order in terms of the statutory unfair prejudice remedy.

¹²⁴ See 2.9 below regarding the liquidation and winding-up of companies based unfairly prejudice conduct.

¹²⁵ See 2.10.3 below for a discussion of the relationship between the statutory unfair prejudice remedy and the statutory derivative claims.

mainly focuses on section 994 read with section 996.

Section 994, which deals with a petition by a company member, provides as follows:

‘994 Petition by company member

- (1) A member of a company may apply to the court by petition for an order under this Part on the ground –
 - (a) 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 (including at least himself), or
 - (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.
- (2) The provisions of this Part apply to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law as they apply to a member of a company.
- (3) In this section, and so far as applicable for purposes of this section in the other provisions of this Part, “company” means –
 - (a) company within the meaning of this Act, or
 - (b) a company that is not such a company but is a statutory water company within the meaning of the Statutory Water Companies Act 1991 (c 58).’Section 996 deals with the powers of the court in granting relief to a petitioner that is successful in proving the requirements set out in section 994.¹²⁶ Section 996 provides as follows:

‘996 Powers of the court under this Part

- (1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.
- (2) Without prejudice to the generality of subsection (1), the court’s order may –
 - (a) regulate the conduct of the company’s affairs in the future;
 - (b) require the company –
 - (i) to refrain from doing or continuing an act complained of, or
 - (ii) to do an act that the petitioner has complained it has omitted to do;
 - (c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;
 - (d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;
 - (e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company’s capital accordingly.’

¹²⁶ See 2.10 below.

As indicated above, section 995 deals with statutory provisions relating to petitions by the Secretary of State based on unfair prejudicial conduct.¹²⁷

Section 998 deals with the delivery of a copy of a company's constitution to the registrar when a court order alters a company's constitution or in the event of a court granting leave that certain amendments or alterations be made to the company's constitution. Section 998(3) makes it clear that when there is non-compliance with the provisions of this section, a criminal offence is committed by the company and every officer of the company who is in default. The criminal sanction for non-compliance is set out in 998(4).

Section 999 provides that when a court has ordered the alteration of a company's constitution or has granted leave to do so, a copy of the order and the company's articles must be delivered to the registrar.¹²⁸ Non-compliance with the provisions of section 999 is also a criminal offence.¹²⁹

2.5. The interpretational approach to section 994 of the Companies Act 2006

A petitioner must prove that the company committed an act or omission that is unfairly prejudicial to him- or herself as member and/or other members.¹³⁰ Section

¹²⁷ An analysis of this provision falls beyond the scope of this thesis. The same applies to section 997 which is part of the supplementary provisions of Part 30 which deal in particular with rule-making powers under the Insolvency Act 1986 or article 359 of the Insolvency (Northern Ireland) Order 1989 SI 1989/2405 (NI 19) in respect of a winding-up of a company in terms of Part 30 of the Act.

¹²⁸ See also section 998 of the Companies Act 2006. In terms of section 998 a copy of the order must be delivered to the Registrar. The company's articles or the resolution or agreement that was the subject of the court order must accompany a copy of the court order.

¹²⁹ Companies Act 2006, s 999(4) read with s 999(5).

¹³⁰ *McKillen v Misland (Cyprus) Investments Ltd* [2013] EWCA Civ 781, [13] and [14]; [2014] BCC 14.

994 is drafted in wide and flexible terms.¹³¹ The effect of such a formulation creates tension between policy considerations such as legal certainty and the wide discretion of the courts.¹³² The wording of the provision in this manner enables courts to apply the remedy to a wide variety of factual situations and circumstances.¹³³ The legislature further intended to facilitate an interpretation by which the judiciary may deviate from previous judgments that gave restrictive interpretations to the predecessors of the remedy that led to a relatively stifled application of the remedy.¹³⁴ The factual matrix and context of each case is fundamental to the appropriate determination of unfair prejudicial conduct for purposes of section 994.¹³⁵ The term or phrase 'unfairly prejudicial' must be given content in a specific context. Its interpretation and application must also be done in the context of established company law principles.¹³⁶

In short, the phrase encapsulates fairness.¹³⁷ Although the phrase 'unfairly prejudicial' is wide and flexible it is not unrestricted.¹³⁸ The flexible and open texture

¹³¹ *Maidment v Attwood* [2012] EWCA Civ 998, [21]; [2013] BCC 98. See also the discussion of the concept of fairness in *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1098-99. For a detailed discussion of fairness within the company context see 2.6.3 below.

¹³² See *O'Neill v Phillips* [1999] UKHL 24; [1999] 1 WLR 1092, 1098-99 where the court considered the wide and flexible wording of section 459 of the Companies Act 1985 and held that the concept of fairness is not an 'indefinite notion' but requires a court to exercise its discretion judicially and in a principled manner. See also P Paterson 'A Criticism of the Contractual Approach to Unfair Prejudice' (2006) *Company Lawyer* 204, 214. See further 2.6.3 below for a discussion of the concept of fairness.

¹³³ *Saul D Harrison & Sons plc, Re* [1995] 1 BCLC 14, 17-20; [1994] BCC 475. In *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1098-99 the court stated that the remedy under section 459 of the Companies Act 1985 should not be given a technical interpretation and application.

¹³⁴ See 2.3.3 above. See also *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1099.

¹³⁵ *Maidment v Attwood* [2012] EWCA Civ 998 [21]; [2013] BCC 98.

¹³⁶ *Maidment v Attwood* [2012] EWCA Civ 998, [21]; [2013] BCC 98.

¹³⁷ See 2.6.3 below for a discussion of the concept of fairness.

¹³⁸ *Maidment v Attwood* [2012] EWCA Civ 998 [21]; [2013] BCC 98.

of the phrase provides for a variety of facts and circumstances in the context of company law.¹³⁹

Facts and circumstances that may be relevant to determine the fairness of the manner in which the affairs of a company is conducted or has been conducted include the basis of the association between the incorporators of the company, the background and history of the company and the nature of the relationship between the members of the company *inter se*.¹⁴⁰ The relationship between the parties to a company is normally regulated by the Act, the constitution of a company and in some instances a shareholders' agreement.¹⁴¹

Another important aspect to take into account is that English company law derives from the law of partnership.¹⁴² Partnerships are contracts of good faith.¹⁴³ This has the consequence that the exercise or enforcement of strict legal rights may be restrained in the context of certain relationships.¹⁴⁴ The content and meaning of the concept of fairness for purposes of section 994 of the Act will be dictated by the context (facts and circumstances of each case) to which it should be applied.¹⁴⁵

The fact that the remedy is cast in wide and open language does not mean that all conduct falls within the jurisdictional requirements of section 994 or that the

¹³⁹ *Maidment v Attwood* [2012] EWCA Civ 998, [44]; [2013] BCC 98.

¹⁴⁰ See *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1098. For a discussion of the application of the remedy to quasi-partnerships see 2.6.5.4 below.

¹⁴¹ See 2.2 above.

¹⁴² *O'Neill v Phillips* [1999] UKHL 24; [1999] WLR 1092, 1098. See also 2.3.1.3 (b) above.

¹⁴³ *O'Neill v Phillips* [1999] UKHL 24; [1999] WLR 1092, 1098.

¹⁴⁴ *O'Neill v Phillips* [1999] UKHL 24; [1999] WLR 1092, 1098.

¹⁴⁵ *Maidment v Attwood* [2012] EWCA Civ 998, [21]; [2013] BCC 98. See also *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1098.

language of section 994 is unbound or unrestricted.¹⁴⁶ On previous occasions courts cautioned against an unjustified wide interpretation of similar provisions.¹⁴⁷ The provisions of section 994 must be judicially applied based on rational principles and a court must not be drawn into usurping a legislative function.¹⁴⁸ Davies and Worthington describe the challenge relating to the interpretation and application of the unfair prejudice remedy as follows:¹⁴⁹

‘In modern law, giving courts the power by statute to control the exercise of discretion by persons or institutions on grounds of “unfairness” is hardly novel. Yet such open-ended legislation, which in effect involves a sharing of the legislative function between Parliament and the courts, always presents the courts with the challenge of how to develop a case-by-case criteria by which the imprecise concept of “fairness” can be given operational content. As we remarked above, the challenge was particularly acute for the courts in relation to the unfair prejudice remedy, for the tradition of the courts was not to interfere in the internal affairs of companies.’¹⁵⁰

2.6 The jurisdictional requirements of section 994 of the Companies Act 2006

The wording of section 994 is the starting point for the correct application thereof. Before a court has the discretion to grant relief in terms of section 996,¹⁵¹ it needs

¹⁴⁶ *Maidment v Attwood* [2012] EWCA Civ 998, [21]; [2013] BCC 98.

¹⁴⁷ See *O’Neill v Phillips* [1999] UKHL 24; [1999] WLR 1092, 1098-99 decided in terms of section 459 of the Companies Act 1985. It is submitted that this approach still applies to the interpretation of section 994 of the Companies Act 2006.

¹⁴⁸ *Maidment v Attwood* [2012] EWCA Civ 998, [21]; [2013] BCC 98. See also *O’Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1098.

¹⁴⁹ Paul L Davies and Sarah Worthington *Gower and Davies’ Principles of Modern Company Law* (10th ed, 2016) 665.

¹⁵⁰ Footnotes omitted.

¹⁵¹ The nature and forms of relief that a court may grant in terms of section 996 are discussed in 2.10 below.

to be satisfied that the jurisdictional grounds in section 994(1) are proven.¹⁵² A member has to prove that the affairs of the company are being conducted or have been conducted in such a manner that is *unfairly prejudicial* to the interests of the members of a company in general or to some part of its members.¹⁵³

¹⁵² In *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch) [624]; [2013] 2 BCLC 583 it was held that the jurisdiction of a court to provide relief in terms of the unfair prejudice remedy in section 994 is statutory. See also the Court of Appeal in *McKillen v Misland (Cyprus) Investments Ltd* [2013] EWCA Civ 781, [11] and [14]; [2014] BCC 14 where the court held that although the powers of a court in section 994 of Companies Act 2006 are formulated in very wide terms, a court may only exercise these powers (or discretion) when the jurisdictional requirements of section 994 are met. The petitioner based his petition on the basis that his co-shareholders failed to offer him the opportunity to acquire more shares in the company when they sold their shares. The petitioner argued that the sale by his co-shareholders was in breach of a pre-emption right contained in a shareholders' agreement. The petitioner sought relief in the form of an order entitling him to purchase the shares from the new shareholder or to entitle him to exercise his pre-emption rights. The court ([17]) held that to prove 'unfairness' the petitioner had to show a breach of the articles of a company or shareholders' agreement. Further, the exercise of legal rights can be subjected to equitable considerations when a personal relationship exists between the shareholders ([17]). The court ([17]) found that a personal relationship did not exist between the members or shareholders. On the facts of the case it was further found that the pre-emption rights under the shareholders' agreement were not triggered and therefore the petitioner did not have a claim under section 994 of the Companies Act 2006.

¹⁵³ Companies Act 2006, s 994(1)(a). See also *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch) [626]; [2013] 2 BCLC 583 where the court emphasised that section 994 of the Companies Act 2006 was incorporated to provide relief against the manner in which the affairs of a company are conducted. The section does not apply to the activities of members amongst themselves, unless such activities or conduct relate to the conduct of the affairs of the company. The relationship between shareholders *inter se* is governed by the law of contract and tort ([626]).

For purposes of section 994 of the Act a distinction should be drawn between the conduct of a member of his or her own affairs and the conduct of the affairs of the company. In *Legal Costs Negotiators Ltd, Re* [1999] 2 BCLC 171, 195-96 the court held that a clear distinction should be maintained between the conduct of a company's organs and that of the individual shareholders or members. It should further be noted that, depending on the facts and circumstances of each case, it can be found that the affairs of a company may not necessarily be conducted by the board, but can take the form of conduct by a senior manager or individual director. See specifically the decision in *Oak Investment Partners XII Ltd Partnership v Boughtwood* [2009] EWHC 176 (Ch) [14]; [2009] All ER 67 in this regard. In *Oak Investment Partners XII Ltd Partnership v Boughtwood* [2009] EWHC

The petitioner should prove that the conduct complained of is both unfair and prejudicial.¹⁵⁴ Conduct that is prejudicial to a member may not necessarily be unfair.

176 (Ch), [2009] All ER 67 case the court [13] specifically emphasised the fact that 'a significant shareholder' was placed in a management position because of his shareholding in the company.

The fiduciary duty of a shareholder towards a company

A shareholder does not have a duty towards a company. See *Arbuthnott v Bonnyman & Ors* [2015] EWCA Civ 536 [50] where the court held that a shareholder in his or her personal capacity does not owe a duty to a company and may vote his or her shares in his or her own interest. See also *Maidment v Attwood* [2012] EWCA Civ 998 [21]; [2013] BCC 98 where the court held that a shareholder (or member) cannot be barred from the institution of legal proceedings against the relevant wrongdoers based on the fact that a breach of duty towards a company could have been detected or seen by its shareholders from the reading of the company's financial statements. In *Maidment*, a petition was brought by a minority shareholder against the sole director of the company based on the excessive remuneration drawn by the director. The director argued that the minority shareholder could not rely on this ground because the remuneration was fully disclosed in the financial statements of the company in preceding financial years, but the minority shareholders failed to act on the information in the statements. The court rejected this argument ([31] and [32]) on the basis that a duty to read the financial statements of a company will imply a legal duty towards the company. A shareholder or member does not have such a duty to a company.

Prejudice affecting all shareholders equally as a defence to an unfair prejudice petition

As regards prejudice suffered by members as a whole or some part of the members of a company see *Meyer v Scottish Co-operative Wholesale Society Ltd* 1954 SC 381 (Court of Session) 392 where the court held that a petitioner could still successfully rely on the oppression remedy in terms of section 210 of the Companies Act 1948, even in circumstances where the oppressor suffered the same prejudice as the petitioner. This approach was confirmed in *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 368-69; [1958] 3 All ER 66 (HL). In this case the parent company adopted a deliberate policy of depriving its subsidiary of business. This caused a fall in value of the shares held by an independent minority of shareholders in the subsidiary company. The petitioners, the independent minority shareholders, based their case on the failure of the nominee directors of the parent company serving on the board of the subsidiary to protect the subsidiary against the implementation of the policy of the parent company. In this case it was argued that the conduct of the parent company and its directors cannot be regarded as oppressive as the effect of the conduct was the same for all members or shareholders of the subsidiary. This argument was rejected by the court. According to the judgment, it is no defence to a petition based on unfair prejudice that all the shareholders of the company suffered the same prejudice.

¹⁵⁴ See *Weatherley v Weatherley & Ors (Shareholder dispute)* [2018] EWHC 3201 (Ch) [82]; *VB Football Assets v Blackpool Football Club (Properties) Ltd (formerly Segesta Ltd)* [2017] EWHC 2767 (Ch) [314].

The removal of a director from the management of a company's affairs – the role of such director's conduct

In *Grace v Biagioli* [2005] EWCA Civ 1222, [2006] BCC 85, [2006] 2 BCLC 70 the court found on the facts of the case that the removal of a director is prejudicial but not unfair for purposes of section 459(1) of the Companies Act 1985. In this case the Court of Appeal ([64] and [65]) found that the removal of the petitioner as director was not unfair because it could not be seen as 'either in breach of a relevant agreement, or otherwise detrimental to the well-being of the company and its assets'. The removal of the director was confirmed as a legitimate exercise of the power by the majority shareholders. The conduct of the director, who was removed, may be taken into account to determine the fairness of the removal, if required. In this case, the director entered negotiations with a potential competitor without disclosing this fact to his co-directors or shareholders ([65] and [70]).

Unfairness and prejudice as requirements of section 994 of the Companies Act 2006

See also *Kohli v Lit* [2009] EWHC 2893 (Ch) [4]; [2010] 1 BCLC 367 where the court held that section 994 requires prejudice and unfairness. In this case the petitioner, Ms Kohli, proved that an issue of new shares diluted her shareholding, and more particularly, the new issue of shares diluted the value of her shareholding due to the fact that the directors issued the new shares at an unjustifiable discount [113] and [119]-[120]. Further, the petitioner proved that the directors also failed to disclose their remuneration in the financial accounts of the company [225]. According to the court [224] this led to unfair prejudice to the Ms Kohli, as minority shareholder, as this caused her to lose trust and 'confidence in the competence and integrity of the board'. The board also sold an asset of the company without the required shareholder approval (see [255] and [258]-[259]). The court held [82] that a rights-offer may be unfairly prejudicial if it 'unfairly discriminates in its effect against one group of shareholders, including shareholders holding shares of the same class as other shareholders who are advantaged by the same exercise. This will commonly be so in the case of a minority shareholder in a small private company, who is unable or disinclined to invest further in a business in which that shareholder has no active role'. See also *Croly v Good* [2010] EWHC 1 (Ch) [6] and [88]; [2011] BCC 105 where the court held that conduct should be unfair and prejudicial to the interests of a member. In this case, Mr Croly was excluded from the board of directors and the participation in the management of the affairs of a company ([97]). The court found ([97]) this exclusionary conduct to be unfairly prejudicial because a quasi-partnership relationship existed between Mr Croly and Mr Good and that the participation in the management in the affairs of the company formed part of agreement between the parties. It was further found that the failure to declare a dividend from the company's profits amounted unfair prejudice as such failure breached an agreement that existed between Mr Croly and Mr Good. An agreement relating to the equal distribution of profits was also breached and amounted to unfair prejudice ([99]). In this regard, Mr Good received certain payments from the company's profits to the exclusion of Mr Croly, which also did not relate to services rendered to the company ([99]). For further examples see *Hale v Waldock* [2006] EWHC 364 (Ch), [2006] All ER 68. See also *Hawkes v Cuddy* [2007] EWHC 2999 (Ch) [202]; [2008] EWHC 210 (Ch) for the principle that conduct must be both prejudicial and unfair for purposes of the unfair prejudice remedy.

The prejudice must also be suffered by a member (petitioner) in his capacity as member.¹⁵⁵ The concepts ‘unfairly’ and ‘prejudicial’ are not defined in the Act. It is the task of the courts to give meaning to these concepts. To establish the meaning

See also the discussion in Paul L Davies and Sarah Worthington *Gower and Davies’ Principles of Modern Company Law* (10th ed, 2016) 672-74.

Forms of conduct that constitute unfair prejudice – breaches of constitution and single acts

See *Maidment v Attwood* [2012] EWCA Civ 998 [11] and [12]; [2013] BCC 98. See also *Kohli v Lit* [2009] EWHC 2893 (Ch), [8]; [2010] 1 BCLC 367 where the court recognised that serious or repeated deviations from its statutes or constitution undermines trust and confidence in the board. This is the case even when the conduct does not have adverse financial consequences for the shareholding of the shareholder or when compliance is regarded as a mere formality. According to the court the standards in terms on which the affairs of the company should be conducted should never be regarded as unimportant. In *Homan v Adams Securities Ltd* [2010] EWHC 2421 [21] the court held that a petitioner’s complaints in terms of section 994 should be considered in totality. However, although the totality of the complaints may amount to unfair prejudicial conduct a single act may also qualify as unfair prejudicial conduct.

¹⁵⁵ See the *obiter* remark in *O’Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1105 where the court cautioned that the requirement that a member must suffer prejudice in his or her capacity as member must not be construed too technically or narrowly. In *R & H Electrical Ltd v Haden Bill Electrical Ltd* [1995] 2 BCLC 280, [1995] BCC 958, 968 the court allowed an application based on the unfair prejudicial remedy where a member was prejudiced in his capacity as a creditor. The court found that a loan to the company provided by the member was sufficiently closely related to his capacity as shareholder in the company. The court granted an order for the buy-out of the shares and the repayment of the loan. In *Elder v Elder and Watson Ltd* 1952 SC 49 the court held that a petitioner cannot complain of oppression or unfair prejudice in his or her capacity as director or employee. See also *Apex Global Management Ltd & Anor v FI Call Ltd & Ors* [2015] EWHC 3269 (Ch) [38] where the court emphasised that reliance can also not be placed on the unfair prejudice remedy in circumstances where the member has not been prejudiced in his or her capacity as member of the company. The unfair prejudice remedy also does not apply to circumstances where a member has allegedly been unfairly dismissed as employee of a company or when a director is removed from the board. However, the unfair prejudice remedy may be available if such a dismissal or removal is in breach of a legitimate expectation. Such expectation must be evaluated further against the conduct of the petitioner in the circumstances of the case. In this regard see 2.6.4 and 2.6.5 below. See further 2.6.2 below for a discussion of the capacity in which a member should be prejudiced before he or she will be able to rely on the provisions of section 994 of the Act. For the position in Australia see 3.5.5 and for the position in Canada see 4.5 below. For the position in South African see 5.7.1.4 below.

of the concepts 'prejudice' and 'unfairly' they should be considered in the context of company law.¹⁵⁶ Case law reveals that although the concept of fairness is flexible and open it does not mean that the courts will give it an unrestricted meaning.¹⁵⁷

2.6.1 Standing

Although the terms 'member' and 'shareholder' are used interchangeably in case law, it is fundamental for purposes of section 994 of the Act to maintain the distinction between these terms. Only a *member* of company may apply for relief in terms of the Act.¹⁵⁸

A member is specifically defined in the Act. A person is a member of a company if such a person agreed to become a member of the company and his or her name is subsequently recorded in the register of members.¹⁵⁹ Therefore a person whose name does not appear in the register of members does not have

¹⁵⁶ *Maidment v Attwood* [2012] EWCA Civ 998 [21] and [44]; [2013] BCC 98. See also *Amin v Amin* [2009] EWHC 3356 (Ch) [412] where the court stated that the exercise of powers for an illegitimate or ulterior purpose is conduct that is unfair to the petitioner. See further *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [107] where the court explained that 'conduct for an ulterior purpose, or conduct in breach of duty which causes the Company loss, or a diminution in the shares, may be unfairly prejudicial. A member's interests will be prejudiced where the Respondent's conduct causes, or threatens to cause, damage to the value of this shareholding. However the fall in the value of the Company's shares is not the only test. The exclusion of the petitioner from his legitimate expectation of participation in a quasi-partnership situation is a classic instance of prejudice'.

¹⁵⁷ See 2.6.3 below for a discussion of unfairness.

¹⁵⁸ Companies Act 2006, s 994(1). See also *Birdi v Specsavers Optical Group Ltd* [2015] EWHC 2870 (Ch) [53].

¹⁵⁹ Companies Act 2006, s 112(2). In terms of section 112(1) the subscribers to a company's memorandum are regarded to have agreed to become members of the company and upon registration become members of such a company whose names must be entered into the register of members. See also *Farstad Supply A/S v Enviroco Ltd* [2011] UKSC 16 [37]; [2011] WLR 921 where the court stated that membership is one of the fundamental principles of company law. See further *Eckerle v Wickeder Westfalenstahl GmbH* [2013] EWHC 68 (Ch).

standing to bring a petition for relief in terms of section 994 of the Act, unless the shares in the company has been transmitted to the petitioner by operation of law.¹⁶⁰

Further a petitioner must be a member of the company of whose conduct of affairs is being complained of.¹⁶¹ The court does not have discretion to extend *standing* to a petitioner who is not a member of a company.¹⁶²

2.6.1.1 The standing of beneficial shareholders

The Act determines the standing of a petitioner.¹⁶³ This implies that a beneficial shareholder does not enjoy standing for purposes of section 994 of the Act, because a beneficial shareholder's name is not recorded in the company's register of members. When a beneficial shareholder is of the view that he or she has been unfairly prejudiced, the nominee of the beneficial shareholder should initiate a petition in terms of section 994 of the Act provided that the name of such nominee appears on the register of members.

When a nominee of a beneficial shareholder acts as a petitioner for purposes of section 994 of the Act, it may attract the argument that it is not the nominee's interest that has been unfairly prejudiced, but the interest(s) of the beneficial

¹⁶⁰ Companies Act 2006, s 994(2).

¹⁶¹ In *Farstad Supply A/S v Enviroco Ltd* [2011] UKSC 16 [37]; [2011] WLR 921 the court held that it is a fundamental principle of company law that persons on the register of members are the members of the company to the exclusion of all other persons. A person whose name does not appear on the register of members cannot rely on the provisions of section 994 of the Act and must find recourse in either an action for the rectification of the register of members or alternatively the enforcement of the subscription agreement. See also *Birdi v Specsavers Optical Group Ltd* [2015] EWHC 2870 (Ch) [53].

¹⁶² However, see 2.7 below for a discussion of the application of section 994 of the Act 2006 in the context of company groups.

¹⁶³ See 2.6.1 above.

shareholder that had been unfairly prejudiced. The nominee will then have the difficulty to prove that he or she as member suffered prejudice.¹⁶⁴ In *Atlasview Ltd v Brightview Ltd*¹⁶⁵ the court held that the interests of a nominee shareholder may include the economic and contractual interests of the relevant beneficial shareholder.¹⁶⁶ Without such an approach, a beneficial shareholder (owner) will not be able to rely on section 994 of the Act as he or she would not have standing and the registered nominee would not be able to prove a prejudiced interest.¹⁶⁷

2.6.1.2 The standing of majority shareholders

The fact that minority shareholders often rely on section 994 of the Act does not mean that the remedy is only available to minority shareholders.¹⁶⁸ The wording of section 994 is clear that '[a] member' may rely on the statutory unfair prejudice remedy. The fact that a member is a majority shareholder does not disqualify the member from having standing for purposes of section 994.¹⁶⁹

¹⁶⁴ See *Atlasview Ltd v Brightview Ltd* [2004] EWHC 1056 (Ch) [35]; [2004] BCC 543 for an example of such an argument.

¹⁶⁵ [2004] EWHC 1056 (Ch); [2004] 2 BCLC 191.

¹⁶⁶ Compare with the position in South Africa as discussed in 5.7.1.1 and 5.7.1.2 below.

¹⁶⁷ *Atlasview Ltd v Brightview Ltd* [2004] EWHC 1056 (Ch) [36]; [2004] 2 BCLC 191.

¹⁶⁸ See Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 662 where it is noted that the controlling shareholders of a company are not excluded from relying on the provisions of section 994 of the Act. The reasoning behind this approach is that in most cases the controlling shareholders of a company will be able to exercise their powers to remedy any harm suffered by them. The remedy will usually be utilised by non-controlling or minority shareholders. See *Cool Seas (Seafoods) Ltd v Interfish Ltd & Ors* [2018] EWHC 2038 (Ch) [153] for an example where relief was granted to a majority shareholder because such shareholder could not use its majority voting rights to protect itself from harm or prejudice.

¹⁶⁹ In *Legal Costs Negotiators Ltd, Re* [1999] 2 BCLC 171 the court entertained an application in terms of the oppression remedy where the applicant held 75% of the shares in the company. See

2.6.2 Prejudice and the capacity in which a member is prejudiced

2.6.2.1 Prejudice

For purposes of the unfair prejudice remedy courts take a wide or broad view on *prejudice* for purposes of section 994 of the Act.¹⁷⁰ Prejudice may present in various forms.¹⁷¹ Prejudice is usually financial loss suffered by a member.¹⁷² However, the rights or interests of a petitioner may be infringed or prejudiced without the petitioner suffering any financial loss.¹⁷³

Usually prejudice of a member takes the form of a diminution of the value of shares.¹⁷⁴ A diminution of value of shares or financial damage is not the only form

3.5.1 below of the position in Australia and 4.5 below for the Canadian position. For the position in South Africa see 5.7.1.1 below.

¹⁷⁰ *Maidment v Attwood* [2012] EWCA Civ 998 [12]; [2013] BCC 98. See also *Weatherley v Weatherley & Ors (Shareholder dispute)* [2018] EWHC 3201 (Ch) [83].

¹⁷¹ The exclusion of a member from the participation in the affairs of a company which is formed on the basis of a quasi-partnership is one example of prejudice that may be suffered by a member. See for example *Quilan v Essex Hinge Co Ltd* [1996] 2 BCLC 417. Such an exclusion will only be regarded as unfair in the absence of a reasonable offer. See further *Weatherley v Weatherley & Ors (Shareholder dispute)* [2018] EWHC 3201 (Ch) [83] where the court found that '[p]rejudice may found in the form of an economic and non-economic act or omission'. For a discussion of reasonable offers see 2.11 below.

¹⁷² *Corran v Butters* [2017] EWHC 2294 (Ch) [109]; *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch) [630]-[631]; [2013] 2 BCLC 583. In *Apex Global Management Ltd & Anor v FI Call Ltd & Ors* [2015] EWHC 3269 (Ch) [41] the court stated that prejudice to a member is not limited to prejudice of a financial nature or affecting the value of the member's shareholding. In *Yusuf v Yusuf* [2019] EWHC 90 (Ch) [138] the court confirmed that the prejudice a member may suffer may extend beyond the member's financial interests and can include infringements of the Companies Act 2006. See also *Routledge v Skerritt* [2019] EWHC 573 (Ch). See further Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 673.

¹⁷³ *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch) [630]; [2013] 2 BCLC 583; *McKillen v Misland (Cyprus) Investments Ltd* [2013] EWCA Civ 781 [16]; [2014] BCC 14. See also *Routledge v Skerritt* [2019] EWHC 573 (Ch).

¹⁷⁴ *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [107]; *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch) [630]; and [2013] 2 BCLC 583. See 2.10.6 below for a discussion of the

of damage or prejudice that a shareholder or member may suffer.¹⁷⁵ However, a petitioner may find it difficult to prove that any prejudice is suffered if he or she is unable to convince the court that the conduct complained of caused negative financial consequences.¹⁷⁶

2.6.2.2 The capacity in which the member is prejudiced

One of the requirements of section 994 of the Act is that a member has to prove that he or she suffered prejudice in his capacity as member of the company.¹⁷⁷ It is

diminution of the value of shares as a form of loss for purposes of the statutory unfair prejudice remedy.

¹⁷⁵ *Shepherd v Williamson* [2010] EWHC 2375 (Ch) para [107]. See also *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch). In *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch) [630]; [2013] 2 BCLC 583 the court alluded to the possibility of a member suffering prejudice which is not damages or loss of a financial nature.

¹⁷⁶ *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch) [630]-[631]; [2013] 2 BCLC 583.

¹⁷⁷ *Arbuthnott v Bonnyman & Ors* [2015] EWCA Civ 536 [45]; See also *Routledge v Skerritt* [2019] EWHC 573 (Ch). See also *Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] UKPC 26 [30] and [37]-[38], [2007] 4 All ER 164 where the court held that the interests of the shareholder or member as creditor were sufficiently related to his capacity as shareholder. See further *Hawkes v Cuddy* [2007] EWCH 2999 (Ch) [202]; [2008] EWHC 210 (Ch); *Amin v Amin* [2009] EWHC 3356 (Ch) [564], [572]; *Croly v Good* [2010] EWHC 1 (Ch); *Shepherd v Williamson* [2010] EWHC 2375 (Ch); *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch), [630]; [2013] 2 BCLC 583. In *Croly v Good* [2010] EWHC 1 (Ch) [6] it was held that a petitioner cannot rely on the remedy in his or her capacity as employee. In this case the court ([89]-[90]) found that the petitioner was not an employee but was rather presented as the 'principal' in the business of the company. This distinguished the petitioner from an employee who has been given some shares ([88]-[90]). In *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [151] the court held on the facts and circumstances of the case that the unfair prejudice suffered by the petitioner was sufficiently closely connected to his shareholding in the company. In this case the petitioner was an employee of the company and held shares in the company. The petitioner was excluded from participating in the management of the company. It is important to note that the court found that the company was a quasi-partnership. It must be stressed that the court emphasised the relevance of the arrangement between the petitioner and co-shareholders. See further *Re a Company (No 004175 of 1986)* [1987] BCLC 574. For examples of judgments dealing with the exclusion of a member from the management of a

in some circumstances sufficient if the member can demonstrate he or she has suffered prejudice in a capacity closely related to his or her membership.¹⁷⁸ This is in keeping with the interpretational philosophy that the provisions of section 994 must be given a wide and flexible interpretation.¹⁷⁹ To strictly apply the requirement that a member should have suffered prejudice in his or her capacity as such, would be too a restrictive interpretation and lose sight of the commercial realities within which companies function.¹⁸⁰

2.6.3 Unfairness

2.6.3.1 Introduction

Initially the English courts adopted a very conservative and restrictive approach to the statutory provisions containing the personal remedy aimed at the protection of

company see *R & H Electrical Ltd v Haden Bill Electrical Ltd* [1995] 2 BCLC 280, [1995] BCC 958 and *Hollaus v Moria* 2019 BCSC 14, 2019 CarswellBC 162 [60] where the court stated conduct that has the effect of excluding a shareholder from exercising his powers in the capacity as shareholder may attract relief under the unfair prejudice remedy. A petitioner cannot rely on section 994 of the Act if the member has been prejudiced in a private capacity. See 2.6.5.4 below for a discussion of the relevance of quasi-partnerships in adjudicating disputes in terms of section 994 of the Act.

¹⁷⁸ *Maidment v Attwood* [2012] EWCA Civ 998 [12]; [2013] BCC 98. See also *Wootliff v Rushton-Turner* [2016] EWHC 2802 (Ch). See further *Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] UKPC 26. In *Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] UKPC 26, [35]-[37]; [2007] 4 All ER 164 the court cautioned against the strict application of the requirement that a member must have suffered prejudice in his or her capacity as such. In *Wootliff v Rushton-Turner* [2016] EWHC 2802 (Ch) [28] the court held that '[a] shareholder's right in the context of an unfair prejudice petition may be wider or greater than just his rights *qua* shareholder. Much will depend on the arrangements between the shareholders and the company, and how closely connected the interests of members are and how they relate to it in other capacities'. The court ([34]) further found that the possibility to award compensation for a breach of a service agreement is not excluded. See also Robert Goddard 'The Unfair Prejudice Remedy' (2008) 12:1 *Edinburgh Law Review* 93, 96.

¹⁷⁹ See 2.5 above regarding the interpretation of the unfair prejudice remedy.

¹⁸⁰ See Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 664.

members.¹⁸¹ The statutory development of the unfair prejudice remedy suggests a wide and flexible interpretation of section 994 of the Act.¹⁸² Even though a wide interpretation is to be given to the provisions of section 994, a court is still bound to the wording of the provisions. A court must exercise its discretion judicially based on rational principles.¹⁸³

2.6.3.2 Unfair prejudicial versus oppressive conduct

One of the jurisdictional requirements of section 994 of the Act is that the conduct complained of should not only be prejudicial but also unfair.¹⁸⁴ This is clear from the reference to the concept of unfair prejudice instead of oppression or oppressive. One must consciously take note of the fact that the provisions of section 994 do not refer to *oppressive* conduct.¹⁸⁵ This approach by the legislature is indicative of the intention to move away from the concept of *oppressive* conduct in contrast with the description of the conduct that is *unfairly prejudicial* to or unfairly disregards the interests of a member.¹⁸⁶

¹⁸¹ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 665 refer to the reluctance of courts to interfere in the internal affairs of companies.

¹⁸² See 2.3 above for a discussion of the development of the statutory personal remedy.

¹⁸³ *VB Football Assets v Blackpool Football Club (Properties) Ltd (formerly Segesta Ltd)* [2017] EWHC 2767 (Ch) [315]. See also *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1098 in the context of the Companies Act 1985.

¹⁸⁴ *McKillen v Mislund (Cyprus) Investments Ltd* [2013] EWCA Civ 781 [15]; and [2014] BCC 14. See also *Hawkes v Cuddy* [2007] EWCH 2999 (Ch) [202]; [2008] EWHC 210 (Ch). See further 2.6.2 and 2.6.3 above.

¹⁸⁵ Section 210 of the Companies Act 1948 used of the term 'oppressive'. See also Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 664 and specifically n 13. See 2.3.3 above for a brief overview of section 210 of the Companies Act 1948.

¹⁸⁶ *Birdi v Specsavers Optical Group Ltd* [2015] EWHC 2870 (Ch) [57]. See also *Saul D Harrison & Sons plc, Re* [1995] 1 BCLC 14, 17; [1994] BCC 475.

Predecessors of section 994 of the Act referred to the term ‘oppressive’.¹⁸⁷ The use of this term created interpretational difficulties. It created uncertainty on whether oppressive conduct implied wrongful (or illegal) conduct or whether the remedy required an invasion of a petitioner’s legal *rights*.¹⁸⁸ Courts interpreted the term oppressive as conduct that is ‘burdensome, harsh and wrongful’.¹⁸⁹ For purposes of the unfair prejudicial remedy the principles in *Elder v Elder and Watson*¹⁹⁰ is to be preferred even though the judgment dealt with the interpretation of the term ‘oppressive’.¹⁹¹ Oppressive or alternatively unfairly prejudicial conduct is a visible departure from the standards of fair dealing that violates the condition of fair play on which every shareholder is entitled to rely when he or she invests in a company.¹⁹² A court would evaluate the conduct or result complained of against the standard of fairness (or unfairness)¹⁹³ which may have the result that conduct can be unfair despite being lawful.¹⁹⁴

¹⁸⁷ See Companies Act 1985, s 459.

¹⁸⁸ *Kohli v Lit* [2009] EWHC 2893 (Ch) [11]; [2010] 1 BCLC 367.

¹⁸⁹ See also *Meyer v Scottish Co-operative Wholesale Society Ltd* 1954 SC 40 (HL) 47 and *Scottish Co-op Wholesale Society Ltd v Meyer* [1959] AC 324, 342. See further *Kohli v Lit* [2009] EWHC 2893 (Ch) [11]; [2010] 1 BCLC 367.

¹⁹⁰ [1952] SC 49.

¹⁹¹ Report of the Company Law Committee (Cmnd 1749, 1962) para 204.

¹⁹² *Elder v Elder and Watson* [1952] SC 49.

¹⁹³ See *Maidment v Attwood* [2012] EWCA Civ 998 [21]; [2013] BCC 98. See also *O’Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092. In *O’Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1098-100 where the court held that the concept of unfairness in section 459 of the Companies Act 1985 runs parallel to what can be regarded as ‘just and equitable’ grounds for the winding-up of a company. The court emphasised that conduct that does not justify an order for liquidation based upon just and equitable grounds, does not by default mean that the specific conduct is fair. See 2.9 below.

¹⁹⁴ See *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360; [1972] 2 All ER 492 (HL); *O’Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1099. See also *McGuinness v Bremmer Plc* (1988) 4 BCC 161. This is in line with the predecessor of section 994 of the Act, namely, section 459 of the

2.6.3.3 The context in which unfairness must be established

The assessment of unfairness must be done in a commercial law context.¹⁹⁵ This entails that although recognising a company as a juristic person, the individuals behind the company structure together with the background against which a company is formed should not be ignored.¹⁹⁶

The context in which the prejudice is suffered plays an important role in the finding of a court on whether such prejudice is fair or unfair.¹⁹⁷ Where a strict enforcement of rights and agreements may be fair in a context where a pure commercial relationship exists between parties, such an approach in other circumstances may be unfair.¹⁹⁸ Examples of such other circumstances include where the association between the members is based on a personal relationship or

Companies Act 1985, where the legislature also elected to describe the nature of the conduct that can be found as unfairly prejudicial. In *Grace v Biagioli* [2005] EWCA Civ 1222 [61]; [2006] BCC 85 the court confirmed that the conduct complained of only needs to be unfair and not necessarily unlawful. See also Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 664-665.

¹⁹⁵ *Grace v Biagioli* [2005] EWCA Civ 1222 [61]; [2006] BCC 85. See also *Saul D Harrison & Sons plc, Re* [1995] 1 BCLC 14, 17; [1994] BCC 475.

¹⁹⁶ *Croly v Good* [2010] EWHC 1 (Ch) [6]; *Waldron v Waldron* [2019] EWHC 115 (Ch) [23]-[24]. See also *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, [1972] 2 All ER 492 (HL). See further 2.3.2 above.

¹⁹⁷ See *Waldron v Waldron* [2019] EWHC 115 (Ch) [24] and [46].

¹⁹⁸ See *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1098 where the court in dealing with section 459 of the Companies Act 1985 made the following observation regarding the context in which fairness should be determined:-

‘Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others (“it’s not cricket”) it may be unfair in some circumstances to take advantage of them. All said to be fair in love and war. So the context and background are very important.’

where the strict enforcement and exercise of rights may be in breach of undertakings, agreements or promises exchanged between the relevant parties.¹⁹⁹ These considerations are important in light of the fact that the constitution of a company may be imperfect in that it may not necessarily encapsulate the full agreement between the parties behind the company.²⁰⁰

Usually, companies are formed to achieve some commercial objective.²⁰¹ The relationship between the company, incorporators and shareholders are contained in the articles of association and in some cases even other forms of agreements.²⁰² Although companies derive from the law of partnership and may consist of a small number of members, the relationship between the members of a

¹⁹⁹ The classic example is where the members of a company agree that all or some of them are entitled to participate in the management of the affairs of the company, and then one or more of the members are excluded from such agreed participation by an exercise of a lawful majority vote. The exclusion from management can be problematic as the law may entitle the removal of a director from the board of the company, but such exclusion can be in breach of an understanding between members and the relevant member or members will be unable to withdraw their capital investment in the company. See 2.6.5 below.

²⁰⁰ See 2.6.5 below for a discussion of the legal basis for the enforcement of legitimate (reasonable) expectations

²⁰¹ See *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1098 where the court further remarked that the basis of association between members is contained in the articles of association, but additional agreements may be made between members. See 2.6.5 below.

²⁰² *Maidment v Attwood* [2012] EWCA Civ 998 [22]; [2013] BCC 98. See also *LCM Wealth Management Limited, Re* [2013] EWHC 3957 (Ch). See further *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092. In *Moxon v Litchfield* [2013] EWHC 3957 (Ch) [7]-[8] the court strictly enforced contractual arrangements against the petitioner and did not find any considerations in terms of section 994 of the Companies Act 2006 to overwrite the agreement between the parties. In *LCM Wealth Management Limited, Re* [2013] EWHC 3957 (Ch) [45] the court held that its jurisdiction in terms of section 994 of the Companies Act 2006 does not include the power to ignore or rewrite the contractual agreements between parties. However, a court may restrain the exercise of legal rights based on equitable considerations.

company must not be equated to that of partners in a partnership.²⁰³

The wording of section 994 of the Act is wide and open textured. However, this does not imply that the provisions of the section are unrestricted.²⁰⁴ The concepts in section 994 require a principle-based interpretation while taking into consideration the context of the relationship between the various parties to the company structure.²⁰⁵ Unfairness is often determined with reference to the rights and duties contained in the articles of association, statute and the established principles of company law.²⁰⁶

In short, fairness should be determined with specific reference to the established company law principles as the starting point of the enquiry. These principles include the fact that a company is a separate juristic person;²⁰⁷ that the affairs of a company are managed by the directors of a company;²⁰⁸ and the principle of majority rule or decision-making.²⁰⁹ The articles in the constitution of the company²¹⁰ and any relevant shareholder agreements are important sources of

²⁰³ *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 380; [1972] 2 All ER 492 (HL). See also 2.6.3.4 below.

²⁰⁴ In *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1098 the court held that the concept of fairness should be judicially applied based upon rational principles and that the content of the concept should not be dependent on the subjective views of individual judges. See 2.5 above.

²⁰⁵ *F&C Alternative Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 1731 (Ch) [77]; *Maidment v Attwood* [2012] EWCA Civ 998 [21]; [2013] BCC 98; [2012] 3 WLR 10; *Birdi v Specsavers Optical Group Ltd* [2015] EWHC 2870 (Ch) [57]; *Hart Investment Holdings Ltd, Re* [2013] EWHC 2067 (Ch) [36].

²⁰⁶ *Kohli v Lit* [2009] EWHC 2893 (Ch) [4]; [2010] 1 BCLC 367. See also para 2.6.3.5 below.

²⁰⁷ See 2.2 above and 2.6.3.4 below.

²⁰⁸ See 2.6.3.5 below.

²⁰⁹ See also 2.6.3.6 regarding the decision-making within companies.

²¹⁰ See 2.6.3.6 below.

understandings and arrangements between the members of a company.²¹¹

2.6.3.4 Separate legal personality

When the unfairness of conduct is evaluated it has to be taken into consideration that a company is a separate legal personality. Courts must not apply the principles of the law of partnership by default to company structures, just because the members of a company regard themselves as partners. Because companies are separate juristic personalities this has as consequence that a company is a person separate from its members.²¹² As an investor, a shareholder or member of a company does not have the right unilaterally to withdraw his or her investment from a company, which means that a member is not by default entitled to a buy-out based on the statutory unfair prejudice remedy.²¹³

2.6.3.5 The management of a company²¹⁴

The allocation of power between the board and the shareholders of a company is regulated in the articles of association and therefore the position may differ from company to company.²¹⁵ Usually, the directors of a company are entrusted with the management of the company's business.²¹⁶ In terms of the articles of association, the power to manage a company is delegated by the members of a company to the

²¹¹ See 2.6.5 below.

²¹² See 2.2 above.

²¹³ See 2.6.5.4 (b) below.

²¹⁴ See 2.2 above.

²¹⁵ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 356.

²¹⁶ This is the position based on the model sets of articles that will apply to companies unless the incorporators adopt a different version. See Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 350.

board.²¹⁷ The implication of this is that shareholders are bound by the decisions of the board as far as these decisions fall within their power to manage the business of a company.²¹⁸

2.6.3.6 Decision-making within companies²¹⁹

The allocation of power between the board of directors and shareholders is a private matter.²²⁰ The power of the board to manage the business of a company is not an original power, but one that is delegated to the board in terms of the articles of association by the shareholders (or members).²²¹ Unless the company has adopted and customised its articles of association to a different effect, the board of directors is entrusted with the management of the business of a company.²²² Most decisions in relation to the affairs of a company are taken by the board.²²³ The power to manage the business of a company is delegated to the board by the shareholders through the articles of association.²²⁴ There are, however, instances where the Act and/or the articles of association requires shareholders to participate in the

²¹⁷ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 350.

²¹⁸ See 2.6.3.6 below.

²¹⁹ See 2.2 above.

²²⁰ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 356.

²²¹ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 357.

²²² The default division of powers for public and private companies is contained in article 3 of the model articles in the Companies Act 2006. See the discussion in Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 357.

²²³ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 355.

²²⁴ See 2.2 and 2.6.3.5 above.

decision-making of the company.²²⁵ Most often the source of the unfair prejudice suffered by a shareholder originates from a decision of the board or the majority shareholders relating to the affairs of a company.²²⁶

A company and its members are contractually bound to the provisions of the company's constitution.²²⁷ The Act also places a legal duty on the members to comply with the provisions of the constitution.²²⁸ The regulation of the relationship between the company, its directors and its members is of vital importance to determine unfairness for purposes of section 994 of the Act.²²⁹ The Act and the company's constitution are the point of departure in the evaluation of the fairness or unfairness of conduct for purposes of section 994. Unless a petitioner is able to prove a breach of some agreement, understanding or expectation, he or she would not be able to prove unfairness.²³⁰

Directors must comply with their fiduciary duties and the duty of care and skill

²²⁵ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 401.

²²⁶ In *Arbuthnott v Bonnyman & Ors* [2015] EWCA Civ 536 [45] the court stated that the affairs of a company are matters that are effected by a company or on its behalf.

²²⁷ Companies Act 2006, s 33(1). See 4.3 below for the position in Canada. For the position in South Africa see 5.4.3.3 below where it is stated that the power of the board to manage the business and affairs of a company is now an original power.

²²⁸ Companies Act 2006, s 33(1).

²²⁹ See 2.6.3 above read with 2.6.5 below.

²³⁰ Unfairness may be established based on a breach of a right in terms of the articles of association or a shareholders' agreement. See *McKillen v Misland (Cyprus) Investments Ltd* [2013] EWCA Civ 781 [17]; [2014] BCC 14; *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [106]. See also *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092 where the court held that cases will not be adjudicated solely on the basis of unfairness, but what is required is a breach of the rules of understanding upon which a company is formed or a deviation from equitable principles. See 2.6.5 below.

when exercising their powers in terms of the Act or articles of association.²³¹ The directors are under a duty to exercise these powers for the benefit of the company.²³² A mere breach of a duty of directors does not automatically qualify as unfair prejudicial conduct.²³³ Such irregularities may be disregarded or ignored when compliance with the duty would have made no difference to the outcome flowing from the conduct complained of or the prejudice suffered.²³⁴ The primary duty of a director or directors is to act in the best interests of the company.²³⁵ When determining whether directors complied with their duty to promote the success of a company, the fairness of their conduct towards members will be taken into

²³¹ Companies Act 2006, s 174. See also *Saul D Harrison & Sons plc, Re* [1995] 1 BCLC 14, 18 and 31; [1994] BCC 475.

²³² *Birdi v Specsavers Optical Group Ltd* [2015] EWHC 2870 (Ch) [57]. See also *Saul D Harrison & Sons plc, Re* [1995] 1 BCLC 14, 18 and 31.

²³³ *Maidment v Attwood* [2012] EWCA Civ 998 [22]-[23]; and [2013] BCC 98. See also *Kohli v Lit* [2009] EWHC 2893 (Ch) [7]; [2010] 1 BCLC 367. In *Maidment v Attwood* [2012] EWCA Civ 998 [22]-[23]; [2013] BCC 98 the court held that one of the most important matters that a court will consider is the basis or terms on which the parties agreed to do business with each other. The agreement between the parties should be considered in light of the rights and duties contained in the Act, such as the rights and duties of directors. The court remarked that a breach of duties by the directors will be indicative of the occurrence of unfair prejudice. The court further stressed that the fiduciary duties of directors are enforced strictly. In *Maidment* the petitioner was a 25% shareholder in a company while the remaining 75% of the shares were held by one other shareholder, Mr Attwood, who was also the sole director of the company. The petitioner approached the court for relief, amongst others, on the basis that Mr Attwood has paid himself an alleged excessive remuneration or disproportionate remuneration to the financial performance of the company. In *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [107] the court took the view that the unfairness of the conduct will depend on whether the conduct complained of is in breach of an agreement between the members of or regarding the company.

²³⁴ *Kohli v Lit* [2009] EWHC 2893 (Ch) [7]; [2010] 1 BCLC 367.

²³⁵ Companies Act 2006, s 172(1). It is important that a director must in complying with this duty have regard to, amongst others, 'the need to act fairly as between members of the company'. See in this regard specifically section 172(1)(f).

consideration as a factor.²³⁶

2.6.3.7 The nature and evaluation of unfair prejudicial conduct

The unfairness of the conduct complained of is determined with reference to the effect of the conduct.²³⁷ This means that the conduct complained of must prejudice the member (or petitioner).²³⁸ When the conduct has no effect or does not cause prejudice, a member will not be able successfully to rely on section 994 of the Act.²³⁹

Relief will be not be granted in terms of section 994 of the Act when the conduct can be regarded as 'trivial' or the effect of the conduct did not impact on the interests of the petitioner.²⁴⁰ This is the position even when the conduct complained of is in breach of a legal requirement.²⁴¹ The prejudice may be determined with reference to a depressive effect on the value of a member's

²³⁶ Companies Act 2006, s 170(1). See also Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 465 read with 610. This provision should be read with section 172(1)(f) of the Act. This provision provides that a director is under a duty to act in a manner that 'he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to' '(f) the need to act fairly as between members of the company'.

²³⁷ See, for example, *Kohli v Lit* [2009] EWHC 2893 (Ch) [4]; [2010] 1 BCLC 367 where the court established prejudice with reference to the depressive effect the complained conduct had on the value of the shareholding of shareholders. The court ([10]) made it clear that a court could find that the affairs of the company had been conducted in an unfairly prejudicial manner towards a member even though the conduct had no impact on the value of the shares of the petitioner. See also *RA Noble & Sons (Clothing) Ltd, Re* [1983] BCLC 273. See further 2.6.2.1 above.

²³⁸ See 2.6.2.1 above.

²³⁹ *Kohli v Lit* [2009] EWHC 2893 (Ch) [4]; [2010] 1 BCLC 367. In *Sprint Electric Ltd v Buyer's Dream Ltd & Anor* [2018] EWHC 1924 (Ch) [324] and *Apex Global Management Ltd & Anor v FI Call Ltd & Ors* [2015] EWHC 3269 (Ch) [42] where the court emphasised that there must be a causal link between the conduct and the effect complained of.

²⁴⁰ *Kohli v Lit* [2009] EWHC 2893 (Ch) [7]; [2010] 1 BCLC 367.

²⁴¹ *Kohli v Lit* [2009] EWHC 2893 (Ch) [7]; [2010] 1 BCLC 367.

shares.²⁴² The content of the concept of fairness should be based on rational principles.²⁴³ Fairness should be determined in light of the provisions of the Act, the constitution of the company and the departures therefrom.²⁴⁴ The deviations or departure must be 'sufficiently serious' to justify relief.²⁴⁵ Such departure may justify relief even when a member does not suffer financial prejudice or when the non-compliance of a formality undermines confidence in the board.²⁴⁶

To determine whether the conduct complained of is unfair for purposes of section 994 of the Act, an objective test is applied.²⁴⁷ An objective test does not take into consideration the motive or intent of the party against whom the relief is sought.²⁴⁸ The unfairness of the conduct is established with reference to the

²⁴² *Kohli v Lit* [2009] EWHC 2893 (Ch) [4]; [2010] 1 BCLC 367.

²⁴³ *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch) [632]. See also *O'Neill v Phillips* [1999] WLR 1092, 1098.

²⁴⁴ *Kohli v Lit* [2009] EWHC 2893 (Ch) [8]; [2010] 1 BCLC 367.

²⁴⁵ *Kohli v Lit* [2009] EWHC 2893 (Ch) [8]; [2010] 1 BCLC 367.

²⁴⁶ *Kohli v Lit* [2009] EWHC 2893 (Ch) [8]; [2010] 1 BCLC 367. See 2.6.2.1 above.

²⁴⁷ *J&S Insurance & Financial Consultants Ltd, Re*, [2014] EWHC 2206 (Ch) [17]; *Fisher v Cadman* [2005] EWHC 377 (Ch) [90]; [2006] 1 BCLC 499; *Cobden Investments Ltd v RWM Langport Ltd* [2008] EWHC 2810 (Ch) [49]; *Kohli v Lit* [2009] EWHC 2893 (Ch) [4], [11]; [2010] 1 BCLC 367; *Waldron v Waldron* [2019] EWHC 115 (Ch) [45]. See also Paul L Davies and Sarah Worthington Gower and Davies' *Principles of Modern Company Law* (10th ed, 2016) 673. See further *Re RA Noble & Sons (Clothing) Ltd Re* [1983] BCLC 273.

²⁴⁸ In *Amin v Amin* [2009] EWHC 3356 (Ch) [414]-[418] the court held that because the test to determine whether conduct is unfairly prejudicial is objective, the conduct of both the petitioner and respondent is relevant whether or not it was known at the time. In accordance with this approach the conduct of the parties prior to the presentation of the petition, between the presentation of the petition and the hearing of the petition – which may include the conduct of the parties during trial – may be taken in consideration to determine whether the conduct is unfair. See also *Corran v Butters* [2017] EWHC 2294 (Ch) [110]. See further *O'Neill v Phillips* [1999] UKHL 24; [1999] WLR 1092, 1104 where the court held that the unfair prejudice remedy is not available where the petitioner based his or her application on the basis that the petitioner experienced a breakdown of trust and confidence due to his or her own subjective beliefs. In *DR Chemical Ltd, Re* (1989) 5 BCC 39, 46 the court found that although the application of the objective bystander test may find conduct or power that is exercised with a proper purpose and with a proper motive

company's constitution and the normal principles of corporate law as a starting point.²⁴⁹ A violation of any of the provisions contained in the last mentioned documents or legal principles are indicative of unfairness.²⁵⁰ The use of the term 'unfairly' enables a court to take into consideration wider equitable considerations in contrast with the enforcement of strict rights of the parties involved in an unfair prejudice dispute.²⁵¹ In *O'Neill v Phillips*²⁵² the court clearly stated that the concept of fairness should not be subjected to 'technical considerations of legal right'²⁵³ as courts are required to exercise a wide power to achieve what is 'just and equitable'.²⁵⁴ The concept of fairness for purposes of the unfair prejudice remedy is

to be unfairly prejudicial, it does not mean that when conduct is committed with an improper purpose or motive that such improper purpose or motive must be ignored because the test for unfair prejudicial conduct is objective. See further *Re RA Noble & Sons (Clothing) Ltd Re* [1983] BCLC 273. See 2.6.4 below for a discussion of the relevance of the petitioner's conduct for purposes of relief in terms of section 994.

²⁴⁹ *Kohli v Lit* [2009] EWHC 2893 (Ch) [13]; *Croly v Good* [2010] EWHC 1 (Ch) [6]; *Maidment v Attwood* [2012] EWCA Civ 998 [21] and [42]; [2013] BCC 98. See also *Grace v Biagioli* [2005] EWCA Civ 1222 [61]; [2006] BCC 85 [61]. In *Kohli v Lit* [2009] EWHC 2893 (Ch) [13]; [2010] 1 BCLC 367 the court emphasised that a breach of directors' duties is not an absolute requirement for a finding that conduct is unfairly prejudicial. Conduct of a director or directors can be found to be unfairly prejudicial even though no breach of these duties has taken place. In *Homan v Adams Securities Ltd* [2010] EWHC 2421 [19] the court held that a breach of the fiduciary duties of directors or an abuse of powers will likely be regarded as unfairly prejudicial conduct. See also *Saul D Harrison & Sons plc, Re* [1995] 1 BCLC 14, 17; [1994] BCC 475. See further 2.6.3.3 above.

²⁵⁰ *Maidment v Attwood* [2012] EWCA Civ 998 [24]; [2013] BCC 98.

²⁵¹ *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379; [1972] 2 All ER 492 (HL); *Re a Company (No 00477 of 1996)* [1986] BCLC 376, 378. In *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379; [1972] 2 All ER 492 (HL) the court confirmed that the exercise of legal rights may be subjected to equitable considerations such as the nature of the relationship between the parties. See also 2.6.5.4 below.

²⁵² [1999] UKHL 24, [1999] WLR 1092, 1098.

²⁵³ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1098.

²⁵⁴ *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch) [632]; [2013] 2 BCLC 583. See also *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1098.

not unrestricted and should be applied judicially.²⁵⁵

2.6.4 The conduct of the petitioner

2.6.4.1 The ‘clean hands’ doctrine

The ‘clean hands’ doctrine entails that a petitioner can be denied relief based on or because of his or her own misconduct.²⁵⁶ The doctrine does not require that the misconduct of the parties be balanced against each other.²⁵⁷

2.6.4.2 The application of the ‘clean hands’ doctrine to the unfair prejudice remedy

A petitioner may rely on section 994 of the Act even though he or she is unable to approach the court with clean hands in relation to the dispute which is the subject of the petition.²⁵⁸ This also means that the conduct of a petitioner will also not bar a petitioner from having standing.

2.6.4.3 The possible effect of the petitioner’s conduct on the discretion of a court

The conduct of a petitioner may cause a court to find that the conduct of the respondent is prejudicial but not unfair.²⁵⁹ Alternatively, when a court finds that the

²⁵⁵ *McKillen v Mislaid (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch) [632]; [2013] 2 BCLC 583; *Yusuf v Yusuf* [2019] EWHC 90 (Ch) [138]. See also *O’Neill v Phillips* [1999] UKHL 24, [1999] 1 WLR 1092, 1098.

²⁵⁶ *Maidment v Attwood* [2012] EWCA Civ 998, [41]; [2013] BCC 98.

²⁵⁷ Robert Hollington QC *Shareholder Rights* (8th ed, 2016) 7-202.

²⁵⁸ *Estera Trust (Jersey) Ltd & Anor v Singh & Ors* [2018] EWHC 1715 (Ch) [616]; *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [108]-[109].

²⁵⁹ *Interactive Technology Corporation Limited v Ferster* [2016] EWHC 2898 (Ch) [318]; *Richardson v Blackmore* [2006] BCC 276; *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [109]. In *Richardson v Blackmore* [2006] BCC 276 [53] the court held that depending on the seriousness of the conduct

conduct of a party is unfairly prejudicial, the conduct of the petitioner may still be an important consideration in formulating the nature of relief in terms of the unfair prejudice remedy.²⁶⁰ The conduct of the petitioner may also be taken into account to make an appropriate order as to costs.²⁶¹

2.6.4.4 The conduct of the petitioner

The fact that the 'clean hands' doctrine does not find application in unfair prejudice proceedings does not mean that the conduct of the petitioner relating to the dispute is irrelevant. However, the conduct (misconduct) of the petitioner will only be considered as far as the conduct is relevant to the alleged unfair prejudicial conduct complained of.²⁶² Because the clean hands doctrine does not apply in determining whether conduct is unfairly prejudicial or not and/or the appropriateness of the relief, the conduct of both the majority and minority shareholders has to be taken into

of the petitioner and the relevance of the conduct to the dispute before the court, the conduct of the petitioner may have the effect that the petitioner is not entitled to relief. See also *London School of Electronics Ltd, Re* [1986] Ch 211, 222; [1985] 3 WLR 474; *Jones v Jones* [2002] EWCA Civ 961 [44]; [2003] BCC 226. See Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 673.

²⁶⁰ *Interactive Technology Corporation Limited v Ferster* [2016] EWHC 2898 (Ch) [318]. See also *Jones v Jones* [2002] EWCA Civ 961 [44]; [2003] BCC 226; *Richardson v Blackmore* [2006] BCC 276 [53]; *Amin v Amin* [2009] EWHC 3356 (Ch) [414]-[415]; *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [109]. In *Vujnovich v Vujnovich* [1990] BCLC 227, 231 the court found that both majority and minority shareholders acted oppressively on the facts of the case. Based on this the court ordered the winding-up of the company as appropriate relief for the company. See further *Braid Group (Holdings) Ltd, Re* [2015] ScotCS CSOH 146 [89]-[90] where the misconduct of the petitioner had an influence on the value of the shares of all shareholders. The conduct of a petitioner may have an influence on how the shareholding of the petitioner may be valued. See in this regard Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 673. See further *London School of Electronics Ltd, Re* [1986] Ch 211, 222; [1985] 3 WLR 474.

²⁶¹ *Richardson v Blackmore* [2006] BCC 276 [62].

²⁶² Robert Hollington QC *Shareholder Rights* (8th ed, 2016) 7-202.

consideration.²⁶³

The conduct of a petitioner that a court may take into consideration to formulate appropriate relief includes the conduct of the petitioner prior to the presentation of the petition, during the time between the presentation of the petition and the date of the hearing of the petition and the conduct of the petitioner during the trial.²⁶⁴ Such considerations are important for making an order that is appropriate at the time of the hearing of the petition.²⁶⁵

2.6.5 Legitimate expectations and the doctrine of equitable considerations

2.6.5.1 Introduction

The statutory unfair prejudice remedy may create the impression that it overwrites established principles of company law such as the principle of majority decision-making. This is often the case when agreements or understandings that are not embedded in the constitution of a company or a shareholders' agreement are enforced. These agreements or understandings are described by courts as legitimate expectations.²⁶⁶ Often it is minority members that rely on the unfair

²⁶³ Robert Hollington QC *Shareholder Rights* (8th ed, 2016) 7-200.

²⁶⁴ *Grace v Biagioli* [2005] EWCA Civ 1222 [73]; [2006] 2 BCLC 70. See also *Richardson v Blackmore* [2006] BCC 276 [57]; *Amin v Amin* [2009] EWHC 3356 (Ch) [417]. See 2.10 below for a discussion of the relief a court may grant in terms of section 994 of the Act.

²⁶⁵ *Grace v Biagioli* [2005] EWCA Civ 1222 [73]; [2006] BCC 85; *Amin v Amin* [2009] EWHC 3356 (Ch) [417].

²⁶⁶ It should be noted that the courts moved away from the use of the term 'legitimate expectations' because of the connotation of the term in the context of the public law. The term 'legitimate expectations' was used in the case of *Saul D Harrison & Sons Plc, Re* [1995] 1 BCLC 14, 19. The use of this terms was later replaced by the concept of 'equitable considerations' in *O'Neill v Phillips* [1999] WLR 1092, 1102.

prejudice remedy to enforce such an agreement or understanding. Courts will give effect to or enforce such reasonable expectations, provided that the member or petitioner relying on such an expectation is able to prove the existence thereof.²⁶⁷ The enforcement of such understanding or agreement is of particular interest when it is taken into account that the majority of members have the right to amend a company's constitution.²⁶⁸

The enforcement of agreements or understandings that exist in addition to the constitution and/or shareholders' agreements becomes especially important in circumstances where there has been a substantial change in the relationship between the company and its members or the members *inter se* and/or when there was a change since the incorporation of the relevant company in the circumstances upon which the association between members were formed. This is also the case when the majority of members or the board adopts resolutions to deal with aspects relating to the affairs of a company that are not dealt with in the Act and/or constitution or shareholders' agreements of a company. This creates the opportunity for the controllers of a company to abuse their powers.²⁶⁹

²⁶⁷ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 667.

²⁶⁸ This is especially the problem when the company contract or the shareholders' agreement is silent on a matter. See Christopher A Riley 'Contracting out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts' (1992) 55 *Modern Law Review* 782, 786. The author (786-87) further points out that the principle of majority rule is inadequate in resolving issues such as the allocation of powers and the conditions relating to the exercise of majority decisions. See also 2.10.4 below regarding the amendment of the articles of association of a company.

²⁶⁹ Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 66; H-Y Chiu 'Contextualising Shareholders' Disputes – a Way to Reconceptualise Minority Shareholder Remedies' (2006) *Journal of Business Law* 312, 312. See also 2.6.3.3 above for a discussion of the company contract as 'imperfect' or incomplete.

There are mainly two theories that attempt to explain nature of a court's discretion in terms of the statutory unfair prejudice and the reason why courts are giving effect to legitimate expectations instead of established company principles. On the one hand this can be explained in terms of the contractual approach while others argue that courts owe their jurisdiction to equitable considerations.

An overview is now provided of the contractual approach and the restraint of rights based on equity considerations in the context of the statutory unfair prejudice remedy. Although these theories are inconclusive in explaining the exact nature of and the manner in which a court should exercise its discretion, both theories contribute to a deeper understanding of the theoretical issues underpinning the unfair prejudice remedy and the enforcement of understandings (or agreements) that are not necessarily contained in a company's constitution and/or shareholders' agreements. An understanding of these theories further gives insight on how courts may construct the concept of fairness for purposes of the unfair prejudice remedy, especially in light of the fact that English company law has been substantially influenced by the law of partnership.²⁷⁰

2.6.5.2 The intervention in private bargains based on fairness

Some authors argue that the statutory unfair prejudice remedy creates a discretion for a court to intervene in private bargains.²⁷¹ This discretion or power of a court is based on judicial fairness.²⁷² When intervening in the private bargains of parties the

²⁷⁰ See also 2.3.1.3 (a) and 2.5 above.

²⁷¹ Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 66.

²⁷² Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 66.

challenge faced by a court is to achieve fairness in giving effect to the freedom of contract.²⁷³ Traditionally courts were reluctant to intervene in the private bargains or arrangements between parties based on the principle that an agreement voluntarily concluded must be honoured.²⁷⁴

2.6.5.3 The contractual approach (or theory) and hypothetical bargains

(a) Introduction

In accordance with the contractual approach companies should be viewed as a network of contractual agreements.²⁷⁵ These bargains and relationships are contained within the company structure.²⁷⁶ Each shareholder or role player strives to promote his or her own objectives that may include wealth maximisation.²⁷⁷ The company structure can be described as the 'equilibrium' of the competing interests of the role players in a company.²⁷⁸ The company structure can also be described as a framework in which parties may reach understandings or arrangements

²⁷³ H-Y Chiu 'Contextualising Shareholders' Disputes – a Way to Reconceptualise Minority Shareholder Remedies' (2006) *Journal of Business Law* 312, 312 and 316 where the author notes that a careful balance needs to be struck between the freedom to contract and the intervention of courts in private bargains, arrangements or agreements to address issues of fairness.

²⁷⁴ See also 2.3.1.3 (a) on the reluctance of a court to intervene in the contractual relations of partners.

²⁷⁵ The contractual approach to company law is the opposite of the traditional legal theory regarding the company structure. See Christopher A Riley 'Contracting out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts' (1992) 55:6 *Modern Law Review* 782, 782.

²⁷⁶ Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 67 states that the company structure reduces transactional costs.

²⁷⁷ Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 67. See also Benjamin Means 'A Contractual Approach to Shareholder Oppression Law' (2011) 79 *Fordham Law Review* 1161, 1165.

²⁷⁸ Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 67

pertaining to the affairs of the company.²⁷⁹

(b) Hypothetical bargains and the incomplete company contract

Because the constitution and/or shareholders' agreement often do not contain all the arrangements or understandings between the parties or do not provide for all possible circumstances that may influence the relationship between the members and/or the company, the company contract can be regarded as incomplete.²⁸⁰ To

²⁷⁹ See Rita Cheung 'Shareholders' Agreements – Shareholders' Contractual Freedom in Company Law' (2012) 6 *Journal of Business Law* 504, 529-30 who states that the challenge for the English law company is to establish an appropriate balance between the freedom of contract and established company law principles. See also Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 67 who argues that the company structure reduces transactional costs.

²⁸⁰ According to Christopher A Riley 'Contracting out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts' (1992) 55 *Modern Law Review* 782, 796 practical issues such as time, costs and other uncertainties are identified as factors preventing shareholders from formulating comprehensive agreements that would not need judicial intervention in resolving disputes caused by uncertainties. See further Benjamin Means 'A contractual Approach to Shareholder Oppression Law' (2011) 79 *Fordham Law Review* 1161, 1163-64. See also Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 67 where it is explained that the reasons why parties are not able fully to define their relationships and to reach agreements or understandings are an important aspect within the context of the relational contract. Reasons for such failure include the long duration of the contract and transactional costs. The other factor that may contribute to disputes within the company context, is that a party or parties to the company contract may not direct their behaviour on the same information. This may be due to the fact that one or more of the parties deliberately refuses to share information. See the reference to Drury in Christopher A Riley 'Contracting out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts' (1992) 55 *Modern Law Review* 782, 785 where it is argued that agreements amongst shareholders are usually of a long duration and therefore need to be treated differently from other forms of contracts. Parties to a company contract need protection against opportunism when situations arise that are not governed by the company contract. See Benjamin Means 'A Contractual Approach to Shareholder Oppression Law' (2011) 79 *Fordham Law Review* 1161, 1164. See further See Christopher A Riley 'Contracting out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts' (1992) 55

bridge this problem some authors argue that the unfair prejudice remedy is a mechanism to enforce hypothetical bargains on parties.²⁸¹ Hypothetical bargains refer to those understandings 'which shareholders would have agreed upon, had they fully recorded their understanding'.²⁸² Such a hypothetical bargain would be influenced by expectations held by a member or members of a company. The expectation of members can be divided in two main categories, namely, universal expectations²⁸³ and particularised hypothetical bargains.²⁸⁴

(c) Universal expectations and generalised hypothetical bargains

Generalised hypothetical bargains contain 'the expectations and intentions of a collectivity of corporate actors. The generalised bargain is thus formulated without reference to individuals, identified parties or the totality of contractual relations'.²⁸⁵

General hypothetical bargains may consist of the intentions and expectations of the collectivity of corporate actors while other rules are of a mandatory nature.²⁸⁶

Modern Law Review 782, 786 who highlights that in most cases shareholders will be unable to foresee and anticipate future contingencies.

²⁸¹ P Paterson 'A Criticism of the Contractual Approach to Unfair Prejudice' (2006) 27:7 *Company Lawyer* 204, 213. See also Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 68-69 and 72.

²⁸² P Paterson 'A Criticism of the Contractual Approach to Unfair Prejudice' (2006) 27:7 *Company Lawyer* 204, 211. See also Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 68-69 and 72. Contra the approach in *JE Cade and Son Ltd, Re* [1992] BCLC 213 where the court rejected the notion that a court has the power to 'superimpose on the rights, expectations and obligations springing from those agreements or understandings further rights and obligations arising from its own concept of fairness'.

²⁸³ See 2.6.5.3 (c) below.

²⁸⁴ See 2.6.5.3 (d) below.

²⁸⁵ Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 73.

²⁸⁶ Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 73.

Mandatory rules apply to all companies and reduces transactional costs.²⁸⁷

(d) Particularised hypothetical bargains

Particularised hypothetical bargains focus on the individual expectations of a shareholder.²⁸⁸ Such expectations will only be enforced or protected when the shareholder is able to provide that the individual expectation is 'founded on a fundamental understanding, or shared expectation, which is not subject to contractual provision'.²⁸⁹ It is not a requirement for the petitioner to prove a legally enforceable contractual agreement.²⁹⁰ The petitioner only has to prove that such an understanding existed between the parties.²⁹¹ Courts have emphasised that the recognition of such understandings or reasonable expectations plays an important

²⁸⁷ Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 73.

²⁸⁸ Compare with the expectations held by parties to a quasi-partnership that will be discussed in 2.6.5.4 below.

²⁸⁹ Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 76.

²⁹⁰ *Grace v Biagioli* [2005] EWCA Civ 1222 [61]; [2006] BCC 85. See also 2.6.5.2 above.

²⁹¹ In Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 666-70 the identification of understandings and/or expectations that justify judicial intervention is one of the main issues to be determined under the remedy as not every expectation is protected. According to P Paterson 'A Criticism of the Contractual Approach to Unfair Prejudice' (2006) 27:7 *Company Lawyer* 204, 211 agreements, contracts and understandings are given a very broad meaning and such agreements, contracts or understandings can be proven with reference to the words or conduct of the members of the company even though such an agreement, contract or understanding is not formally incorporated into the constitution of the company. In this context, according to the author, the reference to 'contractual approach' may be considered inappropriate and he suggests that reference to the 'quasi-contractual approach' is more accurate. The author (212-13) further points out that, should the parties have failed to cover certain issues and circumstances in their agreement or understanding, it does not mean that they have deliberately failed to do so, as it can be explained by the fact that the parties might not have applied their minds to or consciously addressed the particular issue or issues. In light of this last mentioned argument, the jurisdiction of the court to impose an agreement on the parties cannot be excluded.

function in the commercial context, as policy dictates that the honouring of such understandings or agreements forms the cornerstone of commercial conduct.²⁹² However, the exercise of rights in terms of the constitution of a company or a shareholders' agreement may be subject to equitable considerations.²⁹³ This will be the case when the exercise of such a right is in breach of a broader understanding that existed between the parties to the company contract.²⁹⁴

2.6.5.4 Quasi-partnerships

(a) Introduction

The use of the unfair prejudice remedy is especially relevant in the context of quasi-partnerships. Quasi-partnerships are characterised by the very specific contractual relationships that exists between members.²⁹⁵ Quasi-partnerships can also be characterised by the personal relationships between members. These relationships are often based on mutual confidence and trust.

In the context of public and listed companies, the unfair prejudice remedy is

²⁹² *Saul D Harrison & Sons plc, Re* [1995] 1 BCLC 14, 17; [1994] BCC 475. See also P Paterson 'A Criticism of the Contractual Approach to Unfair Prejudice' (2006) 27:7 *Company Lawyer* 204, 214-15.

²⁹³ In *Astec (BSR) plc, Re* [1998] 2 BCLC 556, 558 the court held that a party who wishes to restrain the exercise of a right must prove 'a personal relationship or personal dealings of some kind' between the party seeking relief in the form of restraining the exercise of the right and the party who is entitled legally to exercise the right in question. See also *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1101 where the court referred with approval to *Astec (BSR) plc, Re* [1998] 2 BCLC 556.

²⁹⁴ P Paterson 'A Criticism of the Contractual Approach to Unfair Prejudice' (2006) 27:7 *Company Lawyer* 204, 211.

²⁹⁵ In Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 666 the authors make the important remark that 'a company is a quasi-partnership because of the particular understandings among its members, not that the understandings exist because the company is a quasi-partnership'. See also 2.6.5.3. (d) above.

often used to enforce and protect universal expectations.²⁹⁶ In these types of companies, a shareholder will find it more difficult to prove the existence of a personal expectation between himself, the company and/or the other shareholders.²⁹⁷ Although not impossible, it is unlikely that a quasi-partnership relationship exists between members of a public and listed company.

Quasi-partnerships are usually companies characterised by a small number of shareholders and where particular or specific agreements exist between the shareholders.²⁹⁸ When a court finds that a company is a quasi-partnership it would be more inclined to uphold arrangements between parties even though such arrangements may be informal or even not legally enforceable.²⁹⁹ The personal relationship amongst members requires conduct of mutual confidence and trust from each other.³⁰⁰ However, when unfairness is to be determined in the context of

²⁹⁶ See 2.6.5.3 (c) below for a discussion of universal expectations.

²⁹⁷ See Christopher A Riley 'Contracting out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts' (1992) 55 *Modern Law Review* 782, 796 who notes that 'there will come a point where the extent of the parties' express contracting induces the court to find that the company is not quasi-partnership, but a commercial body based upon contracting at arms-length. Such a finding clearly reduces the court's readiness to imply members' interests, for greater the size of the membership and the more arms-length the relationship between the members, the less easily can it be assumed that shareholders would have reached agreement on any issue hypothetically'.

²⁹⁸ See also 2.6.5.3 (d) above for a discussion of the protection of specific understandings, bargains or expectations.

²⁹⁹ *Croly v Good* [2010] EWHC 1 (Ch) [8]. In *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [89] the court held that in some instances such as the case with quasi-partnerships, the association between the parties is not exhaustively described in the articles of association and/or shareholders' agreement. In this case the company was managed by two director-shareholders. One of the directors, Mr Shepherd, was excluded from the management of the company on certain baseless grounds. The court held [131] that 'Mr Shepherd's expulsion prevented him from participating in the Company's management and from contributing to the prosperity of its business which could lead to profits in which he was entitled, as a member, to share'.

³⁰⁰ *Croly v Good* [2010] EWHC 1 (Ch) [91].

a quasi-partnership, the courts have indicated that one should not lose sight of the fact that it is a company.³⁰¹

(b) The law of partnership and quasi-partnerships

Often it happens that a partnership relationship existed between members prior to the formation of a company. This pre-existing partnership relationship is often subsequently transferred to and maintained after the formation of a company.³⁰² This is an important aspect to take into consideration when determining whether conduct is unfair. Partnership agreements are contracts of good faith in which equity plays an important role.³⁰³ The rights in terms of such agreements should be exercised in good faith.³⁰⁴ Equity may in certain circumstances be relied on to restrain a party from exercising his or her strict legal rights.³⁰⁵ Additional

³⁰¹ See *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1104 where the court referred to the caution expressed in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 380; [1972] 2 All ER 492 (HL) where the court remarked that the concept or analogy of a quasi-partnership should not be pressed too far.

³⁰² *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379-80; [1972] 2 All ER 492 (HL). In this case a relationship in the form of a partnership existed between Mr Ebrahimi and Mr Nazar. In terms of the partnership relationship, Mr Ebrahimi shared equally in the management of the partnership. The court accepted that subsequent to the formation of the company the relationship that existed prior to the formation of the company continued. Mr Nazar removed Mr Ebrahimi lawfully from his position as director of the company. The court found (381) that the exclusion of Mr Ebrahimi from the management of the company justified an order for the winding-up of a company, as the removal of Mr Ebrahimi deprived him from sharing in the profits in the company that were usually paid to the members in the form directors' remuneration.

³⁰³ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1098.

³⁰⁴ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1099.

³⁰⁵ *McKillen v Misland (Cyprus) Investments Ltd* [2013] EWCA Civ 781 [17]; [2014] BCC 14. See also *Birdi v Specsavers Optical Group Ltd* [2015] EWHC 2870 (Ch) [57]. See further *Saul D Harrison & Sons plc, Re* [1995] 1 BCLC 14, 19 and 32; [1994] BCC 475 and more specifically *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1099 where the court held that the unfairness in the exercise of strict legal rights may be based on a breach of rules, or the use of powers, rights or rules in a manner

considerations of equity apply in the context of quasi-partnerships.³⁰⁶

To determine the content and meaning of the concept of fairness in the company law context, the fact that the English company law derived and developed from the legal principles pertaining to partnerships plays an important role in understanding the regulation of relationships in the company law context.³⁰⁷ In terms of English law, companies that can be categorised as quasi-partnerships, can

that is regarded as 'contrary to good faith'. In *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379; [1972] 2 All ER 492 (HL) the court held that such equitable considerations may arise at the time of the formation of the relationship between the parties as shareholders of the company or that it may arise at a later stage. See further *Brownlow v Marshall Ltd* [2000] 2 BCLC 655 [45] decided in terms of section 459 of the Companies Act 1985.

³⁰⁶ See *Croly v Good* [2010] EWHC 1 (Ch) [7] and [8] where the court held that '[i]f it is found that the company falls into this quasi partnership category, the court is more likely to conclude that it is unfair to fail to give effect to, or bring to an end, arrangements which have been made on an informal basis, even though they do not give rise to legal entitlements, or to exclude a participator from the management or conduct of the company's business, if it was part of the arrangement that he should take part in it'. In *Wootliff v Rushton-Turner* [2016] EWHC 2802 (Ch) [16] the court held that in a quasi-partnership the principles of equity require the majority to act in good faith. In the context of a company where the relationship between the parties to the company is of a pure commercial nature, a petitioner will not be able to prove unfairness for purposes of section 994 unless the petitioner can demonstrate that there has been a breach of an agreement relating to the manner in which the affairs of a company would be conducted. In *Brownlow v Marshall Ltd* [2000] 2 BCLC 655 [45] the court remarked that 'it seems to me that was indeed a company in which considerations of a personal character arising out of the relationships between these family shareholders, gave rise to the type of conditions in which equitable considerations, envisaged by Lord Wilberforce in *Ebrahimi v Westbourne Galleries* and by Lord Hoffmann in *O'Neill*, might disentitle the majority to remove a minority shareholder director from office without making a reasonable offer'. See further *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1099.

³⁰⁷ *Croly v Good* [2010] EWHC 1 (Ch) [9]. See also *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1098 where the court remarked that 'company law has developed seamlessly from the law of partnership, which was treated by equity like the Roman *societas*, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it is considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law'.

be wound-up if the facts on which relief is sought in the form of a winding-up order would justify the dissolution of the company if the company was a partnership.³⁰⁸ When a petitioner relies on the fact that the affairs of a company are conducted as a quasi-partnership, he or she should provide the relevant evidence in proving such a relationship.³⁰⁹ The concept of a quasi-partnership has been imported from case law dealing with the winding-up of companies based upon just and equitable grounds.³¹⁰ It would not suffice to argue that a company should be regarded as a quasi-partnership just because the company is small or a private company.³¹¹ There are many small companies or private companies whose affairs are conducted on a pure or exclusive commercial basis. The articles of association are the primary source of regulation of the relationship of members to these companies.³¹²

To determine whether a quasi-partnership relationship exists between the members of a company regard should be had to whether the association between the members are founded upon personal relationships,³¹³ whether an agreement

³⁰⁸ *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 375; [1972] 2 All ER 492 (HL). The court (379) remarked that 'it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent'. The court (380) described the position relating to the winding-up of a company on a just and equitable basis as follows '[t]he just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved'.

³⁰⁹ *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379; [1972] 2 All ER 492 (HL).

³¹⁰ *Flex Associates Ltd, Re* [2009] EWHC 3690 (Ch) [29].

³¹¹ *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379; [1972] 2 All ER 492 (HL).

³¹² *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379; [1972] 2 All ER 492 (HL).

³¹³ *Croly v Good* [2010] EWHC 1 (Ch) [91] and [92]. In this case the court found that a quasi-partnership existed between the members of the company. This finding was based on the fact that the members agreed that they will only be remunerated in the form of dividends that could only have been declared from the profits of the company [90]. The court further based the finding of a quasi-

has been reached in respect of the participation in the management of the company;³¹⁴ or whether there are any restrictions upon the transfer of a member's interest.³¹⁵ The shareholders may also be bound to other forms of agreements or

partnership on the fact that the members conducted the affairs of the company based on mutual agreement between themselves [91]. The court further held that it does not have to 'expressly articulate' an understanding of trust and confidence as such an agreement was an essential ingredient of their relationship in order to give effect to their understanding pertaining to the conduct of the affairs of the company [91]. The court held [89] that the participation in the management of the company was substantial and similar to that of an owner instead of an employee. The exclusion of the petitioner from the management of the affairs of the company was unfairly prejudicial to the petitioner, as the petitioner had a substantial interest in the management of the company to generate profits and further was in breach of an understanding between the members [93].

³¹⁴ In *Amin v Amin* [2009] EWHC 3356 (Ch) [560] the court held that a shareholder in a quasi-partnership company will be entitled to rely on unfair prejudice when his or her exclusion from the management of a company is in breach of an understanding between the parties. In this case the two directors were removed from their positions as such. The court held that their removal was not only lawful but also justified on the basis that the two excluded directors (who were also members of the company) had frustrated the proper financial management of the company, specifically in respect of the payment of suppliers and unauthorised withdrawals. The company was a family business.

³¹⁵ In *Anacott Holdings Ltd, Re* [2013] EWCA Civ 119 [9], [2013] 2 BCLC 46 the court remarked that a quasi-partnership exists when a 'special relationship' is present between the parties and equitable considerations applicable to partnerships apply. In this case the two shareholders each held 50% of the shares in the company. Only one of them was a director of the company. See also *Phoenix Office Supplies Ltd v Larvin* [2002] EWCA Civ 1740 [17]; [2003] 1 BCLC 76 where the court had to determine whether a quasi-partnership existed between the shareholders pertaining to the interests and the conduct of the company's business. In this case the three shareholders of the company had an understanding that all the shareholders would participate in the management of the company's business. A further question the court had to deal with was whether the alleged quasi-partnership between the shareholders included an understanding on the consequences that would follow should one of the shareholders decide to leave the company. The petitioner argued that he was unfairly prejudiced as he was denied access to accounting records of the company. The court had to determine whether the denial of access to company records as a director of the company also impacted on or prejudiced the petitioner as shareholder. The fact that a quasi-partnership exists between the parties does not mean that one or more of the members may withdraw unilaterally from the company and claim that the remaining shareholders buy the withdrawing shareholder's interest ([28]). In *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [108] the court held that section 994 does not entitle a member unilaterally to withdraw from a company even if the company is a quasi-

understandings *inter se*.

A quasi-partnership relationship does not have to be present at the time of the formation of the company. Such a relationship may develop later in the lifetime of the company.³¹⁶ The totality of the arrangements and understandings between the members relating to the conduct of the company's affairs must be considered to establish whether such a relationship is present.³¹⁷

In the context of quasi-partnership companies, the personal relationship amongst members is an important factor for purposes of determining fairness.³¹⁸ In

partnership and the petition is based on a breakdown in trust and confidence between the members. See also *Amin v Amin* [2009] EWHC 3356 (Ch) [531]; *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379; [1972] 2 All ER 492 (HL). See *Croly v Good* [2010] EWHC 1 (Ch) [93] where the court held that an exclusion from the management of the company may in certain circumstances prejudice a member in his capacity as such. See further *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1102. See also 2.6.2 above.

³¹⁶ In *Croly v Good* [2010] EWHC 1 (Ch) [88] the court had to determine precisely when the members commenced with conducting the affairs of a company as a quasi-partnership. The court held that the important question was whether the quasi-partnership had existed at the time of the conduct complained of.

³¹⁷ *Croly v Good* [2010] EWHC 1 (Ch) [88].

³¹⁸ See, however, *Brett v Migration Solutions Holdings Limited* [2016] EWHC 523 (Ch) [193] where the court found that the existence of a quasi-partnership is not a prerequisite for restraining the exercise of legal rights on equitable grounds. In *Hart Investment Holdings Ltd, Re* [2013] EWHC 2067 (Ch) [38] the court found that there were not only a personal relationship between the members of the company, but that there were also an agreement or understanding of trust and confidence. See also *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379; [1972] 2 All ER 492 (HL) where the court held that a court's discretion does not entitle a party to be relieved (exempted) from an obligation that he or she assumed on becoming a member of a company. However, the exercise of a legal right could be subject to equitable considerations. According to the court in *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1098-99 the principle is that the association between the members of a company is contained in the articles of association or other agreements. On a strict application or enforcement of this principle a member will not be able to demonstrate that conduct is unfair 'unless there has been some breach of the terms on which he agreed that the affairs of the

quasi-partnerships, equitable considerations may require that the conduct, permitted by law or by the constitution of a company, be restrained in the event of such conduct being inconsistent with an agreement or understanding between the parties to the quasi-partnership.³¹⁹

2.6.5.5 Criticism of the contractual approach

The concept of the hypothetical bargain is open for criticism because parties are bound to agreements that they have not actually agreed to.³²⁰ It is uncertain whether parties would have agreed to a hypothetical bargain imposed by a court.³²¹ This will also often prompt a court to impose a hypothetical bargain that protects the minority of members. It is unlikely that the majority shareholders would have agreed to terms and conditions to protect the interests of the minority.³²² The contractual approach also fails to explain why courts are reluctant to grant relief based on the mismanagement of companies as it is unlikely that shareholders would have agreed

company should be conducted'. See further *Croly v Good* [2010] EWHC 1 (Ch) [7]. See also 2.6.5.4 above and 2.10.5.5 below on how the shares of a company that is a quasi-partnership are valued.

³¹⁹ *Croly v Good* [2010] EWHC 1 (Ch) [7]; *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [106]; *Birdi v Specsavers Optical Group Ltd* [2015] EWHC 2870 (Ch) [57]. The quasi-partnership may consist of mutual agreements and understandings that are not incorporated in the articles of association of the company. In other words, the reasonable expectations of the party may go beyond the founding documents of a company. See the *obiter* remark by the court in *McKillen v Misland (Cyprus) Investments Ltd* [2013] EWCA Civ 781 [17]; [2014] BCC 14.

³²⁰ See 2.6.5.3 (d) above regarding the power of a court to 'superimpose' agreements on the basis of fairness.

³²¹ P Paterson 'A Criticism of the Contractual Approach to Unfair Prejudice' (2006) 27:7 *Company Lawyer* 204, 213.

³²² P Paterson 'A Criticism of the Contractual Approach to Unfair Prejudice' (2006) 27:7 *Company Lawyer* 204, 213.

to the management of the company.³²³ From a theoretical point of view, the contractual approach does not provide an adequate explanation for the basis of a court's jurisdiction under the unfair prejudice remedy.³²⁴ Further, the unfair prejudice remedy is not based on contract. If this was the case, it would have been possible for shareholders contractually to exclude the operation of the unfair prejudice remedy.³²⁵

Besides from interpreting and explaining the enforcement of agreements and undertakings between parties, the contractual approach fails to explain the application of an external value to the relationship between parties to a contract.³²⁶ It should be kept in mind that the parties to a company contract may reach an agreement or understanding that may impact on the interpretation of the notion of fairness.³²⁷ Because parties may influence the meaning of fairness for purposes of the unfair prejudice remedy, it is doubted whether the concept of fairness can be regarded as a foreign value that this imposed on the parties to the company contract.³²⁸

³²³ P Paterson 'A Criticism of the Contractual Approach to Unfair Prejudice' (2006) 27:7 *Company Lawyer* 204, 214.

³²⁴ P Paterson, 'A Criticism of the Contractual Approach to Unfair Prejudice' (2006) 27(7) *Company Lawyer* 204, 212.

³²⁵ P Paterson 'A Criticism of the Contractual Approach to Unfair Prejudice' (2006) 27(7) *Company Lawyer* 204, 212. See also Christopher A Riley 'Contracting out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts' (1992) 55 *Modern Law Review* 782, 797 where the author argues that section 459 of the Companies Act 1985 was a mandatory provision and therefore could not be contractually excluded.

³²⁶ P Paterson 'A Criticism of the Contractual Approach to Unfair Prejudice' (2006) 27:7 *Company Lawyer* 204, 212.

³²⁷ P Paterson 'A Criticism of the Contractual Approach to Unfair Prejudice' (2006) 27:7 *Company Lawyer* 204, 212.

³²⁸ P Paterson 'A Criticism of the Contractual Approach to Unfair Prejudice' (2006) 27:7 *Company Lawyer* 204, 212. See *Anderson v Hogg* 2000 SLT 634, 630; and [2000] ScotCS 26 where the court remarked that the parties through their words or conduct may have agreed that the affairs of a

2.6.5.6 The introduction of the value of fairness by the unfair prejudice remedy to the law of contract

The purpose of section 994 of the Act is to protect shareholders against the power and control of majority shareholders. Where disputes between shareholders arise due to a breach of an obligation contained in a contract, the dispute relates to the law of contract.³²⁹ The difference between the application of section 994 and the law of contract to the breach of agreements is that a breach of a common law contract does not always raise questions of fairness or equity, while the unfairness of conduct is a prerequisite in obtaining relief in terms of section 994 read with section 996.³³⁰ The effect of section 994 of the Act is thus that the value of fairness is an important consideration which has to be taken into account together with the contractual arrangements that regulate their relationship.³³¹

2.6.5.7 The value of the contractual approach

It is important to note that although the contractual approach provides valuable insight into the application of minority protection in the form of the unfair prejudice remedy, it has its limitations.³³² Fairness empowers courts to enforce agreements or understandings that are not necessarily formally recorded in the constitution or

company would be conducted in a particular manner. This will require a court to view the unfairness of the conduct complained of in light of the understanding or agreement between the parties rather than in light of the provisions of the articles of association.

³²⁹ H-Y Chiu 'Contextualising Shareholders' Disputes – a Way to Reconceptualise Minority Shareholder Remedies' (2006) *Journal of Business Law* 312, 315-16.

³³⁰ H-Y Chiu 'Contextualising Shareholders' Disputes – a Way to Reconceptualise Minority Shareholder Remedies' (2006) *Journal of Business Law* 312, 316.

³³¹ See 2.6.5.7 below.

³³² See 2.6.5.5 above.

shareholders' agreements.³³³ The power, however, does not extend to imposing hypothetical bargains on members.³³⁴ An agreement or understanding will only be protected or enforced if it can be proven that the parties have reached an actual agreement. In the absence of any understanding or agreement the main source of the regulation of the relationship between parties or members is the Act, the constitution and where applicable a shareholders' agreement. The contractual approach to the unfair prejudice remedy explains that a court can protect and enforce the legal expectations of members as fairness requires parties to comply with the agreements or undertakings they have voluntarily given.³³⁵ The unfair prejudice remedy further entitles a court to intervene in the affairs of a company based on fairness.³³⁶ Prior to the unfair prejudice remedy courts were reluctant to do so. Quasi-partnerships refer to companies where particular agreements or understandings exist among members of a company.³³⁷ Quasi-partnerships are not dependent on the number of their members.³³⁸ From an evidential point of view it would be easier to prove the existence of an agreement or understanding between a small number of members than it would be to prove such agreement or understanding between a large number of members.³³⁹

³³³ See 2.6.5.3 (d) above.

³³⁴ See 2.6.5.3 (d) above.

³³⁵ See 2.6.5.2 above.

³³⁶ See 2.3.1.5 above where the reluctance of the courts to intervene in the affairs of companies was applied on an incorrect basis.

³³⁷ See 2.6.5.4 above.

³³⁸ See 2.6.5.4 above.

³³⁹ See 2.6.5.4 (a) above.

2.7 Groups of companies

2.7.1 Introduction

The business and affairs of some companies are conducted in the context of a group structure.³⁴⁰ Within a group of companies the interests of members may also be vulnerable and susceptible to unfairly prejudicial conduct. This makes the consideration of the application of the unfair prejudice remedy within a group of companies not only relevant but also important because of the dominance certain companies, directors and/or shareholders may exercise within a group of companies, which in turn may create opportunities for abuse.³⁴¹ When dealing with companies in a group structure, the legal personality of each individual company must not be ignored.³⁴² This means that each company conducts its own affairs.

The wording of section 994(1)(a) of the Act speaks *prima facie* directly to the conduct of the company whose affairs are conducted in an unfairly prejudicial manner to the interests of a member of *that* company.³⁴³ This presupposes that the petitioner must be a member of the company whose affairs are conducted unfairly prejudicially towards him or her. Therefore, when seeking relief in terms section 994, the relief must relate to the company whose affairs are conducted or have been

³⁴⁰ See 2.7.2 below for a discussion of the holding-subsiary relationship between companies.

³⁴¹ See 2.7.2 and 2.7.3 below.

³⁴² See 2.2 above for a discussion of the separate legal personality of companies. See also Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 193-94.

³⁴³ On the wording of section 994(1)(a) of the Act, the conduct can affect the interests of members in general or only some part of the members of the company, but at least the petitioner himself should be affected by the alleged unfairly prejudicial conduct.

conducted unfairly prejudicially to the interests of the petitioner.³⁴⁴ However, it must be cautioned that this interpretation of section 994 may be a too technical and legalistic view of the affairs of a company within a group structure. A court must not follow too restrictive an approach to the interpretation of section 994 and, more specifically, of what constitutes the affairs of a company.³⁴⁵

Case law suggests that the affairs of a company should be determined with specific regard to the business realities of the company.³⁴⁶ This requires that the affairs of a company should be given a wide and broad interpretation, taking into consideration the business realities of the company.³⁴⁷ One such reality may be the

³⁴⁴ See *City Branch Group Ltd, Re* [2004] EWCA Civ 815 [27]; [2004] 4 All ER 735 where the court cautioned against the mechanical application of unfair prejudice cases which dealt with companies that did not operate within a group structure, to unfair prejudice disputes involving companies and parties within a group.

³⁴⁵ See 2.5 above.

³⁴⁶ See in this regard *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch) [628]; [2013] 2 BCLC 583. In *Hawkes v Cuddy* [2009] EWCA Civ 291, [2009] 2 BCLC 427 [50] the court adopted the approach in *Dernacourt Investments Pty Ltd, Re* (1990) 2 ACSR 553 where it was held that the affairs of the company should be given a wide and broad interpretation where the business realities of a situation are taken into consideration. The affairs of a company include the matters considered or to be or may be considered the board ([50]). The affairs of a company may also consist of matters that are not considered by or actually serve before the board of a company ([50]).

³⁴⁷ See *Hawkes v Cuddy* [2009] EWCA Civ 291, [2009] 2 BCLC 427 [50] where the court adopted the approach in *Dernacourt Investments (Pty) Ltd, Re* (1990) 2 ACSR 553. See also *City Branch Group Ltd, Re* [2004] EWCA Civ 815 [22]-[23]; [2004] 4 All ER 735 where the court with reference to *Nicholas v Soundcraft Electronics Ltd* [1993] BCLC 360 held that when the holding company exercises substantial control over the financial affairs of the subsidiary, the conduct of the affairs of the subsidiary can be attributed to the holding company. A legalistic or narrow view of the affairs of the affairs of a company is inappropriate. When determining the affairs of a company a court should take the business realities of the situation into consideration. Indicators of financial control include the authorisation of payments by the holding company and the non-payment of the holding company of monies due to the subsidiary. See further *Meyer v Scottish Co-operative Wholesale Society Ltd* 1954 SC 381 (Court of Session) 391.

fact that the affairs of the company are conducted within a group structure.³⁴⁸ The fact that the affairs of a subsidiary have been conducted in an unfairly prejudicial manner does not restrict the application of section 994 of the Act to the subsidiary company.³⁴⁹

2.7.2 The subsidiary-holding company relationship

A group of companies exists when one company is a subsidiary of another. The last

³⁴⁸ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 228 point out that the principle of limited liability is not simply ignored because a group of companies operate as a single-economic entity.

³⁴⁹ See *City Branch Group Ltd, Re* [2004] EWCA Civ 815 [28]-[29], [2004] 4 All ER 735 where the court held, after considering the Australian decisions of *Norvabron Pty Ltd, Re (No 2)* (1986) 11 ACLR 279 and *Dernacourt Investments (Pty) Ltd, Re* (1990) 2 ACSR 553, that 'the affairs of the holding company towards the subsidiary may constitute the conduct of the affairs of the subsidiary and *vice versa*'. In this case the company was the holding company of three subsidiaries. Two of these subsidiaries were wholly-owned subsidiaries of the company, while the third subsidiary was a subsidiary of one of the last mentioned wholly-owned subsidiaries of the company. The shares in the holding company were held on a 50%/50% basis by two families namely Gross and Rackind. Gross instituted legal proceedings in terms of section 459 of the Companies Act 1985 and alleged unfair prejudice regarding the manner in which the affairs of one of the wholly-owned subsidiaries were conducted. The Rackind family argued ([15]) that the holding company and the specific wholly-owned subsidiary were separate legal personalities, and therefore members of the holding company could not rely on the provisions of section 459 of the Companies Act 1985 for relief, based on the manner with which the affairs of the wholly-owned subsidiary were conducted. This is because the members of the holding company are not members of the wholly-owned subsidiary ([19]). The court rejected this argument of the Rackind family by holding that the affairs of a holding company may include the affairs of a wholly-owned subsidiary. The court explained ([19]) 'that the conduct complained of is certainly capable of prejudicing the interest of the subsidiary concerned, on which footing there will be a risk of diminution in value of the company's investment in the subsidiary, which in turn will mean actual or potential prejudice of the interests of the shareholders in the company'. The court specifically stressed ([21] and [26]) the fact that Mr Gross and Mr Rackind were the only directors of the holding company and of the two relevant wholly-owned subsidiaries and the directors of the third wholly-owned subsidiary save for one. The court held ([26]) that 'the affairs of a subsidiary can also be the affairs of the its holding company, especially where, as here the directors of the holding company, which necessarily controls the affairs of the subsidiary, also represent a majority of the directors of the subsidiary'.

mentioned company is the holding company.³⁵⁰ A company will be a subsidiary of the holding company when the holding company can exercise control over the subsidiary.³⁵¹

To apply section 994 of the Act to a holding-subsidary relationship of companies, the degree of relevance of the conduct of the holding company's affairs to the subsidiary company and vice versa needs to be determined.³⁵² Common directors of the boards of the holding company and the subsidiary company is indicative of a clear link or relevance between the conduct of the affairs of the companies within a group structure.³⁵³

³⁵⁰ Companies Act 2006, s 1159(1).

³⁵¹ Section 1159(1)(a)-(c) of the Companies Act 2006 states that a company is a subsidiary of another company (the holding company), in circumstances where the holding company holds the majority of the voting rights in the subsidiary, or is a member of the subsidiary company and has the right to appoint or remove the majority of the board members of the subsidiary, or if the holding company is a member of the subsidiary company 'and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it, or if it is a subsidiary of a company that is itself a subsidiary of that other company'. Section 1159(2) defines a 'wholly-owned subsidiary' as a company whose total share capital is held by the holding company or its wholly-owned subsidiaries.

³⁵² See, for example, *City Branch Group Ltd, Re* [2004] EWCA Civ 815 [22]-[23]; [2004] 4 All ER 735 where the court held with reference to *Nicholas v Soundcraft Electronics Ltd* [1993] BCLC 360 that when the holding company exercises substantial control over the financial affairs of the subsidiary, the conduct of the affairs of the subsidiary can be attributed to the holding company.

³⁵³ See also in the context of section 459 of the Companies Act 1985 *City Branch Group Ltd, Re* [2004] EWCA Civ 815, [2004] 4 All ER 735 where the court further held ([26]) that the phrase 'affairs of a company' should be given a wide and broad interpretation. The affairs of the subsidiary company can also be the affairs of the holding company, especially when the directors of the holding company comprise the majority of the members of the board of the subsidiary ([26]). The court held that the board members of the holding company serving on the board of the subsidiary company were well aware of the manner in which the affairs of the company were conducted ([28]). In *Meyer v Scottish Co-operative Wholesale Society Ltd* 1954 SC 381 (Court of Session) 391 and *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324; [1958] 2 All ER 66 (HL) the holding company ('the parent company') established a subsidiary. The holding company appointed three nominee directors to the board of the subsidiary. The two petitioners were also appointed to the board of the subsidiary.

2.7.3 Control and separate legal personality in company groups

Based on the separate juristic personalities of companies it can be argued that a member of a subsidiary company cannot rely on the unfair prejudice remedy when the affairs of the holding company are being or have been conducted unfairly prejudicially.³⁵⁴ When this line of argument is accepted, a member may only seek relief against the company whose affairs are being conducted or have been conducted unfairly prejudicially to the interests of a member or members of that

The two petitioners were also given a minority shareholding in the subsidiary. Due to a change in circumstances, the holding company did not need to conduct its business through the subsidiary anymore. The holding company attempted to buy the shareholding of the petitioners at a far lower value than its true or actual value, which caused the petitioners to refuse to sell their shares. The holding company subsequently adopted a policy to divert business away from the subsidiary to the holding company. In the Court of Session it was held (391) that when a holding company creates a subsidiary that deals in the same line of business as the holding company and the subsidiary company has an independent minority of shareholders, an obligation arises to deal fairly with the subsidiary company. In *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 367; [1958] 2 All ER 66 (HL) the court, in dealing with section 210 of the Companies Act 1948, found that the nominee directors of the holding company placed their duty to the holding company above the duty they had to the subsidiary company. In this case the directors failed to do something positive to protect the interests of the subsidiary. According to the court (367) the affairs of a company can be conducted oppressively when such conduct takes the form of an omission or a failure to act. The court rejected the argument of the directors that if they had acted positively it would not have had any effect or made any difference. As regards the issue of the freedom of directors to serve as members of more than one board of directors, the court (368) made the following comment: ‘Your Lordships were referred to *Bell v Lever Brothers Ltd* [1932] AC 161 (HL) at 195], where Lord Blanesburgh said that a director of one company was at liberty to become a director also of a rival company. That may have been so at that time. But it is at risk now of an application under s 210 if he subordinates the interests of the one company to those of the other.’

³⁵⁴ For an example of such an argument see *City Branch Group Ltd, Re* [2004] EWCA Civ 815 [15]; [2004] 4 All ER 735 where the petitioner relied on section 459 of the Companies Act 1985 for relief against the holding company based on the manner with which the affairs of the wholly-owned subsidiaries were conducted.

particular company.³⁵⁵ Simply put: the petitioner must prove that he or she is a member of the company whose affairs are being conducted in a unfairly prejudicial manner. This approach is open to criticism.³⁵⁶

Although each company within a group of companies has separate juristic personality, the influence that a holding company may exert over a subsidiary company regarding the manner with which the affairs of a subsidiary are conducted cannot be ignored.³⁵⁷ Circumstances may arise where the affairs of one company can be attributed to another.³⁵⁸ This will especially be the case where one company

³⁵⁵ See also *Re a Company (No 001761 of 1986)* [1987] BCLC 141, 144. See *City Branch Group Ltd, Re* [2004] EWCA Civ 815 [27]; [2004] 4 All ER 735 where the court emphasised that the court in *Re a Company (No 001761 of 1986)* [1987] BCLC 141 did not deal directly with the question on whether the conduct of affairs of one company can be attributed to another.

³⁵⁶ In *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch) [628]; [2013] 2 BCLC 583 the court held that an interpretation and application of section 994 of the Companies Act 2006 should not lose sight of business realities in determining the affairs of a company. See also *Meyer v Scottish Co-operative Wholesale Society Ltd* 1954 SC 381 (Court of Session) 390 where the Court of Session held that when interpreting and applying section 210 of the Companies Act 1948 'the business realities of a situation' should be taken into account and that a narrow legalistic approach is inappropriate.

³⁵⁷ In *Meyer v Scottish Co-operative Wholesale Society Ltd* 1954 SC 381 (Court of Session) 390 the court held, in the context of section 210 of the Companies Act 1948, that when a subsidiary is formed the parent company (holding company) should when conducting its own affairs act fairly towards the subsidiary, especially when the subsidiary has an independent group of minority of shareholders. In *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 366-67; [1958] 2 All ER 66 (HL) the court found oppression in the conduct of the affairs of the subsidiary, as the nominee directors of the Society on the board of the subsidiary, placed their duty towards the Society above those of the subsidiary. By doing so they have failed to take steps to defend or protect the subsidiary against the actions of the Society. The court further held that it is no defence to the directors of the subsidiary to argue that they have done nothing, because any action on their part would have been outvoted by the majority on the board.

³⁵⁸ *City Branch Group Ltd, Re* [2004] EWCA Civ 815 [24], [26], [29] and [33]; [2004] 4 All ER 735. See also *Birdi v Specsavers Optical Group Ltd* [2015] EWHC 2870 (Ch) [53]. See further *R v Board of Trade ex p St Martins Preserving Company Limited* [1965] 1 QB 603, 613 where it was held that the affairs of a company can include the affairs of its subsidiary.

exercises a form of control over the affairs of another.³⁵⁹ It should be noted that the application of the unfair prejudice remedy within a group company structure cannot be equated to the lifting or piercing of the corporate veil.³⁶⁰

2.7.4 Unfair prejudice and the affairs of a wholly-owned subsidiary

It may be argued that the member of a holding company cannot be said to have suffered prejudice because the affairs of a wholly-owned subsidiary of the holding company have been conducted in an unfairly prejudicial manner.³⁶¹ This argument

³⁵⁹ In *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch) [628]; [2013] 2 BCLC 583 the court explained that '[i]f the affairs of the subsidiary are being conducted in a manner which damages the subsidiary and hence the value of the holding company's interest in the subsidiary and hence the value of the holding company's interest in the subsidiary, then the omission of the directors of the holding company to take steps to rectify the situation seems to me plainly capable of falling within section 994(1). Likewise, where the directors of the partly owned subsidiary nominated by the holding company permitted the holding company to build up a business at the expense of the subsidiary's business, which was allowed to wither, without taking steps to protect the subsidiary's position, they were engaged in the conduct of the affairs of the subsidiary'. See also *City Branch Group Ltd, Re* [2004] EWCA Civ 815 [26]; [2004] 4 All ER 735. In *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 361; [1958] 2 All ER 66 (HL) where Lord Keith of Avonholm found, after acknowledging the existence of two separate legal personalities, that on the facts of the particular case, the parent (or holding) company and the subsidiary company conducted their business in principle as a partnership. However, this did not mean that the parties could rely on the legal remedies available to partners, but the principle is important to describe the close relationship that existed between the parent and subsidiary company. See further *R v Board of Trade ex p St Martins Preserving Company Limited* [1965] 1 QB 603, 613.

³⁶⁰ In Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 231-32 the point is made that although it is possible to ignore the principle of limited liability within a group of companies, it is rarely done. The authors (193-94) explain that the strict application of the principle of limited liability within a group of companies 'could be justified on the grounds that it encourages investment by "outside" investors in the subsidiaries (as opposed to the parent)'. The authors (194) further point out that this argument is thin when applied in the context of wholly-owned subsidiaries.

³⁶¹ See the argument in *City Branch Group Ltd, Re* [2004] EWCA Civ 815 [19]; [2004] 4 All ER 735. See also *Apex Global Management Ltd & Anor v FI Call Ltd & Ors* [2015] EWHC 3269 (Ch) where

can be rejected on the basis that when the investment of the holding company in the wholly-owned subsidiary is destroyed, it translates into exposure to a risk in the form of the diminution of the value of the shareholding of the member in the holding company.³⁶² To evaluate the conduct of the business affairs of a wholly-owned subsidiary and a holding company in strict isolation is an approach that loses sight of the practical business operations of such a group of companies. Often the directors of the holding company are well aware of the dealings or conduct in respect of the business affairs of the wholly-owned subsidiary. It is submitted that the same principles may apply in the context of an ordinary holding subsidiary company relationship.³⁶³

2.8 Interests

Section 994 of the Act explicitly protects the ‘interests’ of a member. The Act does not define the term ‘interests’. To determine the interests of a member, the question must be approached with the assistance and guidance of case law decided in terms of section 994 of the Act and its predecessors. It is clear that the *interests* of a member are wider than the *rights* of a member.³⁶⁴ The interests of a member are

the court gave the example that the affairs of a company may include the affairs of a wholly-owned subsidiary in circumstances where the two companies have common directors.

³⁶² *City Branch Group Ltd, Re* [2004] EWCA Civ 815 [19]; [2004] 4 All ER 735. In this case the court held that the conduct complained of prejudiced the affairs of the subsidiary company which in turn created the risk of the diminution of the value of the investment of the holding company in the subsidiary.

³⁶³ *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch) [628].

³⁶⁴ In *Interactive v Corp Ltd v Ferster* [2016] EWHC 2896 (Ch) [314] the court favoured a wide definition to the concept of interests. See also Stephan Griffin ‘Shareholder Remedies and the no Reflective Loss Principle – Problems Surrounding the Identification of a Membership Interest’ (2010) 6 *Journal of Business Law* 461, 468. See also *Hill v Spread Trustee Co Ltd* [2006] EWCA Civ 542 [101]; [2007] 1 All ER 1106 where the court referred to the concept of interests for purposes of section 459 of the Companies Act 1985. See further *Sam Weller & Sons Ltd, Re* [1990] Ch 682, 685.

not limited to the constitution of a company.³⁶⁵ To establish the interest of a petitioner a court may have to look beyond the legal entity to consider the rights, obligations and expectations of the members of a company while taking into consideration surrounding circumstances accurately to define and establish the interests of a member.³⁶⁶

The provision can be used to enforce undertakings and agreements between members. In certain circumstances 'equitable principles might make it unjust, or inequitable (or unfair) for a party to insist on legal rights or to exercise them in a particular way'.³⁶⁷ It is submitted that the provision cannot be used to avoid such undertakings and agreements.³⁶⁸ The interests of a member may consist of legal expectations that a member may have in relation to the manner in which the affairs

³⁶⁵ In *VB Football Assets v Blackpool Football Club (Properties) Ltd (formerly Segesta Ltd)* [2017] EWHC 2767 (Ch) [312] the court stated that the interests of a member is not limited to 'strict legal rights under the constitution of the company or under collateral agreements'. In *Carrington Viyella plc, Re* (1983) 1 BCC 98 the court equated membership rights with interests while in *Re a Company (No 008699 of 1985)* (1986) 2 BCC 99 the court looked beyond membership rights to establish the interests of the petitioner. See Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 72 where it is emphasised that section 459 went further than the protection of the personal rights of a shareholder, as it may also be relied on to protect a shareholder's interests, which is a wider concept than rights. Unfair prejudicial conduct is not confined to conduct that is illegal. In *Woolliff v Rushton-Turner & Ors* [2016] EWHC 2802 (Ch) [34] the court held that the interests of a member is dependent of his or her relationship with the other members of the company.

³⁶⁶ *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (HL) 379, [1972] 2 All ER 492. See also *Interactive v Corp Ltd v Ferster* [2016] EWHC 2896 (Ch) [314] where the court also took the view that a wide definition should be given to the concept of interests.

³⁶⁷ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1099.

³⁶⁸ In context of the 'just and equitable' provision on which a company could be wound-up in terms of the Companies Act 1948 the court in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (HL) 379, [1972] 2 All ER 492 held that the 'provision does not, as the respondents [the company] suggest, entitled one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it'.

of a company will be conducted.³⁶⁹ Such expectations should be given effect to, but the court should remain cautious not to rewrite such expectations or other relevant agreements.³⁷⁰ It forms part of the interests of a member that the affairs of the company must be conducted in accordance with the articles and that any powers in the articles will be exercised properly.³⁷¹ The provision also comes into play when a personal relationship exists between the members of a company.³⁷²

2.9 Alternative remedy³⁷³

2.9.1 Introduction

It is interesting to note that the wording of section 996 of the Act does not expressly provide for relief in the form of a winding-up order based on 'just and equitable' grounds.³⁷⁴ However, section 122(1)(g) of the Insolvency Act 1986 makes specific provision for such relief.³⁷⁵ When one considers the development of the statutory

³⁶⁹ Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 72 notes that membership interests are wider than legal rights. It is not possible to define or determine protectable membership interests. See 2.6.5 above for a discussion of the legitimate expectations of a member as a protectable interest.

³⁷⁰ Robert Goddard 'Enforcing the Hypothetical Bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 77.

³⁷¹ See Christopher A Riley 'Contracting out of Company Law: Section 459 of the Companies Act 1985 and the Role of the Courts' (1992) 55 *Modern Law Review* 782, 793-94 where it is argued that the interests of a member may in appropriate cases extend beyond the membership rights contained in the constitution of a company. See also *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (HL) 379, [1972] 2 All ER 492.

³⁷² *Interactive v Corp Ltd v Ferster* [2016] EWHC 2896 (Ch) [314]. See 2.6.5.4 above for a discussion of the role of quasi-partnerships in determining the unfairness of conduct.

³⁷³ See 2.3.3.1 above regarding the need for an alternative remedy to the winding-up of a company on 'just and equitable' grounds. See also 2.9 below of a discussion of the unfair prejudice remedy as an alternative to the winding-up of a company on 'just and equitable' grounds.

³⁷⁴ See Companies Act 2006, s 996.

³⁷⁵ See also Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 682-84.

unfair prejudice remedy, it is clear that the remedy was developed to provide an alternative to the winding-up of companies on 'just and equitable' grounds.³⁷⁶ This may also explain why section 996 does not expressly state the winding-up of a company on 'just and equitable' grounds. Because section 994 read with section 996 of the Act provides for an alternative remedy to section 122(1)(g) of the Insolvency Act 1986, it is important to understand the potential interrelationship between these two remedies.

2.9.2 Policy considerations and the winding-up of companies

Section 122(1)(g) of the Insolvency Act 1986 has been influenced substantially by equitable principles derived from the law of partnership.³⁷⁷ In the event of the availability of alternative relief, policy considerations may require courts to exercise their discretion sparingly under section 122(1)(g) of the Insolvency Act 1986.³⁷⁸ This is because the only outcome of a successful reliance on section 122(1)(g) of the

³⁷⁶ *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031 [2]; [2002] 1 BCLC 141. See also *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [56]; [2012] 1 All ER 414 where the court held that '[s]ection 994 will usually provide the source of a satisfactory alternative remedy such a buy-out order that winding-up under s 122(1)(g) is therefore a last resort, and in my experience, an exceptional remedy to grant in the context of disputes between shareholders'. The same court [57] stated that '[t]he residual power of the court under s 122(1)(g) to order winding-up where no other remedy would be appropriate or available does not therefore support the characterisation of a petition for s 994 relief as a class remedy. It is designed to resolve issues of unfair prejudice without the winding-up of the company'. In *Badyal v Badyal & Anor* [2018] EWHC 68 (Ch) [112] the court described the winding-up of a company as a remedy of 'last resort' as 'section 994 will normally provide a more appropriate alternative'. See further 2.3 and more specifically 2.3.3.1 above. For the position in Australia see 3.5.1 below.

³⁷⁷ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 683. See also *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 (HL) 379, [1972] 2 All ER 492 regarding the winding-up of companies on 'just and equitable' grounds.

³⁷⁸ *Hawkes v Cuddy* [2007] EWHC 2999 (Ch) [246]-[247]; [2008] BCC 390. See also Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 683.

Insolvency Act 1986 is that a perfectly viable and sustainable company will have to be wound-up.³⁷⁹

2.9.3 Unfair prejudice and winding-up on ‘just and equitable’ grounds – is there a difference?

Although section 994 read with section 996 of the Act provides an alternative remedy to the winding-up of companies on ‘just and equitable’ grounds, it is important to note the differences in the grounds for relief regarding each of these remedies. The question arises whether a court may grant relief in terms of section 996, without making a specific finding that the conduct of the affairs of a company are unfairly prejudicial, in circumstances where the making of a winding-up order on ‘just and equitable’ grounds is justified.³⁸⁰ The argument is often made that the grounds for relief in terms of section 994³⁸¹ and the grounds for a winding-up of a company on ‘just and equitable’ grounds must be equated.³⁸² In *O’Neill v Phillips*³⁸³ the court emphasised that the concept of fairness for purposes of section 459 of the Companies Act 1985 does not require a petitioner to prove that he or she is also entitled to an order for the winding-up of the company based on ‘just and equitable’ grounds.³⁸⁴ The court held that a petitioner should prove that the affairs of the

³⁷⁹ This is one of the criticisms against section 122(1)(g) of the Insolvency Act 1986. See Paul L Davies and Sarah Worthington *Gower and Davies’ Principles of Modern Company Law* (10th ed, 2016) 683.

³⁸⁰ See *Hawkes v Cuddy* [2007] EWHC 2999 (Ch) [101]; [2008] BCC 390 for an example of such an argument in the context of a deadlock between parties. See also the argument in *O’Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1104.

³⁸¹ Companies Act 2006.

³⁸² See the argument which is based on the judgment in *Guidezone Ltd, Re* [2000] EWHC 1561 (Ch), [2000] 2 BCLC 321 in *Hawkes v Cuddy* [2007] EWHC 2999 (Ch) [102]; [2008] BCC 390.

³⁸³ [1999] UKHL 24, [1999] WLR 1092.

³⁸⁴ *O’Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1099-100.

company is conducted in a manner that is unfairly prejudicial to the petitioner.³⁸⁵ However, in *Guidezone Ltd, Re*³⁸⁶ the court held that conduct cannot be regarded as unfairly prejudicial for purposes of section 459 of the Companies Act 1985 if such conduct would not be able to justify a winding-up order on 'just and equitable' grounds.³⁸⁷

The judgment in *Hawkes v Cuddy*³⁸⁸ is directional on this point. The court in

³⁸⁵ In *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1104-05 the court held that the petitioner, Mr O'Neill, failed that to prove that Mr Phillips undertook to do the things he is accused of failing to do and secondly that Mr Phillips did not commit the transgressions that Mr O'Neill thought he did. The court found that Mr Phillips had no fault in or conducted the affairs of the company in an unfairly prejudicial manner that caused Mr O'Neill to have lost mutual trust and confidence in Mr Phillips. The court further held that a court would not allow a member unilaterally to withdraw his or her capital from a company on a misplaced perception of a loss of trust and confidence between members when the business of the company can still be conducted in accordance with the articles of association. See also *Phoenix Office Supplies Ltd v Larvin* [2002] EWCA Civ 1740 [32]-[33]; [2003] 1 BCLC 76.
³⁸⁶ [2000] EWHC 1561 (Ch); [2000] 2 BCLC 321.

³⁸⁷ *Guidezone Ltd, Re* [2000] EWHC 1561 (Ch) [179]-[180]; [2000] 2 BCLC 321. The petitioners were the shareholders of a company, Guidezone. They sought an order in terms of which the other shareholders of the company purchase their shares at a fair value or that the company purchases the shares from the petitioners. Alternatively, the petitioners sought an order for the winding-up of a company on just and equitable grounds. One of the petitioners proposed at a meeting that the hotel, which was the subject of the sole business of the company, be sold and the company be wound-up. The board of the company rejected the proposal. The petitioner argued that the rejection of the proposal was unfairly prejudicial. The petitioner based its case on a legitimate expectation that the hotel would be sold and the company be wound-up at a time determined by the petitioner ([14]). The court found ([188]-[189]) that no factual basis existed for the legitimate expectation on which the petitioner relied. Further, the court found ([190]) that although there had been a change in the circumstances on which the association of the members were based, the understanding between the parties made allowance for future changes. See also *Cobden Investments Ltd v RWM Langport Ltd* [2008] EWHC 2810 (Ch) [48] where the court expressed doubt on the correctness of the approach taken by the court to the grounds in section 994 of the Act and the winding-up of a company on 'just and equitable' grounds in *Guidezone Ltd, Re* [2000] EWHC 1561 (Ch), [2000] 2 BCLC 321.

³⁸⁸ [2009] EWCA Civ 291, [2009] 2 BCLC 427.

*Hawkes v Cuddy*³⁸⁹ rejected the approach in *Guidezone Ltd, Re.*³⁹⁰ It acknowledged the fact that the same facts and circumstances may justify relief in terms of both section 994 of the Act and section 122(1)(g) of the Insolvency Act 1986.³⁹¹ The rejection of this argument means that a petitioner will not only be entitled to relief in terms of section 994 of the Act once a court is satisfied that an order for the winding-up of company on 'just and equitable' grounds is present. There are important differences between section 994 of the Act and section 122(1)(g) of the Insolvency Act 1986. These differences are emphasised by the wording in which the sections are formulated.³⁹² It is not a requirement to prove unfair prejudicial conduct for the winding-up of a company on 'just and equitable' grounds.³⁹³

2.9.4 Circumstances where only section 122(1)(g) of the Insolvency Act 1986 applies

A petitioner may be entitled to relief in terms of section 122(1)(g) of the Insolvency Act 1986 in circumstances where he or she has not been unfairly prejudiced.³⁹⁴ Examples where a court may grant a winding-up order based on 'just and equitable' grounds include where the substratum of a company disappeared³⁹⁵ or where there is a loss of mutual trust and confidence between the members.³⁹⁶ The court in

³⁸⁹ [2009] EWCA Civ 291, [2009] 2 BCLC 427.

³⁹⁰ [2000] EWHC 1561 (Ch); [2000] 2 BCLC 321.

³⁹¹ *Hawkes v Cuddy* [2009] EWCA Civ 291 [104]; [2009] 2 BCLC 427.

³⁹² See *Hawkes v Cuddy* [2009] EWCA Civ 291 [105]; [2009] 2 BCLC 427.

³⁹³ *Hawkes v Cuddy* [2009] EWCA Civ 291 [110]; [2009] 2 BCLC 427.

³⁹⁴ See *Hawkes v Cuddy* [2009] EWCA Civ 291 [104]; [2009] 2 BCLC 427 where the court gave the example of the winding-up of a company on 'just and equitable' grounds where the substratum of the company does not exist anymore.

³⁹⁵ *Hawkes v Cuddy* [2009] EWCA Civ 291 [104]; [2009] 2 BCLC 427.

³⁹⁶ *Hawkes v Cuddy* [2009] EWCA Civ 291 [108]; [2009] 2 BCLC 427. It must be noted that the court in *Grace v Biagioli* [2005] EWCA Civ 1222; [2006] BCC 85 [61] stated that a breakdown of a

*Hawkes v Cuddy*³⁹⁷ emphasised that a breakdown in trust and confidence does not necessarily justify relief in terms of section 994.³⁹⁸

2.9.5 Situations where both section 994 of the Act and section 122(1)(g) of the Insolvency Act 1986 may apply

The same conduct may justify relief in terms of section 994 of the Act and in terms of section 122(1)(g) of the Insolvency Act 1986. This will be, for example, the case in the event of a deadlock caused by the unfair prejudicial conduct of one of the parties. The appropriate remedy for such a deadlock may take the form of relief either in terms of section 994 of the Act or section 122(1)(g) of the Insolvency Act 1986.

2.9.6 Section 122(1)(g) of the Insolvency Act 1986 and the availability of alternative remedies

Section 122(1)(g) of the Insolvency Act 1986 should be read with section 125. Section 125 contains the powers of a court when hearing a petition for the winding-up of a company. Section 125(2) of the Insolvency Act 1986 empowers a court to grant relief in the form of a winding-up order on 'just and equitable' grounds. Section 125(2) further provides that the winding-up order may be granted if the grounds for

relationship between members based on mutual trust and confidence will only justify relief when the majority excluded 'the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder'. The court confirmed [61] that a shareholder has no right of unilateral withdrawal. This approach was followed in *Badyal v Badyal* [2018] EWHC 68 (Ch) [118]-[119].

³⁹⁷ [2009] EWCA Civ 291 [108]; [2009] 2 BCLC 427.

³⁹⁸ See *Badyal v Badyal* [2018] EWHC 68 (Ch) [119] where the court held that a petitioner should only prove a mere breakdown of trust and confidence that justifies the liquidation of a company. Such an order will only be made when no other form of relief is appropriate. See further *RA Noble & Sons (Clothing) Ltd, Re* [1983] BCLC 273, 291.

such an order is proven and no appropriate alternative remedy is available.³⁹⁹ The courts take the view that these two remedies should be viewed as running parallel to each other and should not necessarily be equated.⁴⁰⁰

2.10 The relief

Once a petitioner established a proper case on the grounds of section 994(1) of the Act, a court may grant relief in terms of section 996.⁴⁰¹ Section 996 cloaks the court with a very wide discretion to tailor relief according to the specific circumstances of each case.⁴⁰² The broad discretion with which the courts are entrusted in terms of

³⁹⁹ Insolvency Act 1986, s 125(2)(a) read with subsection (b).

⁴⁰⁰ *Hawkes v Cuddy* [2009] EWCA Civ 291 [104]; [2009] 2 BCLC 427. See also *Ex parte Estate Acquisition and Development Ltd* [1991] BCLC 154, 161; [1990] BCC 221 where the court held that a petitioner does not have to prove that the conduct complained of justifies relief, because such conduct would have justified the granting of a different remedy. See also *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [60]; [2012] BCLC 335 in commenting on *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092 where the court stated that '[t]he jurisdiction contained in s 994 originated as an alternative to winding-up on just and equitable ground. Section 210 of the 1948 Act required the court to be of the opinion that the facts would justify the making of a winding-up order on the just and equitable ground. But this link was broken by s 75 of the Companies Act 1980 as a result of the recommendations in the Jenkins Committee (Cmnd) 1749) in 1962 that the grounds for seeking alternative relief should be widened. The decision in *O'Neill v Phillips* was intended to define the circumstances in which the s 994 jurisdiction should be exercised but it has not re-forged the original link with s 122(1)(g)'.

⁴⁰¹ *Griffith v Gouragey & Ors* [2018] EWHC 1035 (Ch) [143].

⁴⁰² *Goodchild v Taylor & Anor* [2018] EWHC 2946 (Ch) [104]; *Badyal v Badyal* [2018] EWHC 68 (Ch) [112]; *Rembert v Daniel* [2018] EWHC 388 (Ch). See also *Braid Group (Holdings) Ltd, Re* [2015] ScotCS CSOH 146. See further *Grace v Biagioli* [2005] EWCA Civ 1222, [2006] 2 BCLC 70; *Cobden Investments Ltd v RWM Langport Ltd* [2008] EWHC 2810 (Ch); *Oak Investment Partners XII Ltd Partnership v Boughtwood* [2009] EWHC 176 (Ch) [105]; [2009] All ER 67; *Croly v Good* [2010] EWHC 1 (Ch); *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [144]; *F&C Alternative Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 1731 (Ch) [77]; [2012] 3 WLR 10; *Singh v Singh* [2014] EWCA Civ 103. See also *Phoenix Office Supplies Ltd v Larvin* [2002] EWCA Civ 1740. See further *Bird Precision Bellows, Re* [1986] Ch 658. In *Braid Group (Holdings) Ltd, Re* [2016] CSIH 146 [58] the court emphasised that the relief should be granted in respect of the matters complained of. In *Grace v Biagioli* [2005] EWCA Civ 1222 [73]; [2006] 2 BCLC 70 the court held that it has a broad discretion in tailoring

appropriate relief based on the facts and circumstances of each case. To determine and formulate an order that is fair, a court should consider all the relevant circumstances of a case. When the appropriate relief is considered, a court may take into consideration the conduct that took place between the date of the presentation of the petition and the hearing thereof. A court should take a practical approach to tailoring relief by considering 'the overall situation, past, present and future'. In *Hawkes v Cuddy* [2007] EWHC 2999 (Ch) [243] and [246]; [2008] BCC 390 the court emphasised the fact that a remedy granted by a court should be proportionate to the unfair prejudice complained of. The court remarked that an order in terms of which the shares of the petitioner should be bought by the company or other members may be inappropriate in circumstances where the conduct complained of is 'relative modest'. With reference to *Phoenix Office Supplies Ltd v Larvin* [2002] EWCA Civ 1740 [51]; [2003] 1 BCLC 76 the court found that the purpose of the remedy is not to serve as punishment for inappropriate behaviour, but focuses more on the protection of the interests of the petitioner. In this case, a company had three shareholders who all held equal shares in the company and served as directors of the company ([3]). Two of the shareholders wrongfully excluded the petitioner (a director of the company) from access to company records ([3]). In *Cobden Investments Ltd v RWM Langport Ltd* [2008] EWHC 2810 (Ch) [47] the court held that relief will only be granted if there is a causal link between the unfair prejudicial conduct and the prejudice suffered by the petitioner. SCFF was a company whose shares were held equally by the Coden family and the Heffer family. The Coden family held 50% of the shares in SCFF through the petitioner, CIL. The balance of the shares in SCFF were held by the Heffer family through RWM Langport. Both CIL and RWM Langport had the right to appoint directors to the board of SCFF. The court referred to *Blackwood Hodge plc, Re* [1997] 2 BCLC 650, 673 where it was held by Parker J that 'the petitioners must establish not merely that the BH directors have been guilty of breaches of duty in the respects alleged, but also that those breaches caused the petitioners to suffer unfair prejudice in their capacity as preference shareholders'. See in this regard also *Irvine v Irvine* [2006] EWHC 406 (Ch) [256]; [2007] 1 BCLC 349 where the court held that the prejudice suffered by the members 'must be real, rather than merely technical or trivial, and must flow from the conduct said to be unfair'. The company in this case was the holding company of two subsidiaries. The general business of the company was conducted through one of the subsidiaries. At a specific time, the business of this subsidiary was transferred to the other. The shares in the holding company were held by the petitioners (49.96%) and by Ian Charles Irvine (50.04%). In this case, the petitioners alleged ([6]) that their interests were unfairly prejudiced on the basis that Ian Charles Irvine secured payment to himself that is 'excessive, unreasonable, and unjustified levels of remuneration'. This conduct led to the payment of an inadequate dividend to the petitioner ([6]). The petitioners further alleged ([6]) that the affairs of the company were conducted in breach of the Companies Act 1985. The court ([325]) found that the remuneration drawn from the company was excessive and unfairly prejudicial. It further confirmed ([346]-[347]) that the Companies Act 1985 was breached as the companies did not table the financial statements of the companies at shareholders' meetings, but compliance with the particular provisions would not have changed the position and the prejudice suffered by the petitioners. The court ([358]) ordered Ian Charles Irvine to buy the shares of the petitioners. In *Croly v Good* [2010] EWHC 1

section 996 is, however, not unfettered or unrestricted and must be exercised judicially.⁴⁰³ Proving the jurisdictional requirements in section 994(1) does not entitle the petitioner to relief in terms of section 996; it only means that a court has the discretion to grant such relief.⁴⁰⁴ The nature of the relief that may be granted in

(Ch) [101] the court held that the discretion will not be used to make orders against parties who did not participate in the conduct complained of or who are not parties to the proceedings before the court. In this case, the petitioner, a minority shareholder, sought an order in terms of which his shares in a company should be bought out by the other members of the company. In his petition the petitioner based his application on an agreement that he will participate in the management of the affairs of the company, that all the members of the company will draw equal amounts of remuneration and profits distributed in the form of dividends. In November 2007 the petitioner was allegedly excluded from participating in the affairs of the company and denied access to the company's business premises. Since the exclusion of the petitioner, Mr Good, one of the members of the company, proceeded to make excessive withdrawals of cash from the company, and failed to declare dividends to reduce the loan accounts of the members. It is on this basis that the court was approached for relief. The court ([91]) found that a quasi-partnership existed between the members of the company. The court ([93]) further held that the exclusion from the management of the company was prejudicial and unfair in light of the fact that the affairs of the company were conducted in the form of a quasi-partnership. The court ([96] and [99]) further found that the withdrawal of cash and remuneration from the company was in some respects excessive and unfairly prejudicial, as this was done in breach of an arrangement between members. Relief was granted to the petitioner in the form of a buy-out order against Mr Good. The court ([101]) refused to make the order against Mrs Good as she was not a participant in conducting the affairs of the company unfairly. See further *Singh v Singh* [2014] EWCA Civ 103 [23]. In *Bird Precision Bellows, Re* [1986] Ch 658, 669 the court held that the wide discretion entrusted to courts allows a court to grant relief that is 'fair and equitable' in the particular circumstances of the case. See further Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 680.

⁴⁰³ *VB Football Assets v Blackpool Football Club (Properties) Ltd (formerly Segesta Ltd)* [2017] EWHC 2767 (Ch) [425]; *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [46]; [2012] BCLC 335. See also *Hawkes v Cuddy* [2009] EWCA Civ 291 [104]; [2009] 2 BCLC 427; *Kohli v Lit* [2009] EWHC 2893 (Ch) [277]; [2010] 1 BCLC 367; *Braid Group (Holdings) Ltd, Re* [2016] CSIH 146 [58]. In *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [46]; [2012] BCLC 335 the court stated that the interests of other members and creditors can be taken into account when formulating relief. See further *JE Cade & Son Ltd, Re* [1992] BCLC 213, 227.

⁴⁰⁴ In *Kohli v Lit* [2009] EWHC 2893 (Ch) [10]; [2010] 1 BCLC 367 the court explained that the seriousness of the conduct should justify judicial intervention. See also *Braid Group (Holdings) Ltd, Re* [2015] ScotCS CSOH 146 [59].

terms of section 996 falls within the exclusive discretion of the presiding officer.⁴⁰⁵ The wide range of relief that a court may grant in terms of section 996 is regarded as one of the strengths of the unfair prejudice remedy in terms of section 994.⁴⁰⁶

One of the main functions of the relief that a court may grant is to remedy the interests of members in the event of an infringement upon or wrong committed against their interests.⁴⁰⁷ Section 996(2) contains a list of orders that a court may grant.⁴⁰⁸ A court is not bound or restricted to the orders listed in section 996(2) of the Act.⁴⁰⁹ A discussion of the most important forms of relief a court may grant in terms of section 996 of the Act follows.

2.10.1 Regulation of future conduct

To prevent the re-occurrence of the conduct complained of in terms of section 994 a court may make an order to regulate the future affairs of a company.⁴¹⁰ Neither this specific provision nor its predecessor⁴¹¹ has been considered directly by the

⁴⁰⁵ *Braid Group (Holdings) Ltd, Re* [2016] CSIH 146 [59]

⁴⁰⁶ *Maidment v Attwood* [2012] EWCA Civ 998 [28]; [2013] BCC 98.

⁴⁰⁷ *Maidment v Attwood* [2012] EWCA Civ 998 [28]; [2013] BCC 98. See also *VB Football Assets v Blackpool Football Club (Properties) Ltd (formerly Segesta Ltd)* [2017] EWHC 2767 (Ch) [425] where the court held that in granting relief a court must do what is fair in the circumstances of the particular case. The fact that the relief must be proportionate to the unfair prejudice suffered is an element of fairness.

⁴⁰⁸ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 680 note that relief in the form of a buy-out order in terms of which the shares of a petitioner is bought by the controlling shareholder, is the order most often used.

⁴⁰⁹ *Braid Group (Holdings) Ltd, Re* [2016] CSIH 146 [60] and [65] where the court also found that the discretion of the court includes the discretion to attach a value to the shares in question that is fair to all parties to the dispute. See also *Yusuf v Yusuf* [2019] EWHC 90 (Ch) [136]. See further 2.10.5.2 below.

⁴¹⁰ Companies Act 2006, s 996(2)(a).

⁴¹¹ Companies Act 1985, s 461(2)(a).

courts. The reason for this may be that most courts prefer relief in the form of termination of the relationship between the members. A second reason may be that courts are reluctant to participate or intervene in the management of a company, because courts are of the view that the director and/shareholders of a company are in the best position to determine what is in the best interests of the company.⁴¹²

2.10.2 A restraining order or an order to compel

A court can also grant relief in the form of an interdict restraining a company from committing or continuing with conduct complained of in terms of section 994.⁴¹³ Alternatively, an order can be made to compel a company to do something which it has omitted to do when such omission was the subject matter of a petitioner's complaint terms of section 994.⁴¹⁴

2.10.3 Authorisation of civil proceedings

2.10.3.1 Introduction

An interesting and very important feature of the unfair prejudice remedy is that a court may grant relief in the form of an order authorising a member or members to institute civil proceedings in the name and on behalf of the company.⁴¹⁵ This statutory provision is significant as it potentially creates an alternative procedure to the statutory derivative action whereby a member can institute legal proceedings on

⁴¹² See 2.3.1.3 (b) and 2.5 above.

⁴¹³ Companies Act 2006, s 994(2)(b)(i).

⁴¹⁴ Companies Act 2006, s 994(2)(b)(ii).

⁴¹⁵ Companies Act 2006, s 994(2)(c). This provision provides that a court may 'authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct'.

behalf of the company.⁴¹⁶

This approach of the legislature is a unique feature in light of the fact that traditionally the personal remedy (or unfair prejudice remedy) and the derivative action were separate and distinct from each other.⁴¹⁷ In terms of ‘the proper plaintiff rule’ a member could only institute legal proceedings on behalf of the company in certain exceptional circumstances.⁴¹⁸ The distinction between the statutory personal action and the statutory derivative action is further blurred by the express reference in section 260(2)(b) to the right to institute legal proceeding on behalf of a company in terms of section 994.⁴¹⁹

⁴¹⁶ The primary provisions regulating the statutory derivative claim are found in sections 260–264 of the Companies Act 2006. The legislature replaced the rule in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189 with a statutory form of the derivative action (claim). See 2.3.1 above for a discussion of the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189. See also *Saul D Harrison & Sons plc, Re* [1995] 1 BCLC 14, 18; [1994] BCC 475 where the court with regard to section 459 of the Companies Act 1985 stated that ‘[e]nabling the court in an appropriate case to outflank the rule in *Foss v Harbottle* was one of the purposes of the section’.

⁴¹⁷ See 2.3.1 above for a discussion of ‘the proper plaintiff rule’ and ‘the internal management rule’ in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189.

⁴¹⁸ See *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, 210; [1982] 1 All ER 354. See also 2.3.1.4 above.

⁴¹⁹ Section 260(2) of the Companies Act 2006 provides that:

‘A derivative claim may only be brought -under this Chapter, or in pursuance of an order of the court in proceedings under section 994 (proceedings for protection of members against unfair prejudice).’

Jennifer Payne ‘Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection’ (2005) 64 *Cambridge Law Journal* 647, 651 explains that a shareholder may obtain personal relief in terms of section 459 of the Companies Act 1985 for a wrong committed against a company. However, section 459 could not be used to obtain corporate relief for a company, save for an order in terms of which leave is granted to institute legal proceedings on behalf of the company (651).

2.10.3.2 The personal remedy versus the derivative action (or claim)

(a) *The difference between the purpose of the personal remedy and the derivative action*

Traditionally a distinction was drawn between the personal remedy and the derivative action.⁴²⁰ This distinction is important as the personal remedy and a derivative action each gives effect to and protects different principles and interests in the context of company law. While the derivative claim is aimed at obtaining corporate relief for a wrong committed against a company, the personal remedy is aimed at the protection of the individual rights and interests of members.⁴²¹

(b) *The decision not to institute action against wrongdoers as an abuse of power*

The same conduct may simultaneously affect the rights and interests of both the company and its members.⁴²² According to the principles established in *Foss v*

⁴²⁰ See the discussion by Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647 in the context of Companies Act 1985.

⁴²¹ Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 650. See also Julia Tang 'Shareholder Remedies: Demise of the Derivative Claim?' (2012) 1:2 *UCL Journal of Law and Jurisprudence* 178, 205. See further 2.3.1.4 above.

⁴²² See Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 674, where they point out that a wrong committed against a company affects the interests of the members of the company. The authors (674-75) remark that the availability of the derivative claim or action does not preclude a member from relying on the personal action. Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 650 argues that the nature of the complaint and the applicable relief sought are important considerations in determining whether the statutory personal remedy or statutory derivative claim applies to a matter. She further argues (648) that section 459 was 'a deliberate attempt to avoid the narrow rights-based protection that existed previously'.

*Harbottle*⁴²³ and due to the distinction between corporate rights and personal rights, it is the company, and not its members, that should institute legal proceedings against a wrongdoer when a wrong had been committed against the company.⁴²⁴ This distinction now appears to be dispensed with in the formulation of the statutory personal remedy and statutory derivative claim.⁴²⁵

Some authors argue that the statutory personal remedy can now justifiably be used to obtain relief (corporate relief) when wrongs were committed against the company.⁴²⁶ In terms of this approach the grounds for such relief are then not the wrong committed against company, but the abuse of the controllers' power in the company to prevent the company from instituting legal proceedings against the

⁴²³ *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189.

⁴²⁴ Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 650 points out that prior to the decision in *Clark v Cutland* [2003] EWCA Civ 810, [2003] 4 All ER 733, the personal remedy was not available to obtain relief for a company. Prior to this decision it was more likely for a shareholder to obtain relief for him- or herself in terms of the personal remedy. The judgment in *Clark v Cutland* [2003] EWCA Civ 810, [2003] 4 All ER 733 does make the use of the statutory personal remedy a more attractive option than the statutory derivative claim when the facts and circumstances in which these remedies can apply overlap (654).

⁴²⁵ See section 994 read with section 996(2)(c) and sections 260 to 264, and specifically section 263(3)(e) of the Companies Act 2006. See also 2.10.3.1 above.

⁴²⁶ Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 652. See also Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 676-77. See further *Clark v Cutland* [2003] EWCA Civ 810 [8]; [2003] 4 All ER 733 where the Court of Appeal noted and confirmed that 'there was a wide jurisdiction under section 461 to give relief against third parties which could have been granted in a derivative action'. This observation was made by the Court of Appeal in respect of the findings of the court *a quo*. The findings of the judge *a quo* were not challenged in the Court of Appeal.

wrongdoers.⁴²⁷

2.10.3.4 Corporate relief and the unfair prejudice remedy

Section 994 of the Act is the statutory equivalent of the personal remedy.⁴²⁸ The relief usually claimed in terms of the personal remedy is of a personal nature. Because section 994 read with section 996(2)(c) provides for the institution of legal proceedings on behalf of the company, the question arises whether the personal remedy in section 994 can also be utilised to obtain relief for the company and not necessarily for the petitioner (or member).⁴²⁹

Relief in the form of compensation to the benefit of the company based on a wrong committed against it is usually associated with the statutory derivative claim, whereas relief in the form of a buy-out order of the shares of the petitioner by the company (or other members) is usually associated with the statutory personal

⁴²⁷ See Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 652 where she argues that when a company does not act against wrongdoers who committed a wrong against a company, it may be argued that a wrong is indirectly committed against the members or shareholders of the company. The reluctance to act can be regarded as a disregard of the interest of the minority (652). It is interesting to note that section 263(4) of the Companies Act 2006 provides that 'the court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter'.

⁴²⁸ See the argument of Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 650 regarding section 459 of the Companies Act 1985.

⁴²⁹ See in this regard *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, 210 where the court stated that '[a] derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested'.

remedy.⁴³⁰ However, it should be noted that there is case law that supports the grant of corporate relief in terms of a petition based on the unfair prejudice remedy.⁴³¹

In *Clark v Cutland*⁴³² the court awarded relief to the benefit of the company in terms of section 459 of the Companies Act 1985. This case is authority for the principle that a court's discretion in terms of section 461 of the Companies Act 1985, the predecessor of section 996 of the Companies Act 2006, is wide enough 'to grant relief against third parties which could have been granted in a derivative action'.⁴³³ Payne argues that the judgment in *Clark v Cutland*⁴³⁴ has the potential effect that the decision 'to litigate on behalf of the company can be delegated to individual minority shareholders'.⁴³⁵

⁴³⁰ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 676.

⁴³¹ *Clark v Cutland* [2003] EWCA Civ 810, [2003] 4 All ER 733. See also *Wooltiff v Rushton-Turner* [2016] EWHC 2802 (Ch) [32]. See further Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 676-77.

⁴³² [2003] EWCA Civ 810, [2003] 4 All ER 733.

⁴³³ *Clark v Cutland* [2003] EWCA Civ 810 [8]; [2003] 4 All ER 733. See also *Atlasview Ltd v Brightview Ltd* [2004] EWHC 1056 (Ch) [60]; [2004] 2 BCLC 191. Julia Tang 'Shareholder remedies: Demise of the Derivative Claim?' (2012) 1:2 *UCL Journal of Law and Jurisprudence* 178, 206 points out that both a derivative action and unfair prejudicial proceedings were instituted in *Clark*. These actions were consolidated. Despite this the author (208) emphasises that relief was ultimately granted in terms of unfair prejudice proceedings.

⁴³⁴ [2003] EWCA Civ 810, [2003] 4 All ER 733.

⁴³⁵ Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 659. The author further notes (658) that it may sometimes be possible to use the unfair prejudice remedy to circumvent the requirements of the statutory derivative claim. Payne holds the view (659-60) that the test for unfair prejudice may be inappropriate to replace the leave requirement of the derivative action. According to the author (659), courts used to develop the test of unfair prejudice from the point of view of the complaining shareholder to a dispute and whether the rights of the shareholder attached to the shares were breached. As the court focuses on the legal position of the shareholders to a dispute, no room is left to determine whether a claim on behalf of the company in terms of the unfair prejudice remedy is in

2.10.3.5 The use of the statutory unfair prejudice remedy to circumvent the statutory derivative claim

If a petitioner is allowed to rely on the provisions of section 996(2)(c) to institute legal proceedings on behalf of the company, the question arises whether this section can be used to circumvent the requirements of the statutory derivative claim as set out in sections 260 to 264.⁴³⁶ If this is possible, it creates the possible problem that the provisions of sections 260 to 264 may become redundant which could not have been the intention of the legislature.⁴³⁷

Such an approach would also ignore important fundamental differences between the statutory personal action and the statutory derivative claim. One such difference is that the statutory derivative claim procedure described in sections 260 to 264 gives effect to very specific and important policy considerations. Firstly, it

the best interest of the company (660). According to Payne (660) it is not impossible for the courts to develop the concept of unfair prejudice to take into account the best interest of the company. An alternative approach proposed by Payne (660) is that a court may refuse corporate relief when exercising its discretion to order relief in terms of section 461 of the Companies Act 1985, the predecessor of section 996 of the Companies Act 2006. The author (660) is of the view that such an approach is unsatisfactory, as much time would have been spent and expenses incurred during the litigation process prior reaching the stage where the discretion of the court arises. The ratification of wrongs committed and the views of independent organs within a company must also be considered for purposes of the unfair prejudice remedy (660-61).

⁴³⁶ See 2.10.3.4 above where it is explained that the statutory personal action can be utilised to obtain relief for the benefit of the company.

⁴³⁷ The availability of the statutory derivative claim does not bar a petitioner from relying on the unfair prejudice remedy. Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 675 expressed their doubts on whether it was the intention that the provisions of the unfair prejudice remedy should be interpreted in such a manner to 'side-step' the provisions regulating the statutory derivative action. According to the authors section 996(2)(c) is a remedial power to authorise proceedings on behalf of the company and the provision should not be seen as a general leave to commence with derivative proceedings. See *Lowe v Fahey* [1996] 1 BCLC 262.

recognises that a company should be protected from being involved in vexatious legal proceedings and secondly the provisions recognise that it will not always be in the best interests of the company to pursue and enforce the rights of the company.⁴³⁸

2.10.3.6 Some practical considerations

(a) *The protection of corporate rights and the interests of members*

The statutory derivative claim is an action that protects the *rights* of a company. Further, the relief sought in terms of the statutory derivative action is aimed at redressing harm suffered by or committed against the *company*.⁴³⁹ The statutory personal action in section 994 of the Act is aimed at redressing unfair prejudice to the *interests of a member or members*.⁴⁴⁰ The flexible interpretation of section 994, the judgment in *Clark v Cutland*⁴⁴¹ and the complex requirements of derivative claims are all factors that may encourage a litigant rather to attempt to rely on the unfair prejudice remedy in stead of the derivative claim.⁴⁴²

⁴³⁸ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 675. See section 263(3)(e) of the Companies Act 2006 in terms of which a court may take into consideration whether the company decided to pursue a claim. See also 2.10.3.4 above.

⁴³⁹ See 2.10.3.4 above for a discussion whether section 994 can be used to secure relief to the benefit of the company.

⁴⁴⁰ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 674.

⁴⁴¹ [2003] EWCA Civ 810. See also 2.10.3.4 above for a discussion of the use of the unfair prejudice remedy to obtain corporate relief.

⁴⁴² See Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 658 where the author described the jurisdiction of the derivative claim in the Companies Act 1985 as 'undoubtedly complex and obscure'. As regards the purpose of the requirements of the derivative claim the author states that 'the hurdles facing minority shareholders and which make the derivative action cumbersome are there to protect the

(b) Standing and the time of the occurrence of the conduct complained of⁴⁴³

The statutory form of the personal remedy is contained in section 994 of the Act. Section 994 provides standing to the *members* of a company. The remedy is not available to shareholders whose names do not appear on the register of members.⁴⁴⁴ Because of the personal nature of the remedy, a shareholder cannot rely on unfair prejudicial conduct that occurred prior to becoming a member of a company.⁴⁴⁵

It should be noted that only the members⁴⁴⁶ of a company may approach a court for relief in terms of the derivative action. However, in terms of this action, a member can rely on wrongs committed against the company prior to the particular member becoming a member of a company.⁴⁴⁷ This is because the cause of action

company against the single irritated shareholder who through malice or misjudgment would waste the company's time and money if allowed to litigate on the company's behalf'. See also Julia Tang 'Shareholder Remedies: Demise of the Derivative Claim?' (2012) 1:2 *UCL Journal of Law and Jurisprudence* 178, 206.

⁴⁴³ See also 2.6.1 above for a discussion of the standing of a petitioner for purposes of the statutory unfair prejudice remedy.

⁴⁴⁴ The only exception is that standing extends to persons to whom shares are transferred by operation of law. See also para 2.6.1 above.

⁴⁴⁵ Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 656. The author, however, correctly points out (656) that the effect of the judgment in *Clark v Cutland* [2003] EWCA Civ 810, [2003] 4 All ER 733 is that a shareholder can obtain corporate relief in terms of section 459 of the Companies Act 1985, and that a shareholder may be able to rely on conduct that took place prior to the shareholder becoming a member of the company.

⁴⁴⁶ For purposes of the statutory derivative claim in the Companies Act 2006, section 260(5)(c) provides that a member of a company 'include[s] a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law'.

⁴⁴⁷ Companies Act 2006, s 260(4). See also Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 655.

belongs to the company and not the member who is instituting the derivative claim.⁴⁴⁸

In *Atlasview Ltd v Brightview Ltd*⁴⁴⁹ the court held that for purposes of the statutory personal remedy in terms of section 459 of the Companies Act 1985, a nominee shareholder has the necessary standing to protect the interests of the beneficial owner of the relevant shares. The rights of the beneficial owner can therefore be protected indirectly through the nominee who is a member of the company.⁴⁵⁰ It is important to note that the same position pertaining to the standing of a shareholder does not apply to the derivative claims.⁴⁵¹

(c) Interpretation

The distinction between the statutory personal remedy and the statutory derivative claim is blurred by the manner in which these remedies are formulated. In some circumstances a petitioner can be in doubt as to whether he or she should base his or her petition on the statutory personal remedy or on the statutory derivative claim.⁴⁵²

From a practical point of view it is more advantageous for a petitioner to base his or her petition on the provisions of section 994, as the petitioner would not have

⁴⁴⁸ Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 655.

⁴⁴⁹ [2004] EWHC 1056 (Ch); [2004] 2 BCLC 191 [38].

⁴⁵⁰ For a discussion of this case on this point see Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 655-56.

⁴⁵¹ Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 656.

⁴⁵² See 2.10.3.1 above.

to comply with the procedural requirements set out in sections 260 to 264.⁴⁵³ In such circumstances it would be argued that it would be more advantageous for a petitioner to base his or her petition on section 994 of the Act instead of the statutory derivative action that requires the petitioner to comply with various statutory requirements which include obtaining permission from a court to institute derivative proceedings on behalf of a company.⁴⁵⁴

Although section 994 read with section 996 of the Act provides for the authorisation to institute legal proceedings on behalf a company, the provision should not be abused to circumvent the statutory requirements of the derivative

⁴⁵³ In terms of section 260(3) a derivative claim may only be instituted on specified grounds. In terms of section 261(1) a member of a company needs the leave of a court to commence and/or continue with a derivative claim. Leave will only be granted once the court has taken into account the issues and aspects set out in section 263. Julia Tang 'Shareholder Remedies: Demise or the Derivative Claim?' (2012) 1 *UCL Journal of Law and Jurisprudence* 178, 205 argues that the availability of relief in the form of authorisation to institute legal proceedings on behalf of a company under section 994 may reduce the use of the derivative claim. It is further argued (206) that the judicial approach to petitions in terms of section 994 makes the derivative claim available to petitioners even in circumstances where the derivative claim would not have been available due to the complex and restrictive rules in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189. Courts have interpreted section 994 in a much more flexible manner in comparison with the restrictive interpretation and application of the provisions dealing with derivative claims (206). The broad discretion that a court enjoys under section 994 read with section 996, makes the remedy an attractive option to minority shareholders (206). Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 676 argues that section 459 of the Companies Act 1985 provided a more flexible alternative to pursue a corporate claim. Payne (662-63) points out that when a wrong is committed against a company the possibility to obtain corporate relief by way of the statutory personal action in section 459 of the Companies Act 1985 exists. The derivative action was not available to a shareholder when a wrong was committed against the personal interests of the shareholder or member (662-63). Payne (662-63) further argues that the unfair prejudice remedy may be available on the grounds of a negligent breach of a director's duty, but this is not the case in the context of the derivative claim.

⁴⁵⁴ Companies Act 2006, s 261(1). See Julia Tang 'Shareholder Remedies: Demise of the Derivative Claim?' (2012) 1:2 *UCL Journal of Law and Jurisprudence* 178, 208-09.

claim.⁴⁵⁵ Courts need to develop principles to ensure that the available procedure in section 996 is not abused by petitioners.

(d) The indemnification of costs

(i) Costs and derivative claims

When a court grants permission or leave to a member to institute legal proceedings or claim on behalf of a company, such permission or leave may be subjected to certain terms.⁴⁵⁶ These terms are determined by a court 'as it thinks fit'.⁴⁵⁷ Such terms may include the indemnification of a member against the reasonable costs incurred in litigation on behalf of a company.⁴⁵⁸ Usually, a member will have the right to be indemnified even when the derivative claim is unsuccessful.⁴⁵⁹ Courts are readily inclined to order the indemnification of a member's costs.⁴⁶⁰ According to the courts equity requires that the company, and not the relevant member, should carry the costs of such a derivative claim.⁴⁶¹ The reason for this is that any benefit that

⁴⁵⁵ Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 659 in the context of section 459 of the Companies Act 1985.

⁴⁵⁶ Companies Act 2006, s 261(4).

⁴⁵⁷ Companies Act 2006, s 261(4)(a). See also Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 606.

⁴⁵⁸ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 607. See also *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849, 871 where the court found the indemnification of a plaintiff in a derivative action to be a matter of discretion.

⁴⁵⁹ See *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849, 859 where the court confirmed the 'well-known maxim of the law that he who would take the benefit of a venture if it succeeds ought also bear the burden if it fails'.

⁴⁶⁰ See *Steiner v Lee* [2010] EWHC 1539 (Ch), [2011] 1 BCLC 537 [56] where the court held that *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849 is 'clear authority that a shareholder who receives the sanction of the court to proceed with a derivative action should normally be indemnified as to his reasonable costs by the company for the benefit of which the action would accrue'.

⁴⁶¹ *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849, 858.

derives from a successful derivative claim accrues to the company and not the member. Based on this principle, a member may be indemnified for all costs and expenses reasonably incurred.⁴⁶²

(ii) *The issue of costs and the unfair prejudice remedy*

When relying on the unfair prejudice remedy the petitioner carries the costs of the suit by default. Usually, the company involved is not ordered to carry the costs incurred by a member in using the unfair prejudice remedy because the relief sought usually provides relief of a personal nature.⁴⁶³ Because the court in *Clark v Cutland*⁴⁶⁴ opened the door to obtain corporate relief for a company in terms of the unfair prejudice remedy, the default position in relation to costs needs to be reconsidered. The court in *Clark v Cutland*⁴⁶⁵ made it clear that when relief in terms of the unfair prejudice remedy is sought for the benefit of the company, the petitioner may seek an order for costs against the company.⁴⁶⁶

One of the biggest advantages of the derivative claim compared to the unfair prejudice remedy is in relation to costs because an order for the indemnification of costs could be obtained at a very early stage in terms of the derivative claim or action.⁴⁶⁷ In terms of the unfair prejudice remedy an order for costs will usually be made only after the dispute has been determined by the court. This means that a

⁴⁶² According to the court in *Wallersteiner v Moir (No 2)* [1975] 1 All ER 849, 858 and 871 a minority shareholder is in the same position as an agent who has the right to be indemnified for all reasonable costs and expenses incurred in execution of his or her mandate.

⁴⁶³ *Clark v Cutland* [2003] EWCA Civ 810 [35]; [2003] 4 All ER 733.

⁴⁶⁴ [2003] EWCA Civ 810, [2003] 4 All ER 733.

⁴⁶⁵ [2003] EWCA Civ 810, [2003] 4 All ER 733.

⁴⁶⁶ *Clark v Cutland* [2003] EWCA Civ 810 [35]; [2003] 4 All ER 733.

⁴⁶⁷ Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 664.

member first has to incur the actual costs of the relevant litigation in the hope that he or she will be able to obtain an order for the indemnification of costs against the company.⁴⁶⁸ It is argued by some that obtaining an order in relation to costs in terms of the derivative action does act as a strong enough incentive for litigants to make use of the derivative action instead of unfair prejudice proceedings.⁴⁶⁹

(e) *The application for corporate relief in the context of a group of companies*

The statutory unfair prejudice remedy can be applied in the context of a group of companies.⁴⁷⁰ The formulation of the statutory derivative claim prevents it from being applied within a group structure of companies.⁴⁷¹ Because the possibility exists to use the unfair prejudice remedy to obtain relief for the benefit of the company, the possibility arises that a member of company within a group structure may seek relief for the benefit of another company within the same group.⁴⁷² Payne suggests that a member of a company that forms part of a group of companies may use the unfair prejudice remedy to obtain corporate relief for one of the other companies in the group of which the shareholder is not necessarily a member.⁴⁷³ In

⁴⁶⁸ Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 665.

⁴⁶⁹ See Julia Tang 'Shareholder Remedies: Demise of the Derivative Claim?' (2012) 1(2) *UCL Journal of Law and Jurisprudence* 178, 209.

⁴⁷⁰ Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 662.

⁴⁷¹ See Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 661 where it is emphasised that the 'double derivative' or 'multiple derivative' is not recognised in English law.

⁴⁷² Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 661-62. See also 2.10.3.4 above.

⁴⁷³ Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 661-62.

contrast with the unfair prejudice remedy, the derivative claim can only be relied on by a member of a company on whose behalf relief is sought.

(f) *An abuse of control and the protection of a company against frivolous and vexatious litigation*

The derivative claim is an equitable remedy.⁴⁷⁴ Individual members may commence with the process to seek leave or permission to commence with legal proceedings on behalf the company. The leave or permission requirement protects the company from being unnecessarily entangled in frivolous and vexatious litigation.⁴⁷⁵ This is also in line with the view that the institution of a derivative claim is an exception to the proper plaintiff rule.⁴⁷⁶

The statutory derivative action attempts to strike an appropriate balance between the protection of a company against frivolous and vexatious litigation on the one hand and the protection of a company against an abuse of control.⁴⁷⁷ When balancing these interests, the legislature also took into consideration established company law principles.⁴⁷⁸

⁴⁷⁴ Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 657.

⁴⁷⁵ Companies Act 2006, s 261(1). See also Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 658.

⁴⁷⁶ Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 657. See 2.3.1.4 above.

⁴⁷⁷ See also 2.10.3.2 above where the point is made that such an abuse may constitute unfair prejudice. According to Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 657-58 the possible ratification of the conduct committed complained of and the views of an independent group in the company are important considerations to determine whether leave should be granted to commence with a derivative claim on behalf of the company.

⁴⁷⁸ For a general discussion of the company law principles see 2.2 above.

In the formulation of the statutory derivative claim, the legislature gave recognition to the principle of majority rule.⁴⁷⁹ Further, it acknowledged that in some circumstances it would not be in the best interests of the company to institute legal proceedings on behalf of the company.⁴⁸⁰ Because a company is a separate juristic person, the company is the proper plaintiff to institute legal proceedings when a wrong is committed against the company as the cause of action vests in the company and not in the individual shareholders of the company.⁴⁸¹

2.10.4 Restraining the alteration of a company's articles

The court may issue an order in terms of which any amendments or alterations to the articles of a company are prohibited, unless such alteration or amendment is made with leave of the court.⁴⁸²

2.10.4.1 The review of decisions to amend the articles of a company

Decisions or resolutions adopted to amend the articles of a company are reviewable. The ability to challenge these decisions or resolutions is important as such amendments may affect the rights of other members or shareholders of the company that do not necessarily share the sentiments of the majority members of

⁴⁷⁹ Companies Act 2006, s 263(3)(e). See the discussion of Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 653 in the context of Companies Act 1985. Payne (657) notes that the courts attached considerable weight to the ability of a company to ratify the conduct complained of in determining whether permission should be granted to commence with a derivative claim.

⁴⁸⁰ Companies Act 2006, s 263(3)(b). Section 263(3)(a) requires that a member should be *bona fide* in pursuing an application to institute legal proceedings on behalf of the company. See also Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 658.

⁴⁸¹ Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 657. See also 2.2 read with 2.3 above.

⁴⁸² Companies Act 2006, s 996(2)(d).

a company.⁴⁸³

Although the judicial test to determine whether a resolution to amend articles is reviewable the test to be applied is somewhat uncertain. Such resolutions are usually reviewed on the basis that they have not been adopted *bona fide* in the best interest of the company as a whole.⁴⁸⁴ A member will have difficulty in challenging a resolution if it can be demonstrated that the resolution has been adopted in good faith and on a rational basis.⁴⁸⁵ In some other instances it needs only to be proved that the resolution was adopted in bad faith as it is only the members of the company that can judge whether a specific resolution is in the best interest of a company.⁴⁸⁶ There is no unanimity on the question whether it is required that the general meetings acted with a proper purpose in adopting the resolution.⁴⁸⁷

2.10.4.2 Amendments in the interests of the majority

The temptation will also exist for majority shareholders to adopted resolutions to amend the articles of a company that will more often than not only serve the

⁴⁸³ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 639.

⁴⁸⁴ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 639-40.

⁴⁸⁵ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 640.

⁴⁸⁶ See Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 640 who expressed doubt regarding the correctness of the approach. The authors further point out (642) that it does not make any contribution to consider whether the members of the company regard a particular amendment to be in the interests of the company, in order to determine whether the resolution adopting an amendment to the articles of association should be upheld.

⁴⁸⁷ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 643-44.

interests of the majority.⁴⁸⁸ Such amendments may also be at the expense of other or minority shareholders. Examples of such amendments or resolutions include the expropriation of the interests of other shareholders in the company on terms and conditions favourable to certain other shareholders, often majority shareholders.⁴⁸⁹

Although the required majority does have the power to amend the articles of a company, such power is not without limits.⁴⁹⁰ It is submitted that the provisions of section 994 of the Act can be used to challenge resolutions or amendments to the articles of association on the basis that they are unfairly prejudicial.⁴⁹¹ The use of the unfair prejudice remedy is advantageous as a member will have to convince the court that the resolution or amendment is unfair and also prejudicial, a criterion that is wider and in some respects more certain than the judicial tests applied by a court to have such resolutions reviewed. It also affords courts with a range of relief that can be used in balancing the rights of the various parties and stakeholders affected by the resolution.⁴⁹² One of the forms of relief that a court may order in these circumstances is to prohibit certain amendments without the leave of the court or

⁴⁸⁸ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 639.

⁴⁸⁹ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 639-42.

⁴⁹⁰ *Arbuthnott v Bonnyman & Ors* [2015] EWCA Civ 536 [47].

⁴⁹¹ An amendment may be valid but unfair in certain circumstances. See *Arbuthnott v Bonnyman & Ors* [2015] EWCA Civ 536 [48] read with [90]. In [95]-[96] the court expressed its preference to test the validity of amendments to the articles of association based on unfair prejudice, because an amendment to the articles of association does not involve the interests of the company. See also Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 645.

⁴⁹² Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 643 are sceptical about the application of section 994 in this context because it will be highly likely that the complaining members would be bought out which will result in the total exclusion of their participation in the company.

alternatively order the buy-out of certain shareholders depending on the circumstances of the particular case. The court is free to make any further orders.

2.10.5 Purchase or buy-out orders

2.10.5.1 Introduction

(a) *The right of a member to withdraw his or her investment from a company*

When a member is dissatisfied with the manner with which the affairs of the company he or she invested in are conducted, one of the member's options is to sell his or her shares. However, this is not always practical or even possible, as such a sale may, for example, be subject to rights of pre-emption.⁴⁹³ There may also be an inadequate market for the sale of the shares.⁴⁹⁴ This makes the withdrawal of the investment of members in some companies problematic and may often lead to the investments of members being locked into the company.⁴⁹⁵

The default position is that a member does not have the right to compel a company and/or other shareholders of a company to purchase his or her shares.⁴⁹⁶

⁴⁹³ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 681.

⁴⁹⁴ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 680.

⁴⁹⁵ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 680-81.

⁴⁹⁶ *Amin v Amin* [2009] EWHC 3356 (Ch); *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [108]; [2010] All ER 142. In *Amin v Amin* [2009] EWHC 3356 (Ch) [531] and [583] the court held [531] that a shareholder does not have the right to 'put' his or her shares on other shareholders at 'full value' unless he or she suffered at the hands of unfairly prejudicial conduct. The same applies when there was a breakdown of mutual confidence and trust between the members of the company. A petitioner should prove that he or she was unfairly prejudiced before he or she may be entitled to relief. This

Generally it would not be an option to such a member to relinquish his or her shares in the company without compensation of some sort, as the company will retain the benefit of the capital invested by the members without the members deriving any potential benefit from their investments.⁴⁹⁷ When a locked-in member wishes to withdraw his or her investment in a company, one of the options available to a member may be to prove that the affairs of the company are conducted in a manner that is unfairly prejudicial which may entitle the member to relief in terms of section 996 of the Act.⁴⁹⁸ The advantages of making a buy-out order is that a member is free from being locked in a company and/or the company is preserved for the remaining members and employees of a company.⁴⁹⁹

(b) Unfair prejudice and the right of a member to withdraw his or her investment

Section 994 read with section 996 of the Act provides a court with a wide and

is also the case in the context of quasi-partnership companies. See also *Phoenix Office Supplies Ltd v Larvin* [2002] EWCA Civ 1740, [2003] 1 BCLC 76; *O'Neill v Phillips* [1999] WLR 1092, 1104. In *O'Neill v Phillips* [1999] WLR 1092, 1104 the court remarked that '[i]t is not fair to the excluded member, who will usually have lost his employment, to keep his assets locked in the company. But that does not mean that a member who has not been dismissed or excluded can demand that the shares be purchased simply because he feels that he has lost trust and confidence in the others. I rather doubt whether even in partnership law a dissolution would be granted on this ground in a case in which it was still possible under the articles of the business of the partnership to be continued'. See further Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 684-85. In Law Commission 'Shareholder Remedies' (Law Com No 246 Cm 3769, 1997) [3.66] it is stated that 'there are strong economic arguments against allowing shareholders to exit at will'.

⁴⁹⁷ Such investments are also made based on certain expectations or agreements. See in this regard 2.6.5.

⁴⁹⁸ See 2.9 above regarding the unfair prejudice remedy as an alternative remedy to the winding-up of a company on a just and equitable basis.

⁴⁹⁹ *Grace v Biagioli* [2005] EWCA Civ 1222 [75]; [2006] BCC 85.

flexible discretion to order relief to rectify the unfair prejudice suffered by a member.⁵⁰⁰ Once the member has proven that the company's affairs have been conducted in a manner that is unfairly prejudicial, the member should then further attempt to convince the court that the purchase of his or her shares by the company and/or other members of the company is an appropriate remedy in the circumstances of the case.⁵⁰¹

(c) *The terms of a buy-out or purchase order*

The discretion of a court in terms of section 996 of the Act includes the power to make an order in terms of which the shares of the petitioner or relevant member be bought at fair value.⁵⁰² Usually, such an order is made in circumstances where the basis of the association between the parties to the dispute has been destroyed and the subsequent continuation of their association would be unfair to the petitioner.⁵⁰³ The advantage of this form of relief is that the association between the petitioner

⁵⁰⁰ *KR Hardy Estates Ltd, Re* [2014] EWHC 4001 (Ch), [2014] All ER 146 [86]; *Birdi v Specsavers Optical Group Ltd* [2015] EWHC 2870 (Ch) [365]; [2015] All ER 144. See 2.10 above regarding the discretion of a court in terms of section 996 of the Companies Act 2006.

⁵⁰¹ Should the company be ordered to purchase the shares of some of its members, such a purchase will qualify as a reduction of the company's share capital. See Companies Act 2006, s 996(2)(e). See also Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 682.

⁵⁰² Companies Act 2006, s 996(2)(e). See also Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 684-85 who emphasise that a purchase order is a form of relief that can be granted in terms of a petition in terms of section 994 of the Companies Act 2006, and is not a right of a member to withdraw his or her shareholding from a company.

⁵⁰³ *Amin v Amin* [2009] EWHC 3356 (Ch) [412]. See also Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 680 and 684-85. See further in this regard 2.6.5 above.

and other members of the company is terminated.⁵⁰⁴ This form of relief, as with other forms of relief, may only be granted when all the jurisdictional facts in section 994(1) are met.⁵⁰⁵ A further important aspect of relief in the form of a buy-back or purchase of shares is the valuation of the relevant shares. This aspect is discussed below.

2.10.5.2 The duty of a court to determine the value of shares

In line with comparable jurisdictions, English courts often grant relief in the form of purchase or buy-out orders.⁵⁰⁶ When a court grants this form of relief, it also has a duty to determine the value of the relevant shares.⁵⁰⁷ Courts in England have adopted a flexible approach to the valuation of shares that are the subject of a buy-out order in terms of section 996.⁵⁰⁸ When valuing shares that are subject to a buy-out or purchase order, a court is guided by fairness in the context of the facts and circumstances of each case.⁵⁰⁹

⁵⁰⁴ See Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 680 n 89 who refer to *Grace v Biagioli* [2006] 2 BCLC 70 (CA) to point out that a buy-out order is a more effective remedy as a member is protected from future exposure to harm as opposed to a compensation order.

⁵⁰⁵ See 2.6 above.

⁵⁰⁶ Companies Act 2006, s 996(2)(e). For the position in South Africa see 5.9.14 below. See 3.9.4 for the position in Australia and 4.11.9 for the Canadian position.

⁵⁰⁷ *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [147]; [2010] All ER 142. See also Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 680. A court should assign a fair value to the shares in question. In determining the value of shares, a court may take into account the differences in interests of the various shareholders. The fact that a shareholder was a passive investor or acquired his or her shares at a discount may lead to a finding that the shares should not be valued on a *pro rata* basis. See further Robert Goddard 'Enforcing the hypothetical bargain: Section 459-461 of the Companies Act 1985' (1999) *Company Lawyer* 66, 78.

⁵⁰⁸ *Maidment v Attwood* [2012] EWCA Civ 998 [26]; [2012] All ER 203.

⁵⁰⁹ *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [283]; [2010] 1 BCLC 367. See also *Estera Trust (Jersey) Ltd & Anor v Singh & Ors* [2018] EWHC 1715 (Ch) [644]-[645] read with [648] where the court held that the fair value and market value of shares cannot always be equated. There are

While a court enjoys a wide discretion in fixing the value of the shares in a company, this discretion should be exercised judicially while taking into consideration the concept of fairness.⁵¹⁰ The concept of fairness requires a court to value the shares that are subject to a purchase or buy-out order in such a manner that one of the parties is not unjustly enriched.⁵¹¹ This will prevent that unfair

many factors that a court has to take into account to determine the fair value at which shares must be bought in terms of a buy-out order. Factors may include the nature of the relationship between the shareholders involved and the purchaser of the shares [646], the fact that the shares are not sold in an open market [645] and that the acquisition will affect the position of the remaining shareholders in the company. Such acquisition may increase the purchaser's power within the company [646] and the acquisition of the relevant shares below their fair value may financially benefit the acquiring shareholder [646]-[647]. The fair value further has to be determined in light on the unfair prejudicial conduct found [648]. See further *McCallum-Toppin v McCallum-Toppin* [2019] EWHC 46 (Ch) [208] where the court held that on the fact of the specific case the shares of the company subject to a purchase order would be more valuable in the hands of an existing member or shareholder than when they are sold to an investor outside the company.

⁵¹⁰ In *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [299]; [2010] 1 BCLC 367 the court remarked that a shareholder who became a member of a company by the subscription of shares in the company at a discounted price will usually be unable to argue that his or her shares should be bought at an undiscounted price in the event of a purchase order made on unfair prejudicial conduct.

⁵¹¹ For example, where the controlling shareholders intentionally adopt a strategy to diminish the value of a company's shares with the purpose to buy the shares of minority shareholders on more favourable terms. See *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [283]; [2010] 1 BCLC 367. See also *Estera Trust (Jersey) Ltd v Singh* 2019 WL 01641174 (ChD) where the court held that section 996 of the Companies Act 2006 does provide the discretion to order the payment of interest as part of compensation to compensate a member whose shares will be bought by the company or other members from the time of the order until the actual payment of the determined price for the relevant shares. Such an order would usually be made when indulgence is sought to acquire the necessary finance to buy the relevant shares. In such circumstances the company will have the benefit of the member's capital but such member will be excluded from sharing in the growth of the company. It is important to distinguish between interest awarded as a form of compensation in terms of section 996 of the Act and judgment interest in terms of the Judgments Act 1838. No award for interest would be made unless the value of the shares subject to a buy-out order is determined.

prejudicial conduct is incentivised.⁵¹²

(a) The role of experts and the discretion of the court

The discretion of a court to make such an order includes the power to determine the fair value of the relevant shares.⁵¹³ The determination of the value of shares is a very complex matter and often the expertise of experts such as accountants or actuaries is required to provide the court with guidance. However, the ultimate power and duty to fix the value of the relevant shares resides with the court. The court should fix a value that is fair based on the evidence provided.⁵¹⁴ The court's discretion is only subject to the overriding principle that the value determined by the court must be fair in the circumstances of the specific case.⁵¹⁵

⁵¹² *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [283]; [2010] 1 BCLC 367; *Re Blue Index Ltd* [2014] EWHC 2680 (Ch) [26]; *Estera Trust (Jersey) Ltd & Anor v Singh & Ors* [2018] EWHC 1715 (Ch) [647]; *McCallum-Toppin v McCallum-Toppin* [2019] EWHC 46 (Ch) [216]. See also 2.10.5.5 for a further discussion of the application of a minority discount.

⁵¹³ *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031 [33]; [2002] 1 BCLC 141.

⁵¹⁴ *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [152]; [2010] All ER 142.

⁵¹⁵ *Croly v Good* [2010] EWHC 1 (Ch) [105]; [2010] All ER 177. See also *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031 [33]; [2002] 1 BCLC 141. In *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031, [2002] 1 BCLC 141 the petitioner, Profinance, was a 40% shareholder in a company Americanino Ltd ('the company'). The respondent, Mr Gladstone, held the remaining 60% of the shares in the company. The company carried on the business of selling computer memory. It was agreed that Profinance will provide the start-up capital while the day-to-day business would be managed by Mr Gladstone. Initially it was further agreed that Profinance and Mr Gladstone would be equal shareholders in the business. The business was initially very successful and Profinance and Mr Gladstone adjusted their shareholding to a 60/40% shareholding in favour of Mr Gladstone. Profinance approached the court by way of petition, based on unfair prejudice, for relief in the form of an order that Mr Gladstone should buy its shares in the company at fair value. It was conceded that the affairs of the company were conducted unfairly. Mr Gladstone made various offers to buy the shares of Profinance of which none were accepted because the parties could not agree on a fair value of the shares held by Profinance. For a more detailed summary of the facts of the case see *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031 [14]; [2002] 1 BCLC 141. See also *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [279], [280]; [2010] 1 BCLC 367 regarding the

(b) *The flexibility of a court's discretion and the factors and circumstances affecting the valuation of shares*

During the valuation of shares for purposes of a purchase or buy-out order, the unique facts and circumstances of each case must be carefully considered.⁵¹⁶ Because the facts and circumstances differ from case to case, the principles contained in legal precedence should be applied with the necessary flexibility to provide for the unique context of the specific case before a court. Although courts should approach the valuation of the shares of a member based on the individual facts and circumstances of a case, consistency in their approach to the valuation of shares is essential.⁵¹⁷ This can be achieved by having due regard to the principles developed in case law. Existing precedents of other courts should not be blindly or mechanically applied.⁵¹⁸

(i) *Quasi-partnerships and 'the clean hands' principle as factors influencing the value of shares*

Factors that may influence the value of the petitioner's shares in a company include whether the relevant company is quasi-partnership⁵¹⁹ and/or whether the member approached the court with clean hands.⁵²⁰ Where a member to a quasi-partnership approaches a court with clean hands, a valuation of the shares on an undiscounted

appropriate date of valuation and the application of a minority discount. More specifically see 2.10.5.3 and 2.10.5.5 for a discussion of the date to be used as basis for the valuation of the shares subject to a buy-out order and the application of a minority discount, respectively.

⁵¹⁶ *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [299]; [2010] 1 BCLC 367.

⁵¹⁷ *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [299]; [2010] 1 BCLC 367.

⁵¹⁸ *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [299]; [2010] 1 BCLC 367.

⁵¹⁹ See 2.6.5.4 above for a discussion of quasi-partnerships.

⁵²⁰ See 2.6.4 above for a discussion of how the conduct of a petitioner may affect unfair prejudice proceedings.

basis is favoured.⁵²¹ An appropriate valuation must prevent unjust enrichment of a party and must carefully consider the appropriateness of the application of a discount to the value of the shares.⁵²²

(ii) *Other considerations*

A shareholder who has been subjected to unfair prejudicial conduct cannot always be regarded as a willing seller of his shares.⁵²³ Further, the availability of relief in the form of winding-up order is an important consideration in determining the price or value of shares and/or tailoring relief for purpose of a petition based on unfair prejudicial conduct.⁵²⁴ The winding-up of the company must be considered in light of the difference in the value of what the petitioner will receive and the perceived value to the respondents.⁵²⁵

When determining the value of shares in the context of a purchase or buy-out order, a court should be cautious in fixing a value to the shares with reference

⁵²¹ *Croly v Good* [2010] EWHC 1 (Ch) [102]; [2010] All ER 177. See also *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031 [18], [47]; [2002] 1 BCLC 141. See also 2.10.5.5 below for a discussion of the application of a minority discount. See also Paul L Davies and Sarah Worthington Gower and Davies' *Principles of Modern Company Law* (10th ed, 2016) 681 who point out that a minority discount is generally applied when a company is not a quasi-partnership.

⁵²² *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [283]; [2010] 1 BCLC 367. Unjust enrichment may occur where it was the purpose of the buyer's unfairly prejudicial conduct to diminish the value of the seller's shares to enable to the buyer to purchase the shares at a discount ([305]). For example, where business is diverted away from the company.

⁵²³ *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [298]; [2010] 1 BCLC 367.

⁵²⁴ *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [303]; [2010] 1 BCLC 367.

⁵²⁵ Such an approach is aligned with the principle that the relief should remove the complaint and, objectively viewed, be fair in the circumstances of the case. See *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [303]; [2010] 1 BCLC 367; *Anacott Holdings Ltd, Re* [2013] EWCA Civ 119 [12]; [2013] 2 BCLC 46.

to what a willing purchaser is willing to pay for the shares.⁵²⁶ The purchasers of the shares are often unwilling or reluctant purchasers of shares.⁵²⁷ During the valuation of shares a court should take into consideration certain factors that may have an effect on the adjustments made to the value of the shares. For example, the actual value of the shares may be adjusted to rectify the prejudicial effects that the unfair conduct has on the value of the shares of the petitioner.⁵²⁸

2.10.5.3 The date on which the shares are to be valued – the principles

(a) Introduction

The date that will be used as the basis for the valuation of the relevant shares may have a substantial impact on determining the value of the shares.⁵²⁹ Generally, three possible dates could be used as the basis for the valuation of shares that are subject to a buy-out or purchase order. Arguments exist for the use of the date on which the unfair prejudice occurred,⁵³⁰ the date on which the petition is presented to court⁵³¹ and the date on which the order for the purchase of the shares is made.⁵³²

In *Shepherd v Williamson*⁵³³ the court held that ‘decisions are best made with

⁵²⁶ *CVC/Opportunity Equity Partners Ltd v Almeida* [2002] UKPC 16, [44]; [2002] All ER 348. A willing buyer or third party will often only be prepared to pay a value for the relevant shares that reflects the harm done. See Paul L Davies and Sarah Worthington *Gower and Davies’ Principles of Modern Company Law* (10th ed, 2016) 680.

⁵²⁷ *CVC/Opportunity Equity Partners Ltd v Almeida* [2002] UKPC 16, [44]; [2002] All ER 348.

⁵²⁸ *Maidment v Attwood* [2012] EWCA Civ 998 [26]; [2012] All ER 203.

⁵²⁹ Paul L Davies and Sarah Worthington *Gower and Davies’ Principles of Modern Company Law* (10th ed, 2016) 681-82.

⁵³⁰ See 2.10.5.3 (b) below.

⁵³¹ See 2.10.5.3 (c) below.

⁵³² See 2.10.5.3 (d) below.

⁵³³ [2010] EWHC 2375 (Ch) [152].

all relevant evidence before the Court. However, it does not seem to me that expert evidence on values at different times affects the Court's decision as to which date should be selected. That is the wrong way round'. In other words, the date that a court uses as basis for the valuation for the shares is not determined or dictated by the value of the shares on a particular date. A court should first determine the date that should be used as basis for the valuation and only thereafter determine the appropriateness of the valuation.⁵³⁴

(b) The date of the unfair prejudicial conduct

The date on which the unfair prejudicial conduct took place is one of the dates that could be used as the basis to value the relevant shares.⁵³⁵ When this date is used for the valuation of shares, consideration should be given to the possibility that the value of the shares may have been diminished as a result of the unfair prejudicial conduct. This may require adjustments to be made to the base value of the shares to remedy the effect that the unfair prejudicial conduct had on the value of the shares.⁵³⁶ The same applies to benefits that accrued to the member (petitioner)

⁵³⁴ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 681-82 state that the courts have a wide discretion regarding the date which must be used as basis for the valuation of the shares that are subject to a buy-out order.

⁵³⁵ See, for example, *Croly v Good* [2010] EWHC 1 (Ch) [117], [119]; [2010] All ER 177 where the court used the date upon which the petitioner was unfairly excluded from the management of the company.

⁵³⁶ In *Croly v Good* [2010] EWHC 1 (Ch) [118]; [2010] All ER 177 it was submitted that 'the shares were clearly valueless, whatever date was chosen. This was based on the submission that even at the date of expulsion the Company was insolvent unless the director's loan accounts, then amounting to about £400,000, could be collected. It does not however seem to me to be fair that Mr Good should be able to rely on his own inability to pay his debt to the Company to reduce the price that he ought to pay to acquire Mr Croly's shares. Nor does it seem to me right that he should seek to reduce the amount paid by reference to any difficulty Mr Croly might have in repaying the amount he owes, in circumstances where Mr Good has exacerbated that difficulty by failing to declare the

because of his or her shareholding in the company.

(c) The date of the petition

A court can also order that the shares be valued as on the date of the commencement of proceedings relating to unfair prejudice.⁵³⁷ The benefit of this approach is that it often reflects the date on which the petitioner regarded the conduct complained of as having become unfairly prejudicial.⁵³⁸ However, the date of the presentation of the petition, as a basis for the valuation of shares, does not provide concrete and clear answers in relation to the valuation of shares. This date may be insufficient in some respects.⁵³⁹ Using the date on which the petition is

dividends that could have been declared which would have reduced this liability and leaving Mr Croly in the situation in which he is exposed to a claim for recovery by the administrators but the asset which he will presumably wish to use to discharge it, that is the price of his shares, is to be reduced in value by virtue of the very existence of the liability in the first place. I propose therefore to direct that in conducting the valuation exercise the valuer should assume that the director's loan accounts will be recoverable in full'. See also [120] where the court held that '[i]t may be necessary to give further directions as to the basis upon which the valuation will be performed. One matter which I do wish to deal with now however is a claim in the petition that the valuer should assume that Mr Good must repay to the Company all the amounts which are said to have been misappropriated by him from it. These are the amounts paid to Mr Good on account of dividend and other amounts drawn in cash or paid by the Company in respect of his personal expenses. Since all of these amounts have been debited to Mr Good's loan account, he is already liable to repay those amounts to the Company, that liability will be treated as an asset of the Company by virtue of the direction I have referred to above, and no further adjustment is required to be made'.

⁵³⁷ *Scottish Co-operative Wholesale Society v Meyer* [1959] AC 324, 364; [1958] 3 All ER 66.

⁵³⁸ *Croly v Good* [2010] EWHC 1 (Ch) [117]; [2010] All ER 177; *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [152]; [2010] All ER 142. See also *Cumana, Re* [1986] BCLC 430, 435-36. In *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [146]; [2010] All ER 142 the court explained that the date of the presentation of the petition may be regarded as the most appropriate date because this is the date upon which the conduct complained of became unfairly prejudicial to such an extent that the petitioner required relief from a court.

⁵³⁹ In *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031 [37]; [2002] 1 BCLC 141 the court remarked that this may be the case in the event of 'a major change in the (whether for the better or for the worse) in the company's capital structure and business'. The court cited *Re OC (Transport)*

presented may ignore unfair prejudicial conduct and/or its effects that transpired prior to and after the date of the presentation of the petition.

The court will have to take into consideration the contribution of a member in the increase or decrease in the value of shares after the presentation of a petition.⁵⁴⁰ A court could also order that adjustments be made to compensate for unfair prejudicial conduct that took place in the past.⁵⁴¹ It is very important that an increase or decrease in the value of shares must be supported by a proper evidential basis.⁵⁴²

(d) The date on which a court orders the purchase of the shares

Generally, the most appropriate date to use as a basis for the valuation of shares for purposes of a purchase or buy-out order, is the date closest to the actual sale of the shares.⁵⁴³ According to this point of view the shares should be valued as on the

Services [1984] BCLC 251 as an example where a major change took place in the form of a substantial increase in the company's issued capital. The use of an earlier date may be more appropriate in such circumstances.

⁵⁴⁰ See, for example, *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031 [54]; [2002] 1 BCLC 141 where the value of the company in question 'increased almost threefold after the date of the presentation of the petition' in circumstances where the expected industry trend was downwards. In this case the court ([54]) could not find a causal link between the increased value of the company and the efforts or contributions by Mr Gladstone. See also *London School of Electronics, Re* [1986] Ch 211, 225 where the court held that the use of a later date than the date of the presentation of the petition would be unfair in the circumstances of the case as the respondents managed to grow their business through their own efforts and the evidence indicated that the growth would not have been possible with involvement of the company.

⁵⁴¹ *Scottish Co-operative Wholesale Society v Meyer* [1959] AC 324; [1958] 3 All ER 66; and [1959] 3 WLR 404.

⁵⁴² *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031 [54]; [2002] 1 BCLC 141.

⁵⁴³ See *Estera Trust (Jersey) Ltd & Anor v Singh & Ors* [2018] EWHC 1715 (Ch) [632]; *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031 [33]; [2002] 1 BCLC 141. See also *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [146]; [2010] All ER 142; *Brownlow v Marshall* [2000] 2 BCLC 655; *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [287]-[288]; [2010] 1 BCLC 367. See further *London School of Electronics Ltd, Re* [1986] Ch 211; *Elgindata, Re* [1991] BCLC 959. In *London*

date the order is made by the court.⁵⁴⁴ This general rule of application is subject to

School of Electronics Ltd, Re [1986] Ch 211, 224 the court stressed that this is especially the case when the shares of the company are to be valued as going concern. In *Brownlow v Marshall* [2000] 2 BCLC 655 [76] the value of the company increased between the date of the petition and the date when the court granted relief. The court held ([76]) that the appropriate date to use for the valuation of the shares was the date of the court order. The court ([76]) advanced two reasons for the decision. Firstly, that such an increase in value was in part derived from the benefit of having the share capital provided by the petitioner and secondly that the increase in value was achieved through the managers and staff of the company who were not shareholders '(but whose services are paid equally by all shareholders)'. In *Elgindata, Re* [1991] BCLC 959, 1006 the court remarked that it established the extent to which the value of the shares of the petitioners' were diminished by conduct in terms of which petitioners may complain of in terms of section 459 of the Companies Act 1985.

⁵⁴⁴ In *Croly v Good* [2010] EWHC 1 (Ch) [1]; [2010] All ER 177 the petitioner, Mr Croly, sought an order that his shares in a company be bought by Mr and Mrs Good. The petition was based on the unfairly prejudicial conduct of the affairs of the company for purposes of section 994 of the Companies Act 2006 ([1]). The fact that the petitioner required that the shares be valued as on the date of 7 November 2007 was significant in the context of the petition, as the last mentioned date was the date on which the petitioner had been excluded from the management of the company ([1]). The company's financial position also started to deteriorate to a point where the company was placed under administration on 11 April 2009 ([1]). The court [105] explained that the starting point for fixing a date for valuation is the date upon which the order for the purchase of shares is made. This is the position unless the circumstances and facts of the case dictate that an alternative date should be fixed in order to ensure that fairness is achieved between the parties to the dispute. The petitioner argued ([106]) that an earlier date should be used as the basis for valuing the shares. According to the petitioner ([106]) the financial decline of the company was caused by the conduct of Mr Good. It was further argued ([106]) that Mr Good would benefit from such decline as a company that was incorporated by him would purchase the assets. The court held [117] that in the circumstances of the case the date of the expulsion of the petitioner is the most appropriate date to use as the basis for the valuation of the petitioner's shares in the company. See also *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031 [21], [60]-[61]; [2002] 1 BCLC 141 where the court ([61]) referred to various cases and circumstances that may justify the use of an earlier valuation date. The court remarked that '[i]t would be wrong to enumerate all those cases but some of them can be illustrated by the authorities already referred to:

- i) Where a company has been deprived of its business, an early valuation date (and compensating adjustments) may be required in fairness to the claimant (*Meyer*).
- ii) Where a company has been reconstructed or its business has been changed significantly, so that it has a new economic identity, an early valuation date may be required in fairness to one or both parties (*OC Transport*, and to a lesser degree *London School of Electronics*). But an improper alteration in the issued share capital, unaccompanied by any change in the business, will not necessarily have that outcome (*DR Chemicals*).
- iii) Where a minority shareholder has a petition on foot and there is a general fall in the market, the court may in fairness to the claimant have the shares valued at an early

the principle that the valuation must be fair in the context of the facts of the particular case.⁵⁴⁵ In appropriate circumstances, a court may deviate from the general rule and order that the shares be valued based on an earlier date.⁵⁴⁶

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- date, especially if it strongly disapproves of the majority shareholder's prejudicial conduct (*Cumana*).
 - iv) But a claimant is not entitled to what the deputy judge called a one-way bet, and the court will not direct an early valuation date simply to give the claimant the most advantageous exit from the company, especially where severe prejudice has not been made out (*Elgindata*).
 - v) All these points may be heavily influenced by the parties' conduct in making and accepting or rejecting offers either before or during the course of the proceedings (*O'Neill v Phillips*).

The court in *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031 [60]; [2002] 1 BCLC 141 held that the shares of a member in a going concern should be valued at the date on which the purchase is ordered, following *London School of Electronics Ltd, Re* [1986] Ch 211, 222; [1985] BCLC 273, 281. See also *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [285]-[288]; [2010] 1 BCLC 367 where the court held that it will only depart from the general principle to use the date of the order as the basis for the valuation of a member's shares unless there are circumstances that justify another course of action. Examples of such circumstances may include a fall in the market during the hearing of the petition or the conduct of the respondent or respondents ([286]).

⁵⁴⁵ *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031 [60]; [2002] 1 BCLC 141. See also *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [280]; [2010] 1 BCLC 367. See further *Birds Precision Bellows Ltd* [1984] 1 Ch 419 and on appeal [1986] Ch 658 (CA); *London School of Electronics Ltd, Re* [1986] Ch 211, 224; [1985] BCLC 273.

⁵⁴⁶ *KR Hardy Estates Ltd, Re* [2014] EWHC 4001 (Ch) [86]; [2014] All ER 146. See also *Croly v Good* [2010] EWHC 1 (Ch), [2010] All ER 177; *Shepherd v Williamson* [2010] EWHC 2375 (Ch), [2010] All ER 142. See further *OC Transport Services Ltd, Re* [1984] BCLC 251; *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031 [61]; [2002] 1 BCLC 141. In *Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031 [61]; [2002] 1 BCLC 141 the court emphasised the following factors that are indicative of the fairness of the use of an earlier valuation date to determine the fair value of the shares of a petitioner. These factors include whether the company has been deprived of business; whether a significant change of business took place within the company; whether an alteration of the share capital of the company was made; whether there was a sudden fall in the market; and whether a reasonable offer has been made. These factors should be taken into account, but a petitioner is not entitled to an earlier valuation date just because such a date will be more advantageous. In *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [150]; [2010] All ER 142 the court held that '[t]hus it may be appropriate to specify an early valuation date where it is simply unclear whether the respondent's conduct after the date of unfairly prejudicial conduct has caused the diminution in the value of the shares, on the basis that it is unfair for the petitioner to assume the burden of the risk: see *Re OC Transport*. In *Croly v Good and*

2.10.5.4 The breakup value of a company versus the value of a company as a going concern

When a company is wound-up, a member shares in a rateable portion of the

Others [2010] EWHC 1 (Ch) His Judge Cooke (sitting as deputy Judge of this Division) fixed the date of valuation as the date of expulsion, although that was considerably earlier even than the date of the Petition. One factor relevant of this finding that a valuation after the date of expulsion would be unfair to the petitioner was that the company had been put into administration by the majority shareholder for the purpose of implementing a pre-pack sale of its assets to a new company owned by that shareholder and his wife'. In *Shepherd v Williamson* [2010] EWHC 2375 (Ch) [151]; [2010] All ER 142 the court considered the unjust exclusion of the petitioner and the conduct of the respondent towards the petitioner after the exclusion; the fact that a quasi-partnership existed between the members that entitled the petitioner to participate in the management of the affairs of the company, the exclusion of the petitioner from the management of the company impacted on his interests as shareholder of the company; the general fall in the market has partially caused the diminution in the value of the shares of the company, and because the respondent has been the sole control of the affairs the company since the date of the exclusion of the petitioner from the management of the company, the respondent should 'take some responsibility for the decline in business'; the deadlock between the members of the company and the impact thereof on the company's credit rating may be one of the causes of the company's decline, but the respondent rather opted to continue with the business of the company than to wind-up the company; various offers were made to purchase the shares of the petitioner, but none of the offers were 'an equivocal offer to purchase at a fair value'; '(vi) Mr Shepard hedged his bets by bringing proceedings in the Tribunal against the Company at the same time as pursuing his s 994 remedy. While he may have known that the costs of the defence were being borne by the Company's assets he put down a marker at an early stage as to illegitimacy of doing so and as to Mr Williamson's lack of authority to exclude him on any basis.' '(vii) The Company was placed in administration. It emerged only very shortly before trial that its assets have been pre-packed to a new company, Equiss Services Limited, controlled by the Company's associate directors Mr Peters, Mr East and Mr Vann. The Administrators' Report indicates that work in progress was disposed of at some 15% of its ostensible value, although other evidence suggests that it could perhaps have realised some 40%. Mr Williamson is presumably aware of the facts about this sale; Mr Shepherd is not.' The court ([151]) took into consideration that a considerable amount of time had lapsed between the exclusion of the petitioner from the management of the company and the making of the court order. See also *OC Transport Services Ltd, Re* [1984] BCLC 251 where the valuation date was set at 18 months prior to the presentation of the petition. In *Croly v Good* [2010] EWHC 1 (Ch) [113]; [2010] All ER 177 the court fixed the date for the valuation of the shares of the petitioner as the date of his expulsion from the management of the company.

remaining assets – after the payment of creditors – valued on a breakup basis.⁵⁴⁷ Whether the shares of a member is valued based on the breakup value of the assets of the company or on the basis that the company as going concern, makes a substantial difference to the value that a court would attribute to the shares.⁵⁴⁸ In the event of the company being wound-up on ‘just and equitable’ basis, the fair value of the shares of a member is measured against the ‘rateable proportion of the realised assets’ that a member would receive.⁵⁴⁹

When obtaining relief on the basis of section 994, minority shareholders should not, as general rule, be worse off than when a winding-up order is made.⁵⁵⁰ Normally when shares are valued on the basis that a company is a going concern,

⁵⁴⁷ *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [303]; [2010] 1 BCLC 367.

⁵⁴⁸ Paul L Davies and Sarah Worthington *Gower and Davies’ Principles of Modern Company Law* (10th ed, 2016) 681 note that the valuation of a company’s shares on a break-up basis is usually lower than when a company’s shares are valued as a going-concern.

⁵⁴⁹ *Kohli v Lit & Ors* [2009] EWHC 2893 (Ch) [301].

⁵⁵⁰ *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [56], [58]; [2012] 1 BCLC 335. See also *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch), [2010] 1 BCLC 367. See further *CVC/Opportunity Equity Partners Ltd v Almeida* [2002] UKPC 16 [46]; [2002] 2 BCLC 108. In *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [301], [303]; [2010] 1 BCLC 367 the court explained that, when dealing with a petition for the winding-up of a solvent company on ‘just and equitable’ grounds, the possibility exists that the court may direct the liquidator to continue with the business of the company in an attempt to realise the business of the company as a going concern. In *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [56], [58]; [2012] 1 BCLC 335 the court stated that the liquidation of a company is ‘an exceptional remedy’. A dispute relating to a solvent company will not usually involve the rights and interests of creditors and the purpose of the remedy is to preserve the value of the company. The remedy is designed to resolve disputes without the winding-up of the company. In *CVC/Opportunity Equity Partners Ltd v Almeida* [2002] UKPC 16 [46]; [2002] 2 BCLC 108 it was stressed that the fair value of shares should be determined with reference to all the parties to the dispute. To use the break-up value to value the assets of the company and thereby determining the value of shares which are subject to a purchase or buy-order, is not necessarily a reflection of the fair value of the shares between the parties to the dispute ([46]). See also 2.9 above for a discussion of the unfair prejudice remedy as an alternative remedy.

shares will carry a higher value than when a company would be valued on a breakup basis.⁵⁵¹

The valuation of the shares of a quasi-partnership is usually done on the basis that the company would be sold as a going concern.⁵⁵² This is an important consideration, because when the shares of a minority shareholder are bought by the majority shareholder or the company valued at a breakup basis, the respondents or majority shareholder will receive a 'windfall' that can be regarded as being at the expense of the petitioner or minority shareholder.⁵⁵³

In *CVC/Opportunity Equity Partners Ltd v Almeida*⁵⁵⁴ the court held that an offer to purchase the shares of a minority shareholder was not fair because the offer reflected the breakup value of the company.⁵⁵⁵ Such valuation would be unfair towards the member (petitioner) if the respondent would be allowed to continue to carry on the business of the company.⁵⁵⁶ This principle does not prevent a court

⁵⁵¹ *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch); [2010] 1 BCLC 367; *Annacott Holdings Ltd, Re* [2013] EWCA Civ 119; [2013] 2 BCLC 46. In *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [303]; [2010] 1 BCLC 367 the court stated that '[a] winding-up, though producing a rateable proportion of the assets for all shareholders, will often be at break-up value, and therefore not necessarily advantageous to the shareholders'. In *Annacott Holdings Ltd, Re* [2013] EWCA Civ 119 [5]; [2013] 2 BCLC 46 the court remarked that the proceeds of a sale of assets on a breakup basis are usually lower than when the company is sold as a going concern. See also Paul L Davies and Sarah Worthington Gower and Davies' *Principles of Modern Company Law* (10th ed, 2016) 681.

⁵⁵² *Annacott Holdings Ltd, Re* [2013] EWCA Civ 119 [11], [12]; [2013] 2 BCLC 46. In the Law Commission 'Shareholder Remedies' (Law Com No 246 Cm 3769, 1997) [3.8] and [3.9] it is recommended that the valuation of shares be done on a pro rata basis without the application of a minority discount in circumstances similar to *Ebrahimi*, while acknowledging that there is room for the application of a minority discount in companies that are not quasi-partnerships.

⁵⁵³ *CVC/Opportunity Equity Partners Ltd v Almeida* [2002] UKPC 16 [38]; [2002] 2 BCLC 108.

⁵⁵⁴ [2002] UKPC 16; [2002] 2 BCLC 108.

⁵⁵⁵ *CVC/Opportunity Equity Partners Ltd v Almeida* [2002] UKPC 16 [46]; [2002] 2 BCLC 108.

⁵⁵⁶ *CVC/Opportunity Equity Partners Ltd v Almeida* [2002] UKPC 16 [46]; [2002] 2 BCLC 108.

from ordering the valuation of shares of a company on a going concern basis in other circumstances such as where a quasi-partnership is not present.⁵⁵⁷

2.10.5.5 The application of a minority discount

The principles relating to the valuation of shares are flexible.⁵⁵⁸ As general rule, a minority discount is not applied when the shares of a quasi-partnership are valued.⁵⁵⁹ This is because a member of a quasi-partnership whose shares are sold in terms of such order cannot always be regarded as a willing seller.⁵⁶⁰ This does not mean that the shares of companies that are not quasi-partnerships cannot be valued on an undiscounted basis.⁵⁶¹ However, this will only be done in exceptional

⁵⁵⁷ *Anacott Holdings Ltd, Re* [2013] EWCA Civ 119 [11]; [2013] 2 BCLC 46. See also Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 681. See further 2.10.5.5 below.

⁵⁵⁸ *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [292]; [2010] 1 BCLC 367.

⁵⁵⁹ *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [290]; [2010] 1 BCLC 367. The court ([294]) further explained that a departure from this principle is justified in circumstances where the petitioner caused the destruction of the quasi-partnership relationship between the parties. See also *Brownlow v Marshall Ltd* [2000] 2 BCLC 655 [75].

⁵⁶⁰ See *Re Blue Index Ltd* [2014] EWHC 2680 (Ch) [23] where the court emphasised that the application of a minority discount is dependent on whether or not the seller is a willing seller. When the seller is a willing seller the general rule is that a minority discount will be applied. When the seller is not a willing seller a minority discount will not be applied. A member who is selling his or her shares in terms of a buy-out order as a result of unfair prejudice committed against him or her, is an example of an unwilling seller. The application of a minority discount would, however, be appropriate when the shares were acquired by the unwilling seller in a quasi-partnership at a discounted price.

⁵⁶¹ *Strachan v Wilcock* [2006] EWCA Civ 13; *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [290], [297]; [2010] 1 BCLC 367; *Croly v Good* [2010] EWHC 1 (Ch), [2010] All ER 177. See also *Fowler v Gruber* [2009] CSOH 36. In *Croly v Good* [2010] EWHC 1 (Ch) [8] read with [102]; [2010] All ER 177 the court remarked that a minority discount is not generally applied to a quasi-partnership. In *Strachan v Wilcock* [2006] EWCA Civ 13 [31]; [2006] 2 BCLC 555 the court held that the shares of a member of a quasi-partnership should be valued without applying a minority discount. In *Fowler v Gruber* [2009] CSOH 36 [186] the court held that a minority discount must be applied in the absence of a quasi-partnership relationship between the parties. See 2.10.5.4 above.

circumstances.⁵⁶²

2.10.6 Compensation orders and the principle of reflective loss

2.10.6.1 Introduction

Although not specifically stated in section 996 of the Companies Act 2006 a court may grant compensation as a form of relief.⁵⁶³ In some instances, compensation

⁵⁶² *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch); [2010] 1 BCLC 367; *Irvine v Irvine* [2006] EWHC 583 (Ch); [2007] 1 BCLC 445. In *Irvine v Irvine* [2006] EWHC 583 (Ch) [11]; [2007] 1 BCLC 445 the court held that '[a] minority shareholding, even one where the extent of the minority is as slight as in this case, is to be valued for what it is, a minority shareholding, unless there is some good reason to attribute to it a pro-rata share of the overall value of the company. Short of a quasi-partnership or some other exceptional circumstance, there is no reason to accord to it a quality which it lacks. CIHL [the company] is not a quasi-partnership'. See also *McCallum-Toppin v McCallum-Toppin* [2019] EWHC 46 (Ch) [197]. In *Sunrise Radio Limited, Re* [2009] EWHC 2893 (Ch) [293]; [2010] 1 BCLC 367 the valuation of a minority shareholding of a company that was a quasi-partnership was distinguished from a company that was not. When the determining the value of a minority shareholding in a company that is not a quasi-partnership, the fact that the shares are a minority shareholding should be taken into account. The court ([306] and [308]) valued the shares of the petitioner on an undiscounted basis despite the fact that initial quasi-partnership relationship existed between the members. There was an absence of a quasi-partnership at the time of the relevant unfair prejudicial conduct. The remaining shareholders would potentially have been unduly enriched if the shares were to be valued at a discount as high as 80% ([308]). The court ([308]) took into consideration that the petitioner subscribed to the shares of the company at an undiscounted price. A further enrichment would possibly follow in the event of the shares of the company being sold in the near future (2 years) ([308]). The fact that the shares of the petitioner would be transferred to the remaining shareholders justified a valuation on an undiscounted basis ([308]). The petitioner is not a willing seller ([308]). The petitioner should not be worse off because the exit of the petitioner has been forced by unfairly prejudicial conduct and therefore would not be able to share in a future sale ([308]). The petitioner should benefit from the capital growth of the investment ([308]). The facts of the case ([308]) justified the winding-up of the company on a 'just and equitable basis', but the winding-up of the company would result in a less favourable return for shareholders, while a purchase order provides the remaining shareholders with the opportunity to continue with the business of the company as a going concern ([308]). The court ([308]) also took into consideration that an attempt was made to dilute the shareholding of the petitioner in the company.

⁵⁶³ *Rembert v Daniel* [2018] EWHC 388 (Ch).

can be granted in combination with other orders such as a buy-out order. When a wrong is committed against a company the loss or damages suffered by the company may be reflected in the value of shares held by its members.⁵⁶⁴ In light of this a brief analysis of the principle of reflective loss is valuable in understanding the role that the relief in section 996 of the Companies Act 2006 plays in compensating members or shareholders of company.

The default legal position is that a member cannot institute legal proceedings in terms of section 994⁵⁶⁵ to recover loss or damages suffered in the form of a diminution of the value of his or her shares in a company.⁵⁶⁶ This is because the diminution of the value of the shares in the company is a mere reflection of the loss or damages suffered by the company.⁵⁶⁷ The cause of action for such recovery also

⁵⁶⁴ Charles Mitchell 'Shareholders' Claims for Reflective Loss' (2004) 120: *Jul Law Quarterly Review* 457, 458 explains that this loss may take the form of a diminution in value of shares in a company or a reduction of dividends.

⁵⁶⁵ Companies Act 2006.

⁵⁶⁶ See *Johnson v Gore Wood & Co* [2000] UKHL 65, [2001] 1 All ER 481, 503 where the court explained that 'a company suffers loss caused by a breach of duty owed to it, only the company may sue in respect of that loss. No action lies at the suit of a shareholder suing in that capacity and no other to make good a diminution in the value of the shareholder's shareholding where that merely reflects the loss suffered by the company'. See also *Atlasview Ltd v Brightview Ltd* [2004] EWHC 1056 (Ch), [2004] 2 BCLC 191. See further *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, 222-24; [1982] 1 All ER 354; Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 610-12.

⁵⁶⁷ See also Charles Mitchell 'Shareholders' Claims for Reflective Loss' (2004) 120: *Jul Law Quarterly Review* 457, 458 where it is argued that some authorities do not regard a diminution of value in the shares of a company as a personal loss to the members of that company. However, Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 667 argues that a shareholder will be able to base a claim, in the form of the diminution of the value of the its shares in the company, in the event of a breach of a duty towards the shareholder. The author cites *George Fischer (Great Britain) Ltd v Multi Construction Ltd* [1995] 1 BCLC 260 as authority. See also Bas J De Jong 'Shareholders' Claims for Reflective Loss: A Comparative Analysis' (2013) 14:1 *European Business Organization*

vests in the company and not the member or shareholder.⁵⁶⁸

A share entitles a member to participate in the company in accordance with the rights attached to the specific class of shares.⁵⁶⁹ Mitchell is of the view that this approach is too narrow and disregards the reality that a share or shares has an inherent value as property to generate income and can be sold to others.⁵⁷⁰

2.10.6.2 A diminution in the value of shares as a result of a breach of directors' duties

The problem with the reflective loss principle becomes more evident when the basis for the relief is the breach of a director's duty. This because it may then be argued that such a breach does not only infringe on the *rights of a company* but also affects the *interests of the members* of a company.⁵⁷¹ Although it is true that directors'

Law Review 97, 98 and 99 who argues that the use of the term 'personal loss' is not appropriate to determine whether as shareholder has a direct claim for damages as both a reflective loss and a non-reflective loss are losses suffered personally by a shareholder.

⁵⁶⁸ In *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 it was held that when a breach to the company occurs the company is the proper plaintiff to institute legal proceedings against the wrongdoer. For a discussion of *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 and 'the proper plaintiff rule' see 2.3.1 above. See Stephan Griffin 'Shareholder Remedies and the no Reflective Loss Principle – Problems Surrounding the Identification of a Membership Interest' (2010) 6 *Journal of Business Law* 461, 464.

⁵⁶⁹ *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, 222-23. See also Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 667-68. See further Charles Mitchell 'Shareholders' Claims for Reflective Loss' (2004) 120:Jul *Law Quarterly Review* 457, 459.

⁵⁷⁰ Charles Mitchell 'Shareholders' Claims for Reflective Loss' (2004) 120:Jul *Law Quarterly Review* 457, 459.

⁵⁷¹ Based on the *obiter* remarks of the court in *Charnley Davies Ltd (No 2), Re* [1990] BCLC 760, Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 675-76 highlight that the mere breach of a director's duty would not justify relief in terms of the unfair prejudice remedy, but that the petitioner should demonstrate conduct on the part of the controllers of the company that is unfairly prejudicial to the minority. The purpose of the unfair

duties are owed to the company, and not individual shareholders, it can be argued that in some circumstances a breach of a director's duty may constitute grounds for the application of the unfair prejudice remedy.⁵⁷²

2.10.6.3 Loss or damages suffered separately and distinctly from the company

However, in some instances a shareholder may claim for the loss or damages suffered as a result of a diminution in value of his or her shares in a company. In *Johnson v Gore Wood & Co*⁵⁷³ the court emphasised the fact that the authorities do support the principle that a shareholder may recover loss suffered in the form of a diminution in the value of his or her shareholding. This is only the position when the company suffered a loss, but the cause of action to recover such a loss does not vest in the company.⁵⁷⁴ A shareholder or member will also be able to recover or claim for losses or damages suffered, in the form of a diminution in the value of shares, if such losses or damages are separate and distinct from the loss or

prejudice remedy is to provide redress for a disregard of the interests of the minority by the controllers of the company. For example, where directors breached their duties towards the company and the board refuses to institute legal proceedings to remedy such a breach. See also this regard 2.10.3 below. According to Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 610 the reflective loss principle applies to situations where the company and a shareholder have a claim based on the same facts and the alleged loss suffered by the shareholder is a total or partial reflection of the loss suffered by the company.

⁵⁷² Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 649-50.

⁵⁷³ [2000] UKHL 65, [2001] 1 All ER 481, 503.

⁵⁷⁴ *Johnson v Gore Wood & Co* [2000] UKHL 65, [2001] 1 All ER 481, 503. See also Bas J De Jong 'Shareholders' Claims for Reflective Loss: A Comparative Analysis' (2013) 14:1 *European Business Organization Law Review* 97, 112 who is of the view that a shareholder can claim for losses in the form of a reflective loss, provided that the wrongdoer owed a separate duty to the shareholder and the cause of action vests in the shareholder.

damages suffered by the company.⁵⁷⁵

2.10.6.4 Criticism of the reflective loss principle in the prevention of a double recovery

The reflective loss principle is not free from criticism, especially in light of the recognition that a diminution of the market value of shares can be regarded as a loss suffered by the relevant shareholder.⁵⁷⁶ Some approach the reflective loss principle as a mechanism to prevent double recovery from the same victim.⁵⁷⁷ This

⁵⁷⁵ *Johnson v Gore Wood & Co* [2000] UKHL 65, [2001] 1 All ER 481, 503. See also *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, 222-24; [1982] 1 All ER 354. See further Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 612. See also Charles Mitchell 'Shareholders' Claims for Reflective Loss' (2004) 120:Jul *Law Quarterly Review* 457, 460-61; Stephan Griffin 'Shareholder Remedies and the no Reflective Loss Principle – Problems Surrounding the Identification of a Membership Interest' (2010) 6 *Journal of Business Law* 461, 463.

⁵⁷⁶ See *Johnson v Gore Wood & Co* [2000] UKHL 65, [2001] 1 All ER 481, 503 where the court described the problem in dealing with actions regarding reflective loss as follows: 'On the one hand the court must respect the principle of company autonomy, ensure that the company's creditors are not prejudiced by the action of individual shareholders and ensure that a party does not recover compensation for a loss which another party has suffered. On the other, the court must be astute to ensure that the party who has in fact suffered loss is not arbitrarily denied fair compensation. The problem can be resolved only by close scrutiny of the pleadings at the strike-out stage and all the proven facts at the trial stage: the object is to ascertain whether the loss claimed appears to be or is one which would be made good if the company had enforced its full rights against the party responsible, and whether (to use the language of *Prudential* at page 23) the loss claimed is "merely a reflection of the loss suffered by the company".' See also Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 668. See further Bas J De Jong 'Shareholders' Claims for Reflective Loss: A Comparative Analysis' (2013) 14:1 *European Business Organization Law Review* 97, 100 who points out that a wrongdoer is only under an obligation to compensate a victim for actual losses or damages suffered.

⁵⁷⁷ For such an example see the comment made by the court in *Rembert v Daniel* [2018] EWHC 388 (Ch). See also Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 668. See further Charles Mitchell 'Shareholders' Claims for Reflective Loss' (2004) 120 *Jul Law Quarterly Review* 457, 463-64 where

approach is described by some authors as 'artificial', because the right to obtain relief from the same wrongful conduct is given to one victim, the company, at the expense of another, the individual shareholder.⁵⁷⁸ This further leads to the question of the application of the reflective loss principle in circumstances where the company did not recover the damages or loss suffered.⁵⁷⁹ If the reflective principle is not applied in such circumstances and the shareholder is then allowed to proceed with his or her claim against the wrongdoer, situations may arise where the creditors of the company may be prejudiced.⁵⁸⁰

it is explained that the loss or damages suffered by a company will be addressed if the company enforces its rights against the wrongdoer. This principle also protects the interests of other shareholders and the creditors of the company.

⁵⁷⁸ Jennifer Payne 'Sections 459-461 Companies Act 1985 in Flux: The Future of Shareholder Protection' (2005) 64 *Cambridge Law Journal* 647, 668. See, however, Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 611-12 where it is argued that the principle of reflective loss 'supports the principle of centralised management of the company's assets through the board'. See also Bas J De Jong 'Shareholders' Claims for Reflective Loss: A Comparative Analysis' (2013) 14:1 *European Business Organization Law Review* 97, 101-102 who explains that a shareholder entrusts his or her interests to the company and its board and therefore should 'share the company's fate'. Charles Mitchell 'Shareholders' Claims for Reflective Loss' (2004) 120:Jul *Law Quarterly Review* 457, 464 points out that the recovery for reflective loss cannot be denied when the wrongdoer took up a legal obligation towards a member and the company. The author further cautions (465) against an inflexible approach in denying a claim for reflective loss especially when both the relevant member and the company have a cause of action.

⁵⁷⁹ See Charles Mitchell 'Shareholders' Claims for Reflective Loss' (2004) 120:Jul *Law Quarterly Review* 457, 464 who argues that there is no justification in the application of denying the recovery of a reflective loss suffered by a member to prevent a potential double recovery when in the circumstances there is no such a risk. See also Bas J De Jong 'Shareholders' Claims for Reflective Loss: A Comparative Analysis' (2013) 14:1 *European Business Organization Law Review* 97, 100. See also *Giles v Rhind* [2008] EWCA Civ 118 where the court held that a shareholder may institute a claim for a reflective loss in circumstances where the company is unable to do so because of the conduct of the wrongdoers.

⁵⁸⁰ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 611 explain that creditors may be prejudiced as the result of a claim of a shareholder that

The application of the reflective loss principle further appears to be restrictive in circumstances where the company cannot institute or be successful with legal proceedings because the wrongdoer has a proper defence against the claim of the company, but such a defence cannot be raised against a claim of the shareholder.⁵⁸¹

The principle of reflective loss appears not to be applied when an order is made to buy out the shares of a member.⁵⁸² Usually, such a buy-out is done at a fair price. In determining a fair price, the value of the share price prior to the unfair prejudicial conduct is compared to the value after the unfair prejudicial conduct to establish the decrease in value of the shares that the conduct caused. In making an order for the buy-out of shares, courts usually order that the shares be bought at their value prior to the commission of the unfair prejudicial conduct. The effect of

may remove assets belonging to the company from the company. The rights of creditors may be detrimental to creditors as they will only be able to institute a claim against the company, and not the shareholder, for the satisfaction of the creditor's claims. The authors (611) state that different considerations may apply in the case where the company possesses sufficient distributable assets to cover the claims of creditors. Charles Mitchell 'Shareholders' Claims for Reflective Loss' (2004) 120:Jul *Law Quarterly Review* 457, 464-65 highlights that this application should be reconsidered in light of the fact that the capital maintenance rule does not apply anymore and that different considerations should apply, for example, when one is dealing with companies with one shareholder and/or when those companies are solvent. See also Bas J De Jong 'Shareholders' Claims for Reflective Loss: A Comparative Analysis' (2013) 14:1 *European Business Organization Law Review* 97, 100-01 who compares such a claim to a dividend. The author further points out that the issue of prejudice to creditors and/or other shareholders will not arise if the company has 'sufficient distributable assets'.

⁵⁸¹ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 612. Charles Mitchell 'Shareholders' Claims for Reflective Loss' (2004) 120:Jul *Law Quarterly Review* 457, 472-73 argues that the cited authorities who support the proposition that shareholders or members can recover losses or damages based on a reflective loss where the company does not have the ability to recover the loss or damages suffered at the hands of the wrongdoer, provided that double recovery is not a risk.

⁵⁸² For a discussion for the buy-out of shares in terms of a court order see 2.10.5 above, more specifically 2.10.5.2 and 2.10.5.3.

this approach is that a member is then compensated for a reflective loss which is in actual fact a corporate loss.⁵⁸³

2.11 The unfair prejudice remedy and the management of litigation

2.11.1 Introduction

Petitions based on unfair prejudicial conduct are generally characterised by long, protracted and often complex facts.⁵⁸⁴ This also translates into voluminous court papers. From a practical point of view, it is important that cases based on the unfair prejudice remedy should be efficiently managed and dealt with to save time and costs for all parties involved. There is a clear need for mechanisms to deal adequately with cases involving the unfair prejudice remedy. In England, such mechanisms are found in the form of alternative dispute resolution, more specifically arbitration proceedings, and the enforcement of principles, guidelines and practices found in case law that encourage parties to settle matters of this nature in an attempt to avoid court proceedings.⁵⁸⁵ The making of reasonable offers in an attempt to settle a petition based on unfair prejudicial conduct and the role of arbitration proceedings as mechanisms to manage and deal with unfair prejudice petitions are discussed below.⁵⁸⁶

⁵⁸³ Bas J De Jong 'Shareholders' Claims for Reflective Loss: A Comparative Analysis' (2013) 14:1 *European Business Organization Law Review* 97, 106. See also Stephan Griffin 'Shareholder Remedies and the no Reflective Loss Principle – Problems Surrounding the Identification of a Membership Interest' (2010) 6 *Journal of Business Law* 461, 467-68.

⁵⁸⁴ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 678.

⁵⁸⁵ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 678-80.

⁵⁸⁶ See 2.11.2 regarding reasonable offers and 2.11.3 regarding arbitration proceedings.

2.11.2 Reasonable offers and the abuse of the court process

2.11.2.1 Resolving of disputes without court intervention

The general principle is that parties are encouraged to attempt to resolve their differences and disputes without court intervention.⁵⁸⁷ This may be achieved by the making of offers in an attempt to settle a dispute.⁵⁸⁸ The making of settlement offers holds the benefit that it usually reduces the costs and length of the litigation process.⁵⁸⁹

2.11.2.2 The effect of reasonable offers

Reasonable settlement offers in the context of the unfair prejudice remedy play a significant role in the application of the remedy and the adjudication of the relevant dispute. A reasonable offer made in respect of a petition based on unfair prejudicial conduct may have a direct impact on whether the conduct of the respondent(s) can be held as being unfairly prejudicial and/or have an impact on the costs order.⁵⁹⁰

(a) *The guidelines in O'Neill v Phillips*⁵⁹¹

In respect of reasonable offers, the case of *O'Neill v Phillips*⁵⁹² is directional despite

⁵⁸⁷ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1106.

⁵⁸⁸ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1106.

⁵⁸⁹ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1106.

⁵⁹⁰ Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 679 explain that in some circumstances a court can regard the refusal of a reasonable offer and the subsequent institution of legal proceedings based on the unfair prejudice remedy as an abuse of the court process which may lead to the petition being struck down. The authors (679) further state that such an abuse of the court process can take the form a rejection of an 'ad hoc offer' or the refusal to participate in a mechanism in the articles of a company which may have the same effect or other reasonable effect as a buy-out of the petitioner at a fair price.

⁵⁹¹ [1999] UKHL 24, [1999] WLR 1092.

⁵⁹² [1999] UKHL 24, [1999] WLR 1092.

the fact that the court's comments in relation to reasonable offers were *obiter*.⁵⁹³ Although the case dealt with section 459 of the Companies Act 1985 it is submitted that the same principles still apply to litigation involving section 994 of the Companies Act 2006. This case provided clarity on the legal effect that a reasonable offer has on a petition based on unfair prejudice in the event where such an offer is rejected by the petitioner.⁵⁹⁴ The court also discussed the factors that are taken into account to determine whether an offer in reaction to a presentation of a petition in terms of the unfair prejudice remedy is reasonable.⁵⁹⁵

(b) Dismissal of petition based on unfair prejudice

The rejection by a petitioner of a reasonable offer to buy his or her shares at a fair value may be detrimental to a petition based on unfair prejudicial conduct.⁵⁹⁶ A court may dismiss a petition based on unfair prejudicial conduct if the petitioner has rejected a reasonable offer⁵⁹⁷ from his or her opponents.⁵⁹⁸

(c) Costs orders

The rejection of a reasonable offer may also impact on the nature of the cost order a court can make.⁵⁹⁹ When a reasonable offer, which contained the same or more

⁵⁹³ See, for example, *Graham v Every* [2014] EWCA Civ 191 [47]; [2014] All ER 260. See 4.12.3 below for comments on the application of the principles in *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR

⁵⁹⁴ It should be noted that although the court in *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1105-06 disposed of the matter on other grounds the court still considered the issue due to its 'great practical importance'.

⁵⁹⁵ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1107-08.

⁵⁹⁶ In *Amin v Amin* [2009] EWHC 3356 (Ch) [421] the court held that '[a] petitioner who rejects a reasonable offer will not be entitled to any relief because he will not have suffered any prejudice'.

⁵⁹⁷ See 2.11.2.3 below for a discussion of the elements of a reasonable offer.

⁵⁹⁸ *Amin v Amin* [2009] EWHC 3356 (Ch) [423], [531].

⁵⁹⁹ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1106.

beneficial terms of relief than what the court ordered, had been made to a petitioner prior to the granting of such relief, a court can make an adversarial cost order against the petitioner. The petitioner would then usually be ordered to carry the legal costs of the litigation from the date when the reasonable offer was made.⁶⁰⁰

2.11.2.3 The offer: Elements of reasonableness

In *O'Neill v Phillips*⁶⁰¹ the court provided guidelines which can be used to determine whether an offer is reasonable.⁶⁰² Although these guidelines are contained in *obiter* remarks of the court, the application of these guidelines were directional in a number of judgments where the courts had to adjudicate on the reasonableness of offers made for purposes of settling disputes between parties involving unfair prejudice.⁶⁰³

The five elements of a reasonable offer are:

(a) Proportional value and the application of minority discount

The offer should be an offer to purchase the shares of the member at a fair value.⁶⁰⁴

Such value should represent a proportional value of the total value of the issued

⁶⁰⁰ In *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1106 the court remarked that 'I think that parties ought to be encouraged, where at all possible, to avoid the expense of money and spirit inevitably involved in such litigation by making an offer to purchase at an early stage'.

⁶⁰¹ [1999] UKHL 24, [1999] WLR 1092.

⁶⁰² *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1107-08.

⁶⁰³ *Graham v Every* [2014] EWCA Civ 191 [44]; [2014] All ER 260; *Amin v Amin* [2009] EWHC 3356 (Ch) [421].

⁶⁰⁴ The court in *Amin v Amin* [2009] EWHC 3356 (Ch) [422] noted that often majority shareholders will buy the shares of the minority shareholders. However, this is not a set rule, as in some circumstances it would be appropriate for the minority to buy out the shareholding of the majority shareholders. In such circumstances '[i]t will not, therefore, necessarily always be the case that an offer by the respondent majority shareholder to buy out the minority at full value and with a payment of all costs would justify the striking-out of the petition although ordinary that would be so'. For a discussion of the valuation of shares and the determination of the fair value of shares see 2.10.5.3 to 2.10.5.5 above.

share capital of the company.⁶⁰⁵ Only in exceptional circumstances will a discount be applied to a member's shares.⁶⁰⁶

(b) Experts and the procedure to determine the value of shares

(i) The appointment of a competent independent expert

If the parties cannot agree on the value of shares, the offer should provide for a mechanism for purposes of the determination of the value of the shares.⁶⁰⁷ The offer should be clear that such determination would be done by a competent independent expert.⁶⁰⁸ The parties must agree to the appointment of a specific expert or alternatively to nominate a professional body or an association of experts to nominate and appoint an expert to establish the value of shares that are subject to the dispute.⁶⁰⁹

(ii) The process

When the value of the shares will be determined by an expert, such determination does not have to be done by way of arbitration proceedings.⁶¹⁰ The expert also does not have to provide reasons for his or her determination.⁶¹¹ The overriding objective is to achieve an economical and expeditious method for determining the value of the

⁶⁰⁵ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1107.

⁶⁰⁶ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1107. However, see the application of a minority discount as discussed in 2.10.5.5 above and the relevance of a quasi-partnership relationship for purposes of valuing shares for purposes of the unfair prejudice remedy as discussed in 2.10.5.2 (b)(i).

⁶⁰⁷ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1107.

⁶⁰⁸ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1107. See also Paul L Davies and Sarah Worthington *Gower and Davies' Principles of Modern Company Law* (10th ed, 2016) 679.

⁶⁰⁹ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1107.

⁶¹⁰ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1107.

⁶¹¹ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1107.

shares 'even if this carries the possibility of a rough edge for one side or the other (and both parties in this respect take the same risk) compared with a more elaborate procedure'.⁶¹² All the parties to the dispute should have equal access to company information as far as it is relevant to the valuation of the shares standing central to the dispute between the parties.⁶¹³ The parties should have the right to make submissions to the expert responsible for the valuation of the shares.⁶¹⁴ The expert may then deal with these submissions in accordance with his or her discretion.⁶¹⁵

(c) Costs

From a practical perspective, costs and more specifically costs orders are an important aspect of any litigation. An offer does not always have to include an offer to pay the legal costs of the petitioner before it can be regarded as reasonable.⁶¹⁶ A shareholder (usually the majority shareholder) also should be provided with a reasonable opportunity, from the date of the conduct triggering a petition, to

⁶¹² *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1107.

⁶¹³ See, for example, *Graham v Every* [2014] EWCA Civ 191 [47]; [2014] All ER 260 where the valuation report was not provided to the petitioner. See also *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1107.

⁶¹⁴ In *Graham v Every* [2014] EWCA Civ 191 [47]; [2014] All ER 260 the court stressed the importance of the right. See also *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1107;

⁶¹⁵ *O'Neill v Phillips* *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1107.

⁶¹⁶ *Amin v Amin* [2009] EWHC 3356 (Ch) [531]. See also *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1108 where the court held '[b]ut this does not mean that payment of costs need always be offered. If there is a breakdown in relations between the parties, the majority shareholder should be given a reasonable opportunity to make an offer (which may include time to explore the question of how to raise finance) before he becomes obliged to pay costs. As I have said, the fairness does not usually consist of merely in the fact of the breakdown but in failure of a suitable offer. And the majority shareholder should have a reasonable time to make the offer before his conduct is treated as unfair. The mere fact that the petitioner has presented his petition before the offer does not mean that the respondent must offer to pay the costs if he was not given a reasonable time'.

consider the formulation of an offer and, if accepted, the implementation an offer.⁶¹⁷

When the value of shares relevant to a reasonable offer has to be determined with the assistance of a suitably qualified expert the costs of the appointed expert should be carried by the parties equally.⁶¹⁸ However, the expert must have the power to make an alternative determination regarding costs.⁶¹⁹

2.11.3 The arbitration of unfair prejudice disputes

2.11.3.1 Introduction

In a commercial context, the effective and expeditious resolution of disputes is an important component of business efficacy. Often commercial disputes are for many reasons subjected to alternative dispute resolution mechanisms of which arbitration is one.⁶²⁰ It is of great practical importance to consider the application of section 994 of the Act in this context. An analysis of the legal position in England may provide insight into the extent to which disputes in terms of section 994 of the Act can be

⁶¹⁷ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1108. See also *Amin v Amin* [2009] EWHC 3356 (Ch) [583] where the court held that '[i]t is certainly not the case that a minority shareholder who wants to end his involvement and to recover his investment can make an offer, either to sell his own shares or buy the majority's shares, at a proper value and then to allege, when the offer is refused, that the refusal amounts to unfairly prejudicial conduct. All he can do is to make the offer and rely on it when it comes to costs if he is successful in an unfairly prejudice petition based on some other unfairly prejudicial conduct'. See *Graham v Every* [2014] EWCA Civ 191 [47]; [2014] All ER 260 where the court held that the rejection by the petitioner was not unreasonable as the offer amongst others did not provide for costs.

⁶¹⁸ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1107.

⁶¹⁹ *O'Neill v Phillips* [1999] UKHL 24, [1999] WLR 1092, 1107.

⁶²⁰ See Justice Quesntin Loh 'The Limits of Arbitration' (2014) 1:1 *McGill Journal of Dispute Resolution* 66, 67 who states that arbitration is a 'primary mode' of dispute resolution pertaining to international commercial transactions. See also 2.11.3.2 below for a brief reference to the advantages of alternative dispute resolution in the form of arbitration.

subjected to arbitration proceedings.⁶²¹

The resolution of disputes by means of alternative dispute resolution is usually dependent on voluntary agreements entered into by the parties involved. Unless the relevant agreement infringes on public policy considerations, voluntary agreements in terms of which parties undertake to subject disputes covered by the agreement to arbitration are valid and enforceable.⁶²² The wording of the unfair prejudice remedy in the Act specifically considers together issues relating to public policy and the arbitrability of disputes. These aspects must be evaluated in light of the provisions of the Arbitration Act 1996 read with the Act.

2.11.3.2 Arbitration Act 1996

(a) *The legislative framework applicable to arbitrations*

There are many advantages to arbitration proceedings which include the cost-effectiveness of the proceedings and the reduction of delays in the resolution of disputes.⁶²³ Arbitration in England is regulated by the Arbitration Act 1996 read with the arbitration agreement applicable to the relevant dispute. The Arbitration Act

⁶²¹ The position in England must be compared to the position in South Africa where early indications are that courts are of the view that disputes relating to the unfair prejudice remedy in the Companies Act 71 of 2008 cannot be subjected to arbitration. For the position in South Africa see 5.11.2 below.

⁶²² See also *Exeter City Association Football Club Ltd v Football Conference Ltd* [2004] EWHC 2304 (Ch) [21]; [2004] 4 All ER 1179 where the court remarked that public interest encourages arbitration. See further Harry McVea 'Section 994 of the Companies Act 2006 and the Primacy of Contract' (2012) 75 *Modern Law Review* 1123, 1132 who describes the decision in *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855, [2012] 1 All ER 414 as 'pro-arbitration'. See further H-Y Chiu 'Contextualising Shareholders' Disputes – a Way Reconceptualise Minority Shareholder Remedies' (2006) *Journal of Business Law* 312, 324.

⁶²³ Arbitration Act 1996, s 1(a). See Harry McVea 'Section 994 of the Companies Act 2006 and the Primacy of Contract' (2012) 75 *Modern Law Review* 1123, 1132 who argues that arbitration has the potential to be less costly and time-consuming in comparison with the judicial process.

1996 provides for the fair resolution of disputes by an impartial tribunal.⁶²⁴ The Arbitration Act 1996 also specifically recognises the right of parties freely and voluntarily to choose the manner in which disputes between them should be resolved.⁶²⁵

(b) *The enforcement of arbitration agreements and the right to stay court proceedings*

When court proceedings are instituted against a party by a party who is bound to an arbitration agreement, the other party to the arbitration agreement (the respondent(s) or defendant(s)) may approach a court for relief in the form of a stay of the court proceedings against such a party.⁶²⁶ Such a petition will be based on the existence of an arbitration agreement requiring that the matter (or dispute) be referred for arbitration.⁶²⁷ If the dispute before a court is covered by the wording of the arbitration agreement, the court will enforce the arbitration agreement by granting a stay of proceedings.⁶²⁸ Generally, a court will not interfere with an arbitration agreement.⁶²⁹

⁶²⁴ Arbitration Act 1996, s 1(a) of the. See H-Y Chiu 'Contextualising Shareholders' Disputes – a Way Reconceptualise Minority Shareholder Remedies' (2006) *Journal of Business Law* 312, 325.

⁶²⁵ Arbitration Act 1996, s 1(b). See *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [29]; [2012] 1 All ER 414 where the court confirmed the principle, but recognised that the provision does not indicate when public policy considerations would override the principle contained in the provision and the provision does not speak to the overarching principle of arbitrability.

⁶²⁶ Arbitration Act 1996, s 9(1).

⁶²⁷ Arbitration Act 1996, s 9(1). Section 6(1) of the Arbitration Act 1996 defines an 'arbitration agreement' as an agreement in terms of which the parties to the agreement undertake to subject present or future disputes to arbitration. See also *Exeter City Association Football Club Ltd v Football Conference Ltd* [2004] EWHC 2304 [14]; [2004] 4 All ER 1179 where the court held that a court may also stay proceedings when more suitable alternatives are available to resolve a dispute.

⁶²⁸ Arbitration Act 1996, s 9(1).

⁶²⁹ Arbitration Act 1996, s 1(c). See also *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [31]; [2012] 1 All ER 414 where the court confirmed that the Arbitration Act 1996 makes the stay of court proceedings mandatory when a dispute is covered by the arbitration agreement. Prior

(c) Public interest considerations and statutory limitations or restrictions that apply to the arbitration of disputes

The right to have disputes submitted for arbitration proceedings is, however, subject to public interest considerations and/or statutory induced limitations or restrictions.⁶³⁰ If a court is satisfied that the applicable arbitration agreement is null and void, inoperative⁶³¹ or incapable of being performed in terms of the Arbitration Act 1996⁶³² it may not grant a stay of proceedings.

The effect of a refusal to grant a stay of legal proceedings is that ‘any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings’.⁶³³

(d) The enforcement of arbitration agreements and the rights and interests of third parties

There are a number of considerations specific to section 994 read with section 996 of the Act that must be evaluated to ascertain whether or not unfair prejudice disputes may be subjected to arbitration proceedings. One of these considerations is the fact that the resolving of disputes by way of arbitration is founded and dependent on consensual agreements between the parties involved.⁶³⁴ This raises

to the Arbitration Act 1996 such issues were dealt with as a matter of discretion of the court under the Arbitration Act 1975.

⁶³⁰ Arbitration Act 1996, s 1(b) of the. See also *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [27]; [2012] 1 All ER 414.

⁶³¹ *Fulham Football Club (1987) Ltd v Richards & Anor* [2011] EWCA Civ 855 [35]-[36]; [2012] BCLC 335.

⁶³² Arbitration Act 1996, s 9(4). See also section 81(1)(a) for the regulation of matters that cannot be resolved by way of arbitration.

⁶³³ Arbitration Act 1996, s 9(5).

⁶³⁴ In terms of section 9(1) of the Arbitration Act 1996 only a party to an ‘arbitration agreement’ against whom legal proceedings are instituted may apply to a court for stay of proceedings. Such

questions on the role that the interests of parties who are not a party to the arbitration agreement play in the enforcement of arbitration agreements pertaining to disputes in terms of section 994 of the Act.⁶³⁵

The submission of unfair prejudice disputes to arbitration can potentially be challenged on the basis that third parties are often not bound to arbitration agreements, and secondly that the nature of the relief that may be granted may affect the interests of these third parties, despite not being involved in the dispute between the parties concerned.⁶³⁶

(e) Arbitration and matters against or of public interest

Section 9 of the Arbitration Act 1996 recognises the notion that some disputes cannot be subjected to arbitration.⁶³⁷ Agreements that are against public policy will not be enforced. It can be argued that the provisions of the Act are aimed at the protection of the public interest and therefore cannot be contractually excluded,

application must be based on an arbitration agreement. The result of an order staying legal proceedings is that the relevant dispute must be referred for arbitration. See also H-Y Chiu 'Contextualising Shareholders' Disputes – a Way Reconceptualise Minority Shareholder Remedies' (2006) *Journal of Business Law* 312, 324.

⁶³⁵ See *Fulham Football Club (1987) Ltd v Richards & Anor* [2011] EWCA Civ 855 [39]; [2012] 1 All ER 414 where it was argued that disputes involving section 994 of the Act cannot be subjected to arbitration proceedings as the relief may affect the interests of shareholders (or other third parties) who may not be parties to the arbitration agreement.

⁶³⁶ In *Fulham Football Club (1987) Ltd v Richards & Anor* [2011] EWCA Civ 855 [51]; [2012] 1 All ER 414 it was argued that unfair prejudice disputes cannot be subjected to arbitration as the relief may impact on the interests of shareholders and creditors. In this respect the unfair prejudice remedy can be equated with the winding-up of company. See 2.11.3.2 (e)(ii) for a discussion of the court's attitude towards such an argument. It should be noted that a similar argument was accepted by the court in *Exeter City Association Football Club Ltd v Football Conference Ltd* [2004] EWHC 2304 [22].

⁶³⁷ *Exeter City Association Football Club Ltd v Football Conference Ltd* [2004] EWHC 2304 (Ch) [21]; [2004] 4 All ER 1179.

waived or subjected to arbitration proceedings. If such an approach is accepted a court has to refuse a petition to stay proceeding in terms of section 9 of the Arbitration Act 1996.

(i) *The approach in Exeter City Association Football Club Ltd v Football Conference Ltd*⁶³⁸

In *Exeter City Association Football Club Ltd v Football Conference Ltd*⁶³⁹ the court held that a petition under section 459 of the Companies Act 1985⁶⁴⁰ cannot be subjected to arbitration proceedings.⁶⁴¹ The court took the view that the rights under section 459 of the Companies Act 1985 were inalienable.⁶⁴² This means that parties cannot contractually exclude or waive their right to rely on statutory remedies such as the one provided for in section 994 of the Act.⁶⁴³ From this point of view the

⁶³⁸ [2004] EWHC 2304 (Ch); [2004] 4 All ER 1179.

⁶³⁹ [2004] EWHC 2304 (Ch); [2004] 4 All ER 1179.

⁶⁴⁰ The predecessor of section 994 of the Companies Act 2006.

⁶⁴¹ *Exeter City Association Football Club Ltd v Football Conference Ltd* [2004] EWHC 2304 [23] and [26]-[27]; [2004] 4 All ER 1179. It is important to note that the approach taken in this decision was criticised in *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855; [2012] 1 All ER 414.

⁶⁴² In *Exeter City Association Football Club Ltd v Football Conference Ltd* [2004] EWHC 2304 [23]; [2004] 4 All ER 1179 the court held that '[t]he statutory rights conferred on shareholders to apply for relief at any stage are, in my judgment, inalienable and cannot be diminished or removed by contract or otherwise'. In support of this argument see Harry McVea 'Section 994 of the Companies Act 2006 and the Primacy of Contract' (2012) 75 *Modern Law Review* 1123, 1132. Compare K Reece- Thomas and C Ryan 'Section 459, Public Policy and Freedom of Contract: Part 2' (2001) 22 *Company Lawyer* 198, 198 and 205 where the authors in the context of section 459 of the Companies Act 1985 argued that the use of the word 'may' and the absence of an express indication against the contractual exclusion of the provisions of the remedy, is indicative of the fact that the remedy is not mandatory and can contractually be limited, excluded or waived.

⁶⁴³ See the criticism of Harry McVea 'Section 994 of the Companies Act 2006 and the Primacy of Contract' (2012) 75 *Modern Law Review* 1123, 1132 on the decision in *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855; and [2012] 1 All ER 414. According to the author (1132) the emphasis on party autonomy and the view that company law is based on contractual terms, allows for the replacement of 'statutory rules designed for a *public* purpose – to be set aside by private

contractual exclusion or waiver of the right to petition in terms of section 994 of the Act may be regarded as being against public policy.⁶⁴⁴ Companies are creatures of statute and the court has an important power to exercise supervision over the creation, management and administration and the winding-up and liquidation of a company.⁶⁴⁵ During the lifetime of a company shareholders should be able to rely upon the provisions of the Companies Act 1985 – now the Companies Act 2006 – to approach a court for the relief entrenched in the Act and can therefore not be bypassed or limited by a contract or an agreement.⁶⁴⁶

(ii) *The approach in Fulham Football Club (1987) Ltd v Richards*⁶⁴⁷

In *Fulham Football Club (1987) Ltd v Richards*⁶⁴⁸ the court also had to consider whether or not a dispute based on section 994 of the Act can be subjected to arbitration in terms of the Arbitration Act 1996. The court considered the *Exeter City* judgment and cautioned against the argument that the provisions of section 994 of the Act had not been amended after the *Exeter* decision and that therefore it must

bargaining'. The author argues (1132) that this also entrusts arbitrators with rights that are conferred to shareholders in terms of statute. The right of a shareholder under section 994 of the Act and section 122(1)(g) of the Insolvency Act 1986 is a statutory right that 'represents a fundamental mandatory condition of a company's incorporation under the Companies Act 2006'. These statutory rights 'cannot be removed or relinquished by contract, arbitration clause, or otherwise' (1133).

⁶⁴⁴ See in general K Reece-Thomas and C Ryan 'Section 459, Public Policy and Freedom of Contract: Part 2' (2001) 22 *Company Lawyer* 198.

⁶⁴⁵ *Exeter City Association Football Club Ltd v Football Conference Ltd* [2004] EWHC 2304 (Ch) [22]; [2004] 4 All ER 1179. See section 994 and 996 which make specific reference 'the court'. See 2.11.3.2(e)(ii) below for the court's approach in *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855; [2012] 1 All ER 414 to the reference to a 'court' in these sections.

⁶⁴⁶ *Exeter City Association Football Club Ltd v Football Conference Ltd* [2004] EWHC 2304 (Ch) [23]; [2004] 4 All ER 1179.

⁶⁴⁷ [2011] EWCA Civ 855; [2012] 1 All ER 414.

⁶⁴⁸ [2011] EWCA Civ 855; [2012] 1 All ER 414.

be taken that the approach taken by the court in *Exeter City* is correct in holding that unfair prejudice disputes cannot not be subjected to arbitration proceedings.⁶⁴⁹

The court held that neither the Act nor the Arbitration Act 1996 excludes arbitration as a mechanism by means of which disputes under section 994 of the Act may be resolved.⁶⁵⁰ Disputes based on the unfair prejudice remedy is capable of being determined or resolved by an arbitrator as a dispute between members relating to a breach of 'the articles of association or a shareholders' agreement is an essentially contractual dispute'.⁶⁵¹ These type of disputes usually do not involve the rights of creditors and/or the statutory rights or protection given to third parties.⁶⁵² Both the court of first instance and the court of appeal found that the main question to be decided is whether a particular dispute is susceptible to arbitration. The answer to this question is not necessarily dependent on whether the interests of parties, who are not party to the arbitration agreement, are affected.⁶⁵³ The question is rather whether the dispute involves a matter of public interest that cannot be determined during arbitration or 'engaged third party rights'.⁶⁵⁴ The fact that both

⁶⁴⁹ *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [88]; [2012] 1 All ER 414.

⁶⁵⁰ *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [27]-[28]; [2012] 1 All ER 414. Compare with the approach discussed in 2.11.3.2 (e)(i).

⁶⁵¹ *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [77]; [2012] 1 All ER 414. Compare with the approach discussed in 2.11.3.2 (e)(i).

⁶⁵² *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [77]; [2012] 1 All ER 414.

⁶⁵³ *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [40]; [2012] 1 All ER 414.

⁶⁵⁴ See *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [40]; [2012] 1 All ER 414 where the court stated 'that the limitation which the contractual basis of arbitration necessarily imposes on the power of the arbitrator to make orders affecting non-parties is not necessarily determinative of whether the subject matter of the dispute is itself arbitrable. As Mustill & Boyd point out, it does not follow from the inability of an arbitrator to make a winding-up order affecting third parties that it should be impossible for the members of a company, for example, to agree to submit disputes *inter se* as shareholders to a process of arbitration. It is necessary to consider in relation to the matters in dispute in each case whether they engage third party rights or represent an attempt

section 994 and section 996 refer to orders a 'court' can make does not imply that matters relating to unfair prejudice disputes falls exclusively within the jurisdiction of the courts and therefore cannot be referred to arbitration.⁶⁵⁵ This is based on the fact that statute had to provide courts with powers it would not have had if it was not for the enactment of the Act.⁶⁵⁶

2.12 Conclusion

2.12.1 The influence of the law of the partnership on the development of company law

In this chapter various aspects of the unfair prejudice remedy in England were

to delegate to arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process'. A court [46] may take into consideration the interests of members who are not part of the arbitration agreement and/or of a creditor when tailoring the appropriate relief in terms of the unfair prejudice remedy. The court [61] conceded that some of the relief that may be granted in terms of section 996 may have an impact on third parties or shareholders. However, this does not make section 994 of the Companies Act 2006 a class remedy, but may 'impose limitations on the scope of relief obtainable in arbitral proceedings'. According to the court ([76]) only a court can make an order for the winding-up of a company. The court further held ([78]) that '[t]he statutory provisions about unfair prejudice contained in s 994 give to a shareholder an optional right to invoke the assistance of the court in cases of unfair prejudice. The court is not concerned with the possible winding-up of the company and there is nothing in the scheme of these provisions which, in my view, makes the resolution of the underlying dispute inherently unsuitable for determination by arbitration of grounds of public policy. The only restriction placed upon the arbitrator is in respect of the kind of relief which can be granted'. It was further held ([83]) that '[i]f the relief sought is of a kind which may affect other members who are not parties to the existing reference, I can see no reason in principle why their views could not be canvassed by arbitrators before deciding whether to make an award in those terms. Opposition to the grant of such relief by those persons may be decisive. Similarly if the order sought is one which cannot take effect without the consent of third parties then the arbitrators' hands will be tied'.

⁶⁵⁵ See in this regard the judgment of Longmore LJ in *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [96]; [2012] 1 All ER 414. See also Leonardo VP de Oliveira 'The English Law Approach to Arbitrability of Disputes' (2016) 19:6 *International Arbitration Law Review* 155, 161-62.

⁶⁵⁶ See in this regard the judgment of Longmore LJ in *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 [96]; [2012] 1 All ER 414.

considered. What is clear from the research is that the unfair prejudice remedy was introduced to provide an alternative remedy to the winding-up of companies on 'just and equitable' grounds.⁶⁵⁷ It has to be emphasised that the origin of the winding-up of companies on 'just and equitable' grounds stems from the law of partnership.⁶⁵⁸ It further has to be noted that company law developed from the law of partnership.⁶⁵⁹ The close relationship between the law of the partnership and company law is further maintained by traditional law of partnership remedies such as the winding-up of partnerships on 'just and equitable' grounds of which an equivalent remedy is found in the Insolvency Act 1986. The close relationship in certain respects between the law of partnership and the company law had and has important implications for the interpretation and application of the unfair prejudice remedy. In the consideration of the oppression remedy and later the unfair prejudice remedy the courts justified their reluctance to intervene in the affairs of a company based on an adapted form of the law of partnership principle that courts cannot intervene in the relationship between partners.⁶⁶⁰ In exceptional circumstances where the court did intervene the approach was justified on equitable considerations by drawing from the analogy that a partnership is a contract of good faith.⁶⁶¹ Based on this approach a court could restrain a party from exercising his or her rights if it was found that such an exercise of rights was in conflict with equitable considerations or good faith.⁶⁶² This may provide a further explanation for the application of the remedy in the context of quasi-partnerships and specifically in the enforcement of the

⁶⁵⁷ See 2.3.3.1 and 2.9 above.

⁶⁵⁸ See 2.9.2 above.

⁶⁵⁹ See 2.6.5.1 above.

⁶⁶⁰ See 2.3.1.3 (*b*).

⁶⁶¹ See 2.5 and 2.6.5.4 (*b*) above.

⁶⁶² See 2.5 above.

legitimate or reasonable expectations of members.⁶⁶³ The enforcement of reasonable expectations is based on the particular agreements or understandings between members. To a degree it resembles a partnership relationship.⁶⁶⁴ Although it is not impossible for similar understandings or agreements to exist between members of relative large companies, a member may find it difficult to prove an understanding or agreement with a larger enough number of members for the understanding or agreement to form part of the conduct of the affairs of a company.⁶⁶⁵ This approach limits the application of reasonable expectations to companies where a particular relationship exists between members in relation to the manner in which the affairs of a company should be conducted.⁶⁶⁶

Although some of the principles of the law of partnership were influential to the interpretation and application of some company law principles, one should not lose sight of the fact that a company is a separate juristic entity which is regulated by its own and unique legal principles.⁶⁶⁷ The statutory unfair prejudice remedy recognises that the strict enforcement of company law principles such as separate legal personality and majority decision-making may be abused to the detriment of other members of the company.⁶⁶⁸

2.12.2 The criteria of fairness as guiding a paradigm shift

The development, formulation and application of the unfair prejudice remedy in

⁶⁶³ See 2.6.5 above.

⁶⁶⁴ See 2.6.5.4 above where it is cautioned that one should not lose sight of the fact that one is in actual fact dealing with a company.

⁶⁶⁵ See 2.6.5.4 (*b*) above.

⁶⁶⁶ See 2.6.5.4 (*b*).

⁶⁶⁷ See 2.6.5.4 above.

⁶⁶⁸ See 2.2 read with 2.3 above.

England hold important lessons for the formulation and application of the remedy in other jurisdictions such as South Africa. It is important to note the terminology used in the English statutory unfair prejudice remedy. Describing the conduct complained of, it is important to note the remedy is aimed at conduct that is 'unfairly prejudicial' in stead of 'oppressive'. The significance of the use of the term unfairly prejudicial is that the conduct of the company's affairs is determined with reference to the fairness thereof.⁶⁶⁹ The lawfulness and fairness of conduct cannot be equated.⁶⁷⁰ This means that there may be circumstances where lawful conduct can be regarded as unfair and *vice versa*.⁶⁷¹ The fact that the activation of the unfair prejudice remedy is not dependent on the lawfulness of the particular conduct makes the remedy unique. Fairness does not only play an important role for purposes of the jurisdictional requirements of section 994 of the Act, but also influences the form and nature of the relief that a court may grant as well as the application of other related principles of law such as the law of contract and the law of damages.

The use of the term unfairly prejudicial is further important because it makes the test to determine the fairness or unfairness of conduct an objective one.⁶⁷² An objective test entails that the fairness or unfairness of the conduct complained of is not determined by the subjective intention of the party committing the conduct.⁶⁷³ Another important feature with regard to the assessment of the fairness or unfairness of conduct is that it is not determined only with reference to the nature of

⁶⁶⁹ See 2.6.3.2 above.

⁶⁷⁰ See 2.6.3.2 above.

⁶⁷¹ See 2.6.3.2 above.

⁶⁷² See 2.6.3.7 above.

⁶⁷³ See 2.6.3.7 above.

the conduct but is also considered with reference to the effect of the conduct.⁶⁷⁴

For purposes of the unfair prejudice remedy the fairness of the conduct complained of needs to be established in a particular commercial context while taking into consideration that companies are separate legal entities that are managed by a board of directors.⁶⁷⁵ The relationship between the company, the board, the shareholders and the shareholders *inter se* is regulated by the Act, the articles of association and in some instances by shareholders' agreements.⁶⁷⁶

Company matters are decided by means of majority decision-making.⁶⁷⁷ The directors of a company owe their legal duties towards the company and not the members of a company.⁶⁷⁸ However, the unfair prejudice remedy has the effect that directors must in the exercise of their duties act fairly towards the members of the company.⁶⁷⁹ The principle applies to the decisions and conduct of the members of a company as far as their conduct and decisions relate to the affairs of a company. Other principles and considerations, such as the conduct of the petitioning member and voluntarily exchanged agreements between members *inter se* and the company, also play an important role in determining fairness in light of the facts and circumstances of the case.⁶⁸⁰

The honouring of undertakings voluntary given by a party is one aspect of

⁶⁷⁴ See 2.6.3.7 above.

⁶⁷⁵ See 2.6.3.3–2.6.3.5 above.

⁶⁷⁶ See 2.6.3.6 above.

⁶⁷⁷ See 2.2 above.

⁶⁷⁸ See 2.3.1.2 and 2.6.3.6 above.

⁶⁷⁹ See 2.6.3.6 above.

⁶⁸⁰ See 2.6.4 above on the relevance of the conduct of the petitioner and 2.6.5 above for the enforcement of legitimate expectations.

fairness.⁶⁸¹ This requires that when a court has to scrutinise the fairness of a majority decision of members or a board decision, it has to take into consideration that a member had contractually agreed to be bound by the majority decisions of the members of the company and that the company is managed by the board.⁶⁸²

The use of an open-ended concept such as fairness as a requirement for triggering the jurisdiction of a court to provide appropriate relief does not mean that the fairness or unfairness of conduct is to be determined in the air.⁶⁸³ The content of the terms or value of fairness must be established in a principled manner.⁶⁸⁴ The purpose of the use of the term is to provide for a wide variety of facts and circumstances.⁶⁸⁵

Because the unfair prejudice remedy is phrased in wide and open terms, it may in some instances be vague and therefore its application may be uncertain. The English version of the statutory unfair prejudice remedy has in this regard done well to eradicate certain uncertainties which has the potential to be problematic in South Africa.⁶⁸⁶

2.12.3 Standing and the capacity in which a member suffered prejudice

Section 994 of the Act is clear that a registered member may rely on the unfair prejudice remedy.⁶⁸⁷ In other jurisdictions the restriction of the remedy to registered

⁶⁸¹ See 2.2 and 2.6.5.2 above.

⁶⁸² See 2.2 and 2.6.3.5 above.

⁶⁸³ See 2.5 above.

⁶⁸⁴ See 2.5 above.

⁶⁸⁵ See 2.5 above.

⁶⁸⁶ See Chapter 5 below for a discussion of section 163 of the Companies Act 71 of 2008.

⁶⁸⁷ See 2.6.1 above.

members has been criticised.⁶⁸⁸ In this respect the English provision extends standing not only to registered members but also to a person to whom shares are transferred by operation by law.⁶⁸⁹ Although the unfair prejudice remedy is restricted to registered members, it is important to note that courts have held that the interests of a registered member include the economic interests of the beneficial holder of the shares.⁶⁹⁰ The unfair prejudice remedy is further not limited to minority members.⁶⁹¹ Any member may rely on the unfair prejudice remedy. This means that the remedy may find application in situations where members have equal shareholding in a company and/or where a member is a majority shareholder but cannot use his or her voting power to remedy the unfair conduct he is complaining of.⁶⁹²

The English courts also had to deal with the technical argument that a member does not only have to be a registered member of a company to rely on the unfair prejudice remedy, but also must have suffered the unfair prejudice complained of in his or her capacity as member.⁶⁹³ The courts are of the view that requiring that a member should have suffered prejudice in that capacity is a too restrictive and technical interpretation of the unfair prejudice remedy. Although the legislature and the courts acknowledge that a registered member may suffer unfair prejudice in other capacities than that of being a member, courts do require that the capacity in which the member is unfairly prejudiced must be closely related to his or

⁶⁸⁸ See, for example, Chapter 5 below.

⁶⁸⁹ See 2.6.1 above.

⁶⁹⁰ See 2.6.1.1 above.

⁶⁹¹ See 2.6.1.2 above.

⁶⁹² See 2.6.1.2 above.

⁶⁹³ See 2.6.1.2 above.

her capacity as member.⁶⁹⁴

2.12.4 Single occurrence of unfair conduct

Another notable aspect of the formulation of the statutory unfair prejudice remedy is that the provision does not require the conduct complained of to be of a continuous nature.⁶⁹⁵ The remedy further covers once-off or single acts of unfair prejudicial conduct. Previous versions of the statutory unfair prejudice remedy required that the conduct had to be of a continuous nature and to be present at the time relief against such conduct is sought. The tense used in section 994 of the Act also makes this clear.

2.12.5 Company groups

The conduct of the affairs of the company of which a shareholder is a member is usually of primary importance for purposes of having standing in terms of the unfair prejudice remedy. However, the courts recognised that the interests of members can be protected by the unfair prejudice remedy in the context of a group of companies.⁶⁹⁶ Although each of the companies within a group is separate legal entity, English courts acknowledged that members, and especially minority members, are potentially exposed to an abuse of power and recognise the business realities associated with a group of companies.⁶⁹⁷ Here criticism can be levelled against the English approach for not expressly recognising in the legislative provisions of the unfair prejudice remedy for the application of remedy in the context of a group of companies and leaving it up the courts to provide direction on the

⁶⁹⁴ See 2.6.2.2 above.

⁶⁹⁵ See 2.6 above.

⁶⁹⁶ See 2.7 above.

⁶⁹⁷ See 2.7 above.

application of remedy in this regard.

2.12.6 The scope and purpose of available relief

The unfair prejudice remedy provides for courts to grant innovative forms of relief. Section 996 of the Act provides courts with a wide discretion to grant relief.⁶⁹⁸ This wide discretion enables courts to tailor relief that is appropriate to the facts and circumstances of each case.⁶⁹⁹ Forms of relief are listed in the statutory form of the unfairly prejudice remedy that were not available under early statutory formulations of the remedy or the common law form of the remedy.⁷⁰⁰ Initially the only form of relief a court could grant against oppressive or unfairly prejudicial conduct was the liquidation of a company on 'just and equitable' grounds, similar in nature the remedy available to the partners in a partnership.⁷⁰¹ Although there are close similarities and to a certain degree overlap between the winding-up of partnerships on 'just and equitable' grounds and the unfair prejudice remedy in terms of which a similar form of relief can be granted, there are important differences in the liquidation of companies and partnerships on 'just and equitable' grounds.⁷⁰² One of the characteristics of a company is perpetual succession, a characteristic a partnership lacks. Policy considerations further require that sustainable companies should be formed and maintained.⁷⁰³ Therefore, a remedy such as the liquidation of companies on 'just and equitable' grounds which may result in the demise of a perfectly sustainable company should only be relied on as a last resort. The English

⁶⁹⁸ See 2.10 above.

⁶⁹⁹ See 2.10 above.

⁷⁰⁰ See 2.10 above.

⁷⁰¹ See 2.3.3.1 above.

⁷⁰² See 2.3.4 above read with 2.9 above.

⁷⁰³ See 2.3.3.1 above.

legislature and courts also went about a lot of trouble to break the link between the winding-up on 'just and equitable' grounds and the unfair prejudice remedy, which is welcomed because although the grounds for the liquidation of companies on 'just and equitable' grounds may overlap with the unfair prejudice remedy there are some important differences.⁷⁰⁴

Traditionally courts were very reluctant to intervene in the affairs of a company.⁷⁰⁵ The wide forms of relief a court is able to grant in terms of the unfair prejudice remedy have brought a change to this approach. It is therefore necessary to consider the nature, scope and purpose of relief that courts may grant in terms of the unfair prejudice remedy. The purpose of the relief a court may grant in terms of the unfair prejudice remedy is to stop the unfair prejudice complained of and not necessarily remedy the prejudice suffered. As indicated above, the winding-up of a company on 'just and equitable' grounds is now a remedy of last resort and therefore a court should strive to provide an alternative form of relief for purposes of the unfair prejudice remedy.⁷⁰⁶ In formulating appropriate relief, courts will take into consideration the causal link between the conduct complained of and the unfair prejudice suffered.⁷⁰⁷ The relief must also be proportionate to the conduct complained of.⁷⁰⁸ It needs to be stressed that even if the jurisdictional requirements in section 994 of the Act were proven a court still has the discretion on whether or not any relief will be granted. Therefore, technical transgressions of the Act and an amendment of the articles of association or shareholders' agreement may not

⁷⁰⁴ See 2.9 above.

⁷⁰⁵ See 2.5 above.

⁷⁰⁶ See 2.9.1 above.

⁷⁰⁷ See 2.6.3.7 above.

⁷⁰⁸ See 2.10 above. See also *Griffith v Gourgey & Ors* [2018] EWHC 1035 (Ch) [25].

necessarily attract relief.⁷⁰⁹ The basic principles established by the courts in the granting of relief in terms of the statutory unfair prejudice remedy need to be considered with specific reference to the forms of relief that a court may grant.

2.12.7 The protection of informal agreements or undertakings

In the application of the unfair prejudice remedy courts recognise that the individuals behind the company structure do hold some reasonable expectations which may not be articulated in the company's articles of association and/or shareholders' agreements.⁷¹⁰ These reasonable expectations are taken into consideration to determine fairness and the relief in terms of the unfair prejudice remedy is usually employed to enforce such expectations.⁷¹¹ This enforcement of legitimate expectations is justified on the basis that the honouring of voluntary agreements is an aspect of fairness.⁷¹² In this respect it is important to note that a court would only enforce such a reasonable expectation if it is based on an actual agreement or understanding. A court will not enforce hypothetical bargains between parties. In light of this, the application of the unfair prejudice remedy should not be seen as being restricted to quasi-partnerships or other smaller type of companies. From an evidential perspective, the existence of a reasonable expectation may be more difficult to prove in companies with larger numbers of members. This cannot be attributed to a restrictive interpretation by the courts of the unfair prejudice remedy or that the existence of reasonable expectations is only possible in small companies

⁷⁰⁹ See 2.10 above. See also *Waldron v Waldron* [2019] EWHC 115 (Ch) [51] and *Routledge v Skerritt* [2019] EWHC 573 (Ch) [22].

⁷¹⁰ See 2.2 and 2.3.2 above

⁷¹¹ See 2.6.5 above.

⁷¹² See 2.2 above.

or companies with only a few shareholders.

2.12.8 Relief against future conduct

One of the strengths of section 996 of the Act is that relief may be granted against threatening conduct.⁷¹³ The effect of this is that relief may be proactively granted and therefore a member does not have to wait until his or her interests have been unfairly prejudiced. This is not necessarily the position in other jurisdictions considered in this thesis.⁷¹⁴

2.12.9 Relief in the form of a buy-out of shares

The most widely-used form of relief granted by the English courts is the buy-out or purchase order. It can be ordered that either the company and/or other members of the company must buy the shares of the petitioner. Section 996 makes express provision for this form of relief.⁷¹⁵ Although it is usually ordered that the shares of a minority member should be bought by a majority member it may be ordered in exceptional circumstances that the shares of a majority member be bought by a minority member. Buy-out orders have the practical value of terminating the relationship between the parties involved in the dispute.⁷¹⁶ The shares subject to a buy-out order have to be bought at a fair value.⁷¹⁷ The English courts provide some useful guidelines relating to the basis on which such shares should be valued. In determining the fair value of shares it should be taken into consideration that a

⁷¹³ See 2.10.2 above.

⁷¹⁴ See Chapter 5 below for a discussion of the uncertainty regarding the application of section 163 of the Companies Act 71 of 2008 to future or threatening conduct which may lead to the reduced protection of shareholders.

⁷¹⁵ See 2.10.5 above.

⁷¹⁶ See 2.10.5 above.

⁷¹⁷ See 2.10.5 above.

member cannot 'put' his shares on the company or the other members of the company.⁷¹⁸ The market value of the shares and the breakup value of a company should be taken into account.⁷¹⁹ A range of other factors also play a role in the assessment of the fair value of shares. From a legal perspective the date⁷²⁰ on which the valuation is done; whether a company is valued on a break-up basis or as a going concern;⁷²¹ and whether a minority discount⁷²² is to be applied are some of the most important factors to consider. The overarching principle is that the value assigned to the shares subject to a buy-out order should be fair in the circumstances of the case.⁷²³ In this context courts caution against unjustly enriching one or more of the parties involved in a dispute.⁷²⁴

2.12.10 Compensation as a form of relief

The Act does not expressly make specific provision for awarding compensation caused by unfair prejudice.⁷²⁵ However, English courts did point out that it is possible to award compensation.⁷²⁶ The award for compensation of the members of a company may in some instances be conceptionally difficult to apply and may create certain anomalies in its application when compared to the buy-out of shares at a fair value. This is especially the case when a member suffered prejudice in the form of a diminution of the value of his or her shares in a company due to a wrong

⁷¹⁸ See 2.10.5.1 (a).

⁷¹⁹ See 2.10.5.4 above.

⁷²⁰ See 2.10.5.3 above.

⁷²¹ See 2.10.5.4 above.

⁷²² See 2.10.5.5 above.

⁷²³ See 2.10.5.2 above.

⁷²⁴ See 2.10.5.2 above.

⁷²⁵ See 2.10.6 above.

⁷²⁶ See 2.10.6 above.

committed against the company by one or more of its directors.⁷²⁷ The loss in the form of a diminution of the value of his or her shares in a company is only reflective of the loss suffered by the company and therefore a member cannot claim compensation for such a loss. For purposes of the unfair prejudice remedy a diminution of the shares of a company held by a member is recognised as prejudice.⁷²⁸ However, the no reflective loss principle may prevent a shareholder from claiming compensation for such a loss.⁷²⁹ Compensation will only be awarded in exceptional circumstances.⁷³⁰ A more appropriate form of relief would be an order directing the payment of compensation to a company based on the successful reliance on the unfair prejudice remedy by a member.⁷³¹

The application of the no reflective loss principle in the context of buy-out orders has not yet been thoroughly considered. The application of this principle becomes relevant to buy-out orders in those cases where a court in its assessment of the fair value of a member's shares provides for rectifying the loss of value a member suffered as a result of unfair prejudicial conduct. This may be explained based on the fact that the purpose of the unfair prejudice remedy is to establish fairness amongst the parties and the purpose of any compensation in terms of the unfair prejudice remedy is not to compensate a party for a loss suffered in accordance with the traditional principles relating to the law of damages but rather to ensure fairness amongst parties by preventing that one party obtains an unfair advantage over the other as result of the buy-out order. This makes the no reflective loss

⁷²⁷ See 2.10.6.2 above.

⁷²⁸ See 2.6.2.1 above.

⁷²⁹ See 2.10.6 above.

⁷³⁰ See 2.10.6.3 above.

⁷³¹ See 2.10.3.4 above.

principle inapplicable in these circumstances.

2.12.11 The authorisation to institute legal proceeding on behalf of a company

One of the innovative provisions of section 996 of the Act is the authorisation of a member to institute legal proceedings on behalf of a company.⁷³² This approach of the legislature must be viewed against the fact that the enforcement of strict company law principles fails to protect members in specific circumstances.⁷³³ This is especially the case when the controllers of a company commit wrongs against a company and use their control to prevent the company from seeking relief against such wrongs. The failure to pursue legal proceedings against wrongdoers is often justified based on the strict enforcement of the principle of majority rule and/or that the board of directors is in the best position to determine whether it is the best interest of a company to do so.⁷³⁴ The failure to act and the last mentioned justification therefo may in some circumstances be a form of unfair prejudice.⁷³⁵ It should be noted that this form of relief can only be sought in a very limited set of circumstances and therefore does not create the risk for causing the statutory derivative claim to become redundant.⁷³⁶ In contrast with the statutory derivative claim, a member relying on the statutory unfair prejudice remedy is not required to obtain authorisation to institute legal proceedings.⁷³⁷

2.12.12 Dispute resolution

Due to the nature of unfair prejudice proceedings the efficient management of such

⁷³² See 2.10.3 above.

⁷³³ See 2.2 and 2.3.1.4 above.

⁷³⁴ See 2.3.1.4 above.

⁷³⁵ See 2.3.1.4 above.

⁷³⁶ See 2.10.3.5 above.

⁷³⁷ See 2.10.3.5 above.

proceedings is essential. The making of reasonable offers is an important aspect that may impact on the application of the unfair prejudice remedy. The rejection of a reasonable offer may be considered to determine whether or not the conduct complained of is unfairly prejudicial and/or whether to make an appropriate costs order.⁷³⁸ A second aspect in dealing with unfair prejudice claims is whether such disputes can be disposed of in arbitration proceedings. The current position is that disputes involving the unfair prejudice remedy may be dealt with by way of arbitration proceedings, provided that relief is not sought which can only be granted by a court.⁷³⁹ Just because the interests of third parties may be affected by relief in terms of the unfair prejudice remedy does not bar the application of the remedy in arbitration proceedings.⁷⁴⁰

⁷³⁸ See 2.11.2.2 above.

⁷³⁹ See 2.11.3.2 (e)(ii) above.

⁷⁴⁰ See 2.11.3.2 (e)(ii) above.

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3.1 Introduction*

Sections 232 to 235 of the Corporations Act 2001 provide for the Australian statutory personal action (or remedy), generally referred to as the oppression remedy.¹ This remedy can be used for relief against, amongst others, oppressive or unfair prejudicial conduct.² The purpose of this chapter is to provide an analysis of the statutory oppression (or unfair prejudice) remedy under Australian law. This analysis includes an evaluation of the statutory formulation of the remedy in the Corporations Act 2001. The judicial interpretation and application of the oppression remedy are also scrutinised. As with its South African equivalent, the Australian oppression remedy has also been substantially influenced by English law.³ After an analysis of the wording of sections 232 to 235 and their application, aspects that may be beneficial or relevant to the reform of the South African position are pointed out.⁴

3.2 The basic principles of Australian company law

3.2.1 Introduction

As with other jurisdictions,⁵ the statutory remedy against oppressive or unfair prejudicial conduct must be considered in the context of established company law

* Reference to case law is mainly made to the neutral citations of cases and where available the reported citation of cases is also provided. It should also be noted that the detail in the neutral citations is sufficient to identify the relevant court.

¹ See 3.4 below where these provisions are outlined.

² See 3.5 and specifically 3.5.5 below for a discussion of the grounds of the statutory oppression remedy.

³ See 3.3 below and more specifically 3.3.2.

⁴ The analysis of the statutory oppression remedy in Australia is provided in 3.4–3.7 and 3.10 below.

⁵ See, for example, the law in England as discussed in Chapter 2 above, the law in Canada as discussed in Chapter 4 below, and the law in South Africa as discussed in Chapter 5.

principles.⁶ The incorporation of the oppression remedy creates some conceptual challenges for the application of established company law principles. The statutory oppression remedy requires courts to use their broad discretion to tailor relief in an endless variety of circumstances, while navigating through and upholding established company law principles.⁷ This often brings the oppression remedy in conflict with these established company law principles such as a company being a separate juristic person,⁸ the principle of majority decision-making,⁹ and the governance of a company and its relationship with its members which are regulated by the constitution.¹⁰

3.2.2 The company as a body corporate

After registration, a company becomes a body corporate.¹¹ As a body corporate, a company enjoys all the common law attributes of a body corporate, unless legislation provides otherwise.¹² A company is a separate legal entity which entails that it is the bearer of rights, privileges, duties and liabilities separate from its

⁶ See also 3.6 below.

⁷ See 3.9 below. Compare the position in England in this regard as discussed in 2.10 above. See also 5.4.3 below for the application of the oppression remedy in South Africa in the context of established corporate law principles.

⁸ See 3.2.2 and 3.8 below.

⁹ See 3.2.3 and 3.6.2 below.

¹⁰ See 3.6.1 and 3.9.4.2 (f) below.

¹¹ Corporations Act 2001, s 119. The registration process is regulated by section 117 read with section 118 of the Corporations Act, 2001.

¹² Robert P Austin and Ian M Ramsay *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 107.

members or directors.¹³ A company has the capacity and powers of an individual.¹⁴

3.2.3 The management of and decision-making within a company

The business of a company is managed by or under the direction of the board.¹⁵

Unless otherwise provided by the Corporations Act 2001 or the constitution of a company, the directors of a company are entitled to exercise all the powers of the company.¹⁶ Generally, the decision-making of or within the company is based on the principle of majority rule meaning that resolutions are adopted by ordinary or simple resolutions.¹⁷

3.3 The development of the statutory oppression remedy – an overview

3.3.1 Introduction

The early statutory development of the Australian oppression remedy shares a

¹³ Robert P Austin and Ian M Ramsay *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 116. For the position in England see 2.2 above.

¹⁴ Corporations Act 2001, s 124. The power of a company may be restricted in its constitution or by its objects but conduct beyond its objects or restrictions in its constitution does not necessarily render the relevant conduct invalid. See in this regard s 125 of the Corporations Act 2001. Compare with the position in South African as discussed in 5.2 below.

¹⁵ Corporations Act 2001, s 198A(1). In this context it is interesting to note that section 232 refers to the conduct of the company's *affairs* and not *business*. '[A]ffairs' is defined in section 53 of the Corporations Act 2001. See also *Catalano v Managing Australia Destinations (Pty) Ltd* [2014] FCAFC 55 [8] where the court held that the definition of 'affairs' in section 53 is not exhaustive. For the South African position see 5.2.3 below. Note that in section 66(1) of the Companies Act 71 of 2008 the legislature expressly stated that the board of directors is responsible for the management of the *affairs* and *business* of a company. In this regard see the South African position in 5.4.3.3 below.

¹⁶ Corporations Act 2001, s 198A(2).

¹⁷ See RP Austin and IM Ramsay *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 221. However, some instances require the adoption of a special resolution as defined in section 9 of the Corporations Act 2001. See 3.6.2 below for a discussion of the principle of majority decision-making within companies.

number of similarities with its English counterpart.¹⁸ Differences between the two jurisdictions can be ascribed to the statutory formulation or wording of the remedy in the Companies Act 2006 and the Corporations Act 2001.¹⁹ The predecessors of the current formulation of the oppression remedy in the Corporations Act 2001 is briefly discussed below in order to provide context to the current formulation of the remedy in sections 232 to 235.²⁰

3.3.2 Section 186 of the Companies Act 1961

Section 186 of the Companies Act 1961 was modelled on section 210 of the Companies Act 1948 (UK) and the recommendations of the Cohen Committee.²¹

Section 186(1) of the Companies Act 1961 provided:

‘Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to one or more of the members (including himself) may, or, following on a report by an inspector under this Act, the Minister may apply to the Court for an order under this section.’

¹⁸ See 2.3.3 above for the statutory development of the remedy in England and 3.3. below for the statutory development of the remedy in Australia.

¹⁹ See Chapter 2 above for an analysis of the unfair prejudice remedy in England. See 3.4 for an analysis of the statutory oppression remedy in Australia.

²⁰ See 3.3.2 to 3.3.4 below.

²¹ RP Austin and IM Ramsay *Ford, Austin and Ramsay’s Principles of Corporations Law* (17th ed, 2018) 704. See 2.3.3 above for a discussion of section 210 of Companies Act 1948 (UK) and 2.3.3.1 above for a discussion based on recommendations of the Cohen Report. It should be noted that the basis of section 186 of the Companies Act 1961 was the Companies Act 1958 of the state of Victoria. Section 94(1) of the Victorian Companies Act 1958 provided:

‘Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) may with the leave of a judge of the Court or, following a report by an inspector under this Act, the Attorney-General, may without leave apply to the Court for an order under this section.’

See also *Campbell v Backoffice Investments (Pty) Ltd* [2008] NSWCA 95 [336].

3.3.2.1 Standing and oppressive conduct

Section 186(1) of the Companies Act 1961 entitled a *member* of a company to apply to a court for relief when the affairs of a company are conducted in a manner that is oppressive to one or more members of the company. The conduct of the company's affairs must have been at least *oppressive* towards the member who brought the application.²²

The section extended standing to the Minister.²³ The Minister may have brought an application based on a report issued by an inspector under the Companies Act 1961.²⁴

3.3.2.2 The relief

The object of the relief was to put an end to the matters complained of in relation to the affairs of a company.²⁵ Once the requirements of section 186(1) were proven, default relief in the form of a winding-up order could be granted.²⁶ However, the provision recognised that relief in the form of a winding-up order could in some cases be inappropriate.²⁷ In such cases, a court could consider alternative forms of

²² Companies Act 1961, s 186(1).

²³ Companies Act 1961, s 186(1). See 3.9 below for a discussion of the relief that may be granted in terms of the current statutory oppression remedy.

²⁴ Companies Act 1961, s 186(1).

²⁵ Companies Act 1961, s 186(2).

²⁶ Companies Act 1961, s 186(2)(a).

²⁷ See Companies Act 1961, s 186(2)(b). According to this provision it would be inappropriate to order the winding-up of a company when such an order would be unfairly prejudicial to a member or members in terms of s 186(1) of the Companies Act 1961. See also 3.9.1 below for a discussion of the grounds for the winding-up and liquidation of a company and the ground for relief against oppressive or unfairly prejudicial conduct.

relief.²⁸ Alternative forms of relief could be granted if the conduct of the company's affairs justified the winding-up of a company.²⁹ Forms of alternative relief included orders for the regulation of the future affairs of a company³⁰ and the purchase of shares of members by other members or even by the company itself.³¹ When a company acquired the shares from a member, the capital of the company was reduced.³² The discretion of a court to grant relief included the power to order alterations or additions to a company's memorandum or articles.³³

3.3.3 Section 320 of the Companies Act 1981

3.3.3.1 Oppressive, unfair or unjust conduct

Section 320 of the Companies Act³⁴ provided for a member of a company to apply for relief when the affairs of the company were conducted in a manner that was oppressive or unfairly prejudicial to or unfairly discriminatory against one or more of the members (including that member) or which was contrary to the interests of the members as whole.³⁵ This section covered both the conduct of the affairs of a

²⁸ Companies Act 1961, s 186(2)(b).

²⁹ Companies Act 1961, s 186(2)(b). See also 3.9.1 below for a discussion of the overlap between the winding-up of a company on the grounds in section 232 and the winding-up of a company on a 'just and equitable' basis.

³⁰ See also 3.9.3 below.

³¹ Companies Act 1961, s 186(2)(b). See also 3.9.4 below.

³² Companies Act 1961, s 186(2)(b). See also 3.9.5 below.

³³ Companies Act 1961, s 186(2)(b) and s 186(4). In this regard, the provision was similar to the current provision in the Corporations Act 2001. See also 3.9.2 below.

³⁴ No 89 of 1981.

³⁵ Companies Act 89 of 1981, s 320(1)(a)(i). The exact wording of section 320(1) reads:

'An application to the Court for an order under this section in relation to a company may be made:
by a member who believes:
that affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members, or in a manner that is contrary to the interests of the members as a whole; or

company and any actual or proposed act, omission or resolution by or on behalf of the company.³⁶ Reliance could also be placed on the remedy on the ground that the directors of the company have acted in their own interests and not in the interest of the members as a whole or where their conduct was unfair or unjust to one or more members (including that member) other than the directors.³⁷ The Commission also had the power to apply for relief in terms of section 320.³⁸

3.3.3.2 Forms of relief

If a court found that one or more of the grounds in section 320(1)(a) existed it could grant relief in a variety of forms.³⁹ Section 320(2) made it clear that a court could make any order that it deemed fit. The relief included, but was not limited to, the following orders: -

- the winding-up of a company;⁴⁰
- the regulation of the future affairs of the company;⁴¹
- an order in terms of which the shares of a member be purchased by

that an act or omission, or proposed act or omission, by or on behalf of the company, or a resolution, or a proposed resolution, of a class of members, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member or members or was or would be contrary to the interests of the members as a whole’.

See also 3.5.5.1 below for a discussion of similar grounds in the context of section 232 of the Corporations Act 2001.

³⁶ See also 3.5.3 below in the context of section 232 of the Corporations Act 2001.

³⁷ Companies Act 89 of 1981, s 320(1)(a)(ii). See also 3.9.6, and more specifically 3.9.6.3, where the overlap between the oppression remedy and derivative proceedings is discussed in the context where the interests of members as a whole are in potential conflict with that of the directors of a company.

³⁸ Companies Act 81 of 1981, s 320(1)(b).

³⁹ Read with section 320(2)(a) and (b) of the Companies Act 89 of 1981.

⁴⁰ Companies Act 89 of 1981, s 320(2)(c). See also 3.9.1 below for a discussion of the current position with regard to this form of relief.

⁴¹ Companies Act 89 of 1981, s 320(2)(d). See also 3.9.3 below.

any other member or members;⁴² and

- an order in terms of which the shares of a member are purchased by the company and the share capital the company is reduced accordingly.⁴³

In section 320, the legislature also acknowledged that relief in the form of a winding-up order would often not be appropriate.⁴⁴ In those circumstances a court could grant alternative forms of relief when a winding-up order would have caused unfair prejudice to a member or members in terms of section 320(2)(a) and section 320(2)(b).

Section 320 further contained provisions dealing with the practicalities in the event of a court making an order that altered or added additions to the memorandum or articles of a company.⁴⁵

3.3.4 Section 260 of the Corporations Law

3.3.4.1 The personal remedy and the protection of corporate rights

Prior to the statutory reform of the derivative action, the institution of legal proceeding on behalf of a company was regulated in accordance with the principles in *Foss v Harbottle*.⁴⁶ Section 260(2)(g) of the Corporations Law made specific

⁴² Companies Act 89 of 1981, s 320(2)(e). Compare also with the current position as discussed in 3.9.4 below.

⁴³ Companies Act 89 of 1981, s 320(2)(f). Compare also with the current position as discussed in 3.9.5 below.

⁴⁴ Companies Act 89 of 1981, s 320(3). See also 3.3.3.2 above.

⁴⁵ Companies Act 89 of 1981, see ss 320(4) -(7).

⁴⁶ (1843) 2 Hare 461, 67 ER 189. See 2.3.1 above for a discussion of the principles in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 in the context of England. For a discussion of the proper

provision for a court to authorise the institution and defence of legal proceedings on behalf of the company.⁴⁷ The introduction of section 260(2)(g) was significant as it enabled a court to authorise the institution of legal proceedings on behalf of a company based on an application or petition based on the statutory personal remedy.⁴⁸ This approach was not free from criticism.⁴⁹

3.3.4.2 Criticism against the protection of corporate rights by way of the personal action

The inclusion of section 260(2)(g) was subject to criticism. The main criticism was that this remedy diluted or blurred the division between individual membership rights on the one hand and corporate rights on the other.⁵⁰ According to some authors, it is inapt to provide for the redress of corporate rights in a statutory action designed to protect the individual rights of members.⁵¹

3.3.5 General problems associated with the oppression remedy

An overview of the development of the statutory personal remedy in Australia provides a valuable framework for understanding the current form of the remedy.

plaintiff rule in the context of Australian law see RP Austin and IM Ramsay *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 687-89.

⁴⁷ See 3.9.6 below for a discussion of the current position in this regard.

⁴⁸ Compare with the current position in England as discussed in 2.10.3 above. See also 3.9.6 below for a discussion of the authorisation of a member to institute or intervene in legal proceedings on behalf of a company under the Corporations Act 2001.

⁴⁹ See 3.3.4.2 below.

⁵⁰ G Shapira 'Minority Shareholders Protection – Recent Development' [1982] 10 *NZULR* 134, 159. However, see also JF Corkery 'Oppression or Unfairness by Controllers – What can a Shareholder do about it? An Analysis of s 320 of the Companies Code (1988) 9 *Adel Review* 437, 460-61 argues that the confusion created by section 260(2)(g) is only academic.

⁵¹ G Shapira 'Minority Shareholders Protection – Recent Development' [1982] 10 *NZULR* 134, 159. For a discussion of the interrelationship between the current statutory personal remedy and the statutory derivative action see 3.9.6.3 (a) below.

The statutory provisions before 1983 only referred to oppressive conduct.⁵² It is notable that the legislature extended the statutory provisions to unfair prejudicial conduct.⁵³ This approach was taken in light of the restrictive and limited scope of application of the term 'oppressive'.⁵⁴ The other problematic issue with the original forms of the statutory oppressive remedy was that the remedy only appeared to be applicable to conduct that was positive or continuing.⁵⁵ The remedy did not provide for broad and flexible relief.⁵⁶

3.4 The oppression remedy in the Corporations Act 2001

Section 232 provides as follows:

'Grounds for Court order

The Court may make an order under section 233 if:

- (a) the conduct of a company's affairs; or
- (b) an actual or proposed act or omission by or on behalf of a company; or
- (c) a resolution, or a proposed resolution, of members or a class of members of a company;

is either;

⁵² RP Austin and IM Ramsay *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 705.

⁵³ RP Austin and IM Ramsay *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 705. See also 3.3.3 and 3.3.4 above.

⁵⁴ RP Austin and IM Ramsay *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 705. For a similar approach and criticism in the context of the English law see 2.3.3.3 and 2.3.3.4 above.

⁵⁵ RP Austin and IM Ramsay *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 705. See 3.5.2 below on how this aspect has been addressed in section 232 of the Corporations Act 2001.

⁵⁶ RP Austin and IM Ramsay *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 705. See 3.3 above and especially 3.3.2. Compare with the wording of the current oppression remedy as discussed in 3.5.2 below.

- (d) contrary to the interests of the members as a whole; or
- (e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity.

For purposes of this Part, a person to whom a share in the company has been transmitted by will or by operation of law is taken to be a member of the company.'

Section 233 provides as follows:

'Orders the Court can make

- (1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:
- (a) that the company be wound up;
 - (b) that the company's existing constitution be modified or repealed;
 - (c) regulating the conduct of the company's affairs in the future;
 - (d) for the purchase of any shares by any member or a person to whom a share in the company has been transmitted by will or by operation of law;
 - (e) for the purchase of shares with an appropriate reduction of the company share capital;
 - (f) for the company to institute, prosecute, defend or discontinue specified proceedings;
 - (g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;
 - (h) appointing a receiver or a receiver and manager of any or all the company's property;
 - (i) restraining a person from engaging in specified conduct or from doing a specified act;
 - (j) requiring a person to do a specified act

Order that the company be wound up.

- (2) If an order that the company be wound up is made under this section, the provisions of this Act relating to the winding up of companies apply:
- (a) as if the order were made under section 461; and
 - (b) with such changes as are necessary.

Order altering constitution

- (3) If an order made under this section repeals or modifies a company's constitution, or requires the company to adopt a constitution, the company does not have the power under section 136 to change or repeal the constitution if that change or repeal would be inconsistent with the provisions of the order, unless:

- (a) the order states that the company does have the power to make such a change or repeal; or
- (b) the company first obtains the leave of the Court.’

Section 234 provides as follows:

‘Who can apply for order

An application for an order under section 233 in relation to a company may be made by:

- (a) a member of the company, even if the application relates to an act or omission that is against:
 - (i) the member in a capacity other than as a member; or
 - (ii) another member in that capacity as a member; or
- (b) a person who has been removed from the register of members because of a selective reduction; or
- (c) a person who has ceased to be a member of the company if the application relates to the circumstances in which they ceased to be a member; or
- (d) a person to whom a share in the company has been transmitted by will or by operation of law; or
- (e) a person whom ASIC thinks appropriate having regard to the investigations it is conducting or has conducted into:
 - (i) the company’s affairs; or
 - (ii) matters connected with the company’s affairs.’

3.5 The interpretation and application of sections 232 to 234 of the Corporations Act 2001

3.5.1 Section 232 of the Corporations Act 2001

To be entitled to rely on section 232 a member must prove actual or proposed conduct by or on behalf of a company,⁵⁷ alternatively an actual or proposed resolution by members or a class of members⁵⁸ or that the affairs of a company is conducted in a manner⁵⁹ or that is, either ‘contrary to the interests of the members as a whole’⁶⁰ or is ‘oppressive to, unfairly prejudicial to, or unfairly discriminatory

⁵⁷ Corporations Act 2001, s 232(b).

⁵⁸ Corporations Act 2001, s 232(c).

⁵⁹ Corporations Act 2001, s 232(a).

⁶⁰ Corporations Act 2001, s 232(d). See 3.5.5.1 below.

against, a member or members whether in that capacity or in any other capacity.⁶¹

Section 232 contains the jurisdictional grounds that must be proven before a court has a discretion to order relief in terms of section 233.⁶² The first part of section 232 clearly describes the forms of conduct that may trigger the provisions of section 232.⁶³ The section expressly covers conduct in relation to the affairs of a company. Section 232 further covers conduct by or on behalf of a company. Resolutions of members or classes of members are specifically included. It should specifically be noted that both section 232(b) and 232(c) cover *proposed* conduct and resolutions.⁶⁴

To determine whether the conduct described in section 232(a)-(c) may attract relief, it has to be measured against the criteria in section 232(d) and (e). This means that the conduct in question must either be contrary to the interests of members as a whole⁶⁵ or be commercially unfair.⁶⁶ This can be referred to as the effect of the conduct.⁶⁷ Another important aspect on the formulation of section 232 is that it expressly recognises that a petitioner may also suffer oppression in capacities other than in the capacity as member.⁶⁸

⁶¹ Corporations Act 2001, s 232(e). See 3.5.5.2 below.

⁶² *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [111].

⁶³ Corporations Act 2001, s 232(a)-(c).

⁶⁴ See 3.5.3 below for a discussion of the relevance of the inclusion of proposed conduct.

⁶⁵ See 3.5.5.1 below.

⁶⁶ See 3.5.5.2 below.

⁶⁷ See *Catalano v Managing Australia Destinations (Pty) Ltd* [2014] FCAFC 55 [9] where the court held that the conduct complained of must be assessed with reference to the effect or result of the conduct complained of. See 5.7.1.4 read with 5.7.3.6 below for a similar approach in South Africa.

⁶⁸ See 3.7.4 below. Compare with the approach followed in South Africa in 5.7.1.4 below.

3.5.2 When the jurisdictional grounds of section 232 have to be present to attract relief

The point in time when the relevant conduct should be present to justify relief in terms of section 232⁶⁹ is an important aspect of interpretation that has enjoyed the attention of some Australian courts. Potentially it may be argued that relief may only be granted in terms of the oppression remedy when the conduct complained of is present at the time the court considers the matter.⁷⁰ Alternatively, it can also be argued that it must be proven that the relevant conduct was present at the time of the commencement of legal proceedings.⁷¹

The more difficult question is whether relief can be granted if the unfair prejudicial conduct existed at the time of the institution of the legal proceedings, but is absent at the time when the matter is considered by a court.⁷² Predecessors of

⁶⁹ Read with section 233 of the Corporations Act 2001.

⁷⁰ See *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [126] read with [132] where the court clearly held that case law supporting the argument that the complained conduct must be present at the time of the commencement of legal proceedings is based on the wording of predecessors of section 232 of the Corporations Act 2001. These predecessors were directed at the manner in which the affairs of a company 'are being conducted'. See 3.3 above for a brief discussion of the development of the statutory oppression remedy. See also *Munstermann v Rayward* [2017] NSWSC 133 [22].

⁷¹ See the reference to case law in *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [126]. See also *Bessounian v Australian Wholesale Mortgages Pty Ltd* [2007] NSWSC 35 [7] where the court remarked *obiter* that it is not required that the conduct complained of has to be present at the time of the institution of legal proceedings when the oppressive or unfair prejudicial conduct is present at the time when the matter is considered. See further *Munstermann v Rayward* [2017] NSWSC 133 [22] where the court held that whether conduct is oppressive or unfairly prejudicial must be determined with reference to the time when the legal proceedings are instituted, the appropriate relief is determined with reference to the date of the hearing. In *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (2001) 37 ACSR 672 [159] the court adopted a similar point of view in terms of section 260 of the Corporations Law.

⁷² *Bessounian v Australian Wholesale Mortgages Pty Ltd* [2007] NSWSC 35 [7].

section 232 of the Corporations Act 2001 required that the affairs of the company 'are being conducted' in a manner that is unfairly prejudicial.⁷³ The use of the word 'is' in section 232 of the Corporations Act 2001 is not indicative of the *time* at which the conduct needs to be present, but is rather indicative of the *nature* of the conduct upon which an applicant may rely to obtain relief in terms of section 232.⁷⁴

The word 'is' may also refer to the temporary nature or occurrence of the conduct referred to in section 232(a)-(c).⁷⁵ Such an interpretation can further be justified and reinforced based on the fact that section 232 covers conduct or resolutions which cannot be described as being presently oppressive, such as a proposed conduct or resolution that may well be oppressive in nature.⁷⁶

With the relief stipulated in section 233 the conduct complained of does not have to continue until the commencement of the proceedings nor until the time when a court considers the appropriate relief to be granted.⁷⁷ A member may still rely on section 232 even when the conduct complained of ceased at the time of the trial or

⁷³ See section 94(1) of the Victorian Companies Act 1958; section 186(1) of the Companies Act 1961 and section 320(1)(a)(i) of the Companies Act 1981. The court in *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [130] described the formulation of section 232 as 'significantly' different from its predecessors. See also 3.3.5 where it is pointed out that this requirement was one of the weaknesses of some of the predecessors of the current oppression remedy. See 2.3.3.3 above where a similar problem was encountered in the development of the English oppression remedy. See 5.6.2.2 below for a discussion of the tense in which the grounds in section 163(1) of the Southern Companies Act 71 of 2008 is formulated.

⁷⁴ *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [130]-[131].

⁷⁵ *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [130]. According to the court the conduct referred to in section 232 of the Corporations Act 2001 includes present and past conduct.

⁷⁶ *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [131]. According to the court the same argument can be applied to actual conduct or resolutions. Thus, the provisions of section 232 of the Corporations Act 2001 refer to the nature of the conduct or resolution complained of and not the timing or continuance of the conduct or resolution.

⁷⁷ *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [131].

hearing of the matter.⁷⁸ However, this may affect the nature of the relief a court may grant, if any at all.⁷⁹ A court may exercise its discretion to grant relief based on oppressive conduct that occurred in the past.⁸⁰ This argument is supported by the fact that a court may modify the constitution of a company or make an order to regulate the future affairs of the company.⁸¹ This emphasises the fact that the court may still grant relief in those cases where the conduct has ceased temporarily.⁸² There is nothing in the wording of section 232 that deprives a member of relief after the conduct that justifies such relief came to an end.⁸³ However, when a court has to consider a matter in which oppression is alleged, information available to the court at the time of considering the matter may qualify information that was available at the time of the institution of the legal proceedings.⁸⁴

3.5.3 Threatening and/or future conduct

Specific provision is made for future conduct (an act or omission) or resolutions that threaten the interests of members of the company as whole or are oppressive,

⁷⁸ *Peter Exton & Anor v Extons Pty Ltd & Ors* [2017] VSC 14 [34]. In *De Tocqueville Private Equity Pty Ltd v Linden & Conway Ltd, re Linden & Conway Ltd* (2006) 59 ACSR 587 [25] it was held that the conduct complained of does not have to be present at the time of the commencement of legal proceedings or even when the matter is considered by a court.

⁷⁹ See *Peter Exton & Anor v Extons Pty Ltd & Ors* [2017] VSC 14 [34] where the court remarked in this context that '[t]here may be no need or utility for any remedy'. See also *De Tocqueville Private Equity Pty Ltd v Linden & Conway Ltd, re Linden & Conway Ltd* (2006) 59 ACSR 587 [25].

⁸⁰ See also *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [129] and the authorities cited by the court.

⁸¹ *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [131].

⁸² *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [131].

⁸³ *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [131].

⁸⁴ See *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 where the court ([128]) referred to *Jenkins v Supscap Pty Ltd* [2006] NZHC 416; (2006) 3 NZLR 264 [103]. It is important to note that the *Jenkins* decision dealt with the winding-up of a company on a just and equitable basis.

unfairly prejudicial or discriminatory to a member or members.⁸⁵ The fact that the provision covers threatening or future conduct or the adoption of proposed resolutions is one of the strengths of the remedy.⁸⁶ This ties in neatly with the interpretational philosophy or approach that requires courts to adopt an interpretation of the provisions that will enhance the remedy rather than to limit it.⁸⁷

3.5.4 Single or isolated (once-off) conduct

Further, it also does not have to be proven that the conduct complained of is continuing or is of a continuous nature to be able to rely upon section 232.⁸⁸ A single occurrence of the complained conduct is adequate when such conduct falls foul of the provisions in section 232.⁸⁹

3.5.5 Sections 232(d) and 232(e) of the Corporations Act 2001

In order to rely on section 232, an applicant has to prove that the conduct complained of is of a nature described in section 232(a)-(c) and is either 'contrary to the interests of the members as a whole'⁹⁰ or is 'oppressive to, unfairly prejudicial

⁸⁵ See Corporations Act 2001, ss 232(b) and (c) read with ss 232(d) and (e). For the position in South Africa see 5.9.1 below. See 2.6.3.7 above for the position in England.

⁸⁶ Compare to the position South Africa in 5.9.2 below where the position seems uncertain.

⁸⁷ *KGD Investments Pty Ltd v Placard Holdings (Pty) Ltd* [2015] VSC 712 [26].

⁸⁸ *William McCausland v Surfing Hardware International Holding Pty Ltd ACN 090 252 752 (No 2)* [2014] NSWSC 163 [47]. See also 3.3.3 and 3.5.2 above.

⁸⁹ *Spence v Rigging Rentals WA (Pty) Ltd* [2015] FCA 1158 [137]; *McLaughlin v Dungowan Manly Pty Ltd* [2011] NSWSC 215 [50]. See also *Hannon v Doyle* [2011] NSWSC 10 [103] where the court emphasised that '[i]ndividual acts and transactions may be relied upon; but a much more powerful case may often be made by reference to the cumulative effects of a course of conduct and a series of acts, events and transactions'. In *Grego v Copeland & Ors* [2011] VSC 521 [47] the court held that the contrary may also be true, namely, that a single isolated action or failure to act may not be unfair but may be regarded as unfair when all the single acts are viewed cumulatively. See 2.6 above for the position in England.

⁹⁰ Corporations Act 2001, s 232 (d).

to, or unfairly discriminatory against, a member or members whether in that capacity or in any other capacity'.⁹¹ Although these two sections may overlap to some extent, the courts have emphasised that sections 232(d) and (e) form two separate and independent grounds for relief.⁹²

3.5.5.1 Section 232(d)

In contrast with section 232(e),⁹³ section 232(d) is not limited to commercial unfairness.⁹⁴ The grounds in section 232(d) can be linked to breach of the duties of directors.⁹⁵ Although directors' duties are owed to the company, the Corporations

⁹¹ Corporations Act 2001, s 232 (e).

⁹² *Bideena Pty Ltd as trustee for the Bideena Pty Ltd Superannuation Fund* [2016] NSWSC 735 [53]; *KGD Investments Pty Ltd v Placard Holdings (Pty) Ltd* [2015] VSC 712 [27] and [36]; *Ubertini v Saeco International Group SpA (No 4)* [2014] VSC 47 [492]; *Solanki v Cufari* [2014] VSC 345 [56]; *Lenark Pty Limited v TheChairmen1 Pty Ltd* [2011] NSWSC 529 [21]; *Turnbull & Ors v NRMA* [2004] NSWSC 577 [32]; *McLean v DID Piling Pty Ltd & ORS* [2014] SASC 76 [70]. See also *Medical Research and Compensation Foundation v Amaca Pty Ltd* [2004] NSWSC 1227 [19]-[20] where the court accepted that section 232(d) is a separate ground upon which relief can be sought in terms of section 233. In *KGD Investments Pty Ltd v Placard Holdings Pty Ltd* [2015] VSC 712 [36] the court held that factual considerations relevant to one ground may also be relevant for purposes of the other.

⁹³ See 3.5.5.2 below for a discussion of s 232(e).

⁹⁴ *Peter Exton & Anor v Extons Pty Ltd & Ors* [2017] VSC 14 [39]; *Australian Institute of Fitness Pty Limited v Australian Institute of Fitness (Vic/Tas) Pty Limited (No 3)* [2015] NSWSC 1639 [83]; *Corbett v Corbett Court Pty Limited, in the matter of Corbett Court Pty Limited* [2015] FCA 1176 [127]; *Ubertini v Saeco International Group SpA (No 4)* [2014] VSC 47 [491]. See also *Turnbull v National Roads and Motorists Association Ltd* [2004] NSWSC 577 [32] where the court gave the example of wastefulness as being contrary to the interests of the members of a company as a whole which is not necessary commercially unfair. For a discussion of section 232(e) see 3.5.5.2 below.

⁹⁵ See regarding section 320 of the Companies Code the discussion by JF Corkery 'Oppression or Unfairness by Controllers – What can a Shareholder do about it? An Analysis of s 320 of the Companies Code (1988) 9 *Adel Review* 437, 447-48 who explains that '[n]egligence and breaches of fiduciary duty by directors, even though those duties are owed to the company and not the shareholders, are indirectly contrary to the interests of the members as a whole'. See *Campbell v Backoffice Investments (Pty) Ltd* [2008] NSWCA 95; (2008) 66 ACSR 359 [241] where the court

Act 2001 recognises that a breach of such duties is indirectly contrary to the interests of the members of a company as a whole.⁹⁶

Section 232(d) must not be interpreted in a manner that unjustifiably restricts or limits its scope of its application.⁹⁷ To determine whether conduct is ‘contrary to the interests of the members as a whole’ courts apply an objective test.⁹⁸ The determination is made in relation to standards of corporate behaviour or by evaluating the conduct against what would have been expected of reasonable directors conducting the affairs of a company.⁹⁹ A court will pay due regard to the facts and circumstances to determine whether the conduct complained of is not in the best interests of the company as a whole.¹⁰⁰

It is argued that the phrase ‘contrary to the interests of the members as a

remarked that it may not always be possible clearly to distinguish between the breach of duties of directors and cases that amount to oppression.

⁹⁶ JF Corkery ‘Oppression or Unfairness by Controllers – what can a Shareholder do about it? An Analysis of s 320 of the Companies Code (1988) 9 *Adel Review* 437, 447-48

⁹⁷ *Australian Institute of Fitness Pty Limited v Australian Institute of Fitness (Vic/Tas) Pty Limited (No 3)* [2015] NSWSC 1639 [82].

⁹⁸ *Australian Institute of Fitness Pty Limited v Australian Institute of Fitness (Vic/Tas) Pty Limited (No 3)* [2015] NSWSC 1639 [84]; *Goozee v Graphic World Group Holdings (Pty) Ltd* [2002] NSWSC 640; (2002) 42 ACSR 534 [42]-[44].

⁹⁹ *Shanahan v Jatese Pty Ltd* [2018] NSWSC 1088 [301]; *Bideena Pty Ltd as trustee for the Bideena Pty Ltd Superannuation Fund* [2016] NSWSC 735 [54]; *Australian Institute of Fitness (Pty) Limited v Australian Institute of Fitness (Vic/Tas) Pty Limited (No 3)* [2015] NSWSC 1639 [84]; *Grego v Copeland & Ors* [2011] VSC 521 [47]. It is important to note that the conduct of directors may be oppressive despite the absence of a breach of their fiduciary duties. However such a breach is relevant in determining unfairness (*Shanahan v Jatese Pty Ltd* [2018] NSWSC 1088 [302]). See *Gerard Cassegrain & Co Pty Limited v Cassegrain* [2011] NSWSC 1156 [19]. In *Munstermann v Rayward* [2017] NSWSC 133 [22] the court stated that the compliance of a director with his or her duties as director does not automatically mean that the conduct fair.

¹⁰⁰ *Peter Exton & Anor v Extons Pty Ltd & Ors* [2017] VSC 14 [39].

whole'¹⁰¹ should not be interpreted to mean that the conduct must be contrary to the interests of each and every individual member.¹⁰² For purposes of section 232(d) the interests of members as whole are not the interests of the actual members but that of the individual hypothetical member.¹⁰³ Section 232 has 'a wholly objective content and as existing independently of the identity and will of the totality of the shareholders for the time being'.¹⁰⁴

3.5.5.2 Section 232(e) and the concept of commercial fairness

Section 232(e) covers conduct that is oppressive or unfairly prejudicial or is discriminatory to or against a member or members of a company. The prejudice suffered in terms of section 232(e) is not necessarily 'contrary to the interests of the members as a whole'.¹⁰⁵ Section 232(e) must not be applied restrictively and be given a broad interpretation, unless the wording of the provision calls for a restrictive or limited application.¹⁰⁶ A breach of directors' duties does not *per se* amount to oppression, unfairly prejudicial or unfairly discriminatory conduct for purposes of section 232(e).¹⁰⁷ Oppressive or unfair conduct may be conduct that advances the

¹⁰¹ Corporations Act 2001, s 232(d).

¹⁰² L Griggs 'Specific Problems with the Oppression Section' 1993 (9) *Queensland University of Technology Law Journal* 101, 105.

¹⁰³ *Bideena Pty Ltd as trustee for the Bideena Pty Ltd Superannuation Fund* [2016] NSWSC 735 [54].

¹⁰⁴ *Goozee v Graphic World Group Holdings Pty Ltd* [2002] NSWSC 640;(2002) 42 ACSR 534 [44].

¹⁰⁵ Corporations Act 2001, s 232(e). See also *Ubertini v Saeco International Group SpA (No 4)* [2014] VSC 47 [491].

¹⁰⁶ *Vigliaroni & Ors v CPS Investment Holdings Pty Ltd & Ors* [2009] VSC 428 [64].

¹⁰⁷ A breach of fiduciary duties to a company will not necessarily constitute unfair prejudice for purposes of section 232(e) but may be found to be contrary to the interests of members as a whole. See *Peter Exton & Anor v Extons Pty Ltd & Ors* [2017] VSC 14 [39]. See also *Campbell v Backoffice Investments (Pty) Ltd* [2008] NSWCA 95; (2008) 66 ACSR 359 per Basten JA at [214]. See further *Dr Leo Shanahan v Jatese Pty Ltd* [2018] NSWSC 1088 (16 July 2018) [302] where the court held

interests of the majority or controlling members to the detriment of the balance of the members of a company.¹⁰⁸ Therefore it cannot be argued that when the majority of the members or controlling members act in their own interests, it must be regarded as acting in the interests of the members as a whole.¹⁰⁹

The concepts of oppressive conduct, unfair prejudice and unfair discrimination empower a court to look beyond legal rights and to provide relief that is just and equitable in the particular circumstances.¹¹⁰ This also highlights the fact that a member does not have to prove illegal or wrongful conduct before he or she will be entitled to relief.¹¹¹

To determine whether a member is entitled to relief in terms of section 232(e), a member has to prove commercial unfairness.¹¹² Commercial unfairness consists of conduct that is oppressive to and/or, unfairly prejudicial to, and/or conduct that is

that a breach of a director's fiduciary duty is relevant in determining whether there is unfairness for purposes of the oppression remedy. See 3.5.5.1 above.

¹⁰⁸ JF Corkery 'Oppression or Unfairness by Controllers – what can a Shareholder do about it? An Analysis of s 320 of the Companies Code (1988) 9 *Adel Review* 437, 448.

¹⁰⁹ JF Corkery 'Oppression or Unfairness by Controllers – what can a Shareholder do about it? An Analysis of s 320 of the Companies Code (1988) 9 *Adel Review* 437, 448.

¹¹⁰ *Nassar v Innovative Precasters Group Pty Ltd* [2009] NSWSC 342 [85]; *Spence v Rigging Rentals WA (Pty) Ltd* [2015] FCA 1158 [138].

¹¹¹ *Nassar v Innovative Precasters Group Pty Ltd* [2009] NSWSC 342 [85]; *Shew & Ors v Police and Citizens Youth Club & Ors* [2013] NTSC 15 [42]; *Munstermann v Rayward* [2017] NSWSC 133 [22]. See 2.3.3 above for the position in England.

¹¹² *In the matter of Pure Nature Sydney Pty Ltd* [2018] NSWSC 914 (19 June 2018) [60]; *Dr Leo Shanahan v Jatese Pty Ltd* [2018] NSWSC 1088 (16 July 2018) [300]; *In the matter of ICB Medical Distributors Pty Ltd and The International College of Biomechanics Pty Ltd; ICB Gait and Posture Clinic Pty Ltd; Foot Steps Orthotics Pty Limited* [2018] NSWSC 1315 (29 August 2018) [67]; *Boyd v Feeney & Ors* [2017] NSWSC 1595 (22 November 2017) [35]. See also *Shanahan v Jatese Pty Ltd* [2018] NSWSC 1088 [300]; *Spence v Rigging Rentals WA Pty Ltd* [2015] FCA 1158 [138].

unfairly discriminatory against a member or members of a company.¹¹³ Each of these phrases in section 232(e) should not be given its own interpretation, but should be understood to form aspects of commercial unfairness.¹¹⁴ These concepts form a standard against which conduct complained of must be evaluated or measured.¹¹⁵ Although these phrases do overlap to some extent, the section should be read in a manner that the phrases or concepts provide meaning to each other.¹¹⁶

¹¹³ *Shanahan v Jatese Pty Ltd* [2018] NSWSC 1088 [300]; *Wilmar Sugar Australia Limited v Queensland Sugar Limited, in the matter of Queensland Sugar Limited* [2016] FCA 20 [88]; *Morara Pty Ltd v Kingslane Property Investments Pty Ltd* [2019] WASC 136 [71]. See also *Morgan v 45 Fleurs Avenue Pty Ltd* (1986) 10 ACLR 692, 704.

¹¹⁴ *Australian Institute of Fitness (Pty) Limited v Australian Institute of Fitness (Vic)/Tas Pty Limited (No 3)* [2015] NSWSC 1639 [86]; *Corbett v Corbett Court Pty Limited, in the matter of Corbett Court Pty Limited* [2015] FCA 1176 [128]; *Wilmar Sugar Australia Limited v Queensland Sugar Limited, in the matter of Queensland Limited* [2016] FCA 20 [88]; *Ubertini v Saeco International Group Spa (No 4)* [2014] VSC 47 [492]; *In the matter of the New South Wales Bar Association* [2014] NSWSC 1695 [33]; *Solanki v Cufari* [2014] VSC 345 [57]-[58]; *Wambo Coal Pty Ltd v Sumiski Materials Ltd* [2014] NSWCA 326 [226]; *Ian Allan Byrne v AJ Byrne Pty Limited* [2012] NSWSC 667 [44]; *Saykan v Elhan; Elhan v Saykan* [2004] VSC 83 [104]; *Morgan v 45 Fleurs Avenue Pty Ltd* (1986) 10 ACLR 692, 704; *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* [2011] NSWCA 104 [140]; *Territory Realty Pty Ltd v Garraway* [2009] FCA 292 [310]; *KGD Investments Pty Ltd v Placard Holdings Pty Ltd* [2015] VSC 712 [28]. In *Joint v Stephens* [2008] VSCA 210 [134]-[135] the court found that these phrases in section 232(e) should be read as a 'compound expression'. See also *Hillam v Ample Source International Ltd (No 2)* [2012] FCAFC 73; (2012) 202 FCR 336 [4]; *Re Ledir Enterprises Pty Ltd* [2013] NSWSC 1332; (2013) 96 ACSR 1 [178]; and *Knights Quest P/L (ACN 116 122 939) and SMS Management P/L (ACN 101 453 865) v Daiwa Can Company and Barokes P/L (ACN 079 714 579)* [2018] VCSA 349 [130].

¹¹⁵ *Tomavic v Global Mortgage Equity Corporation Pty Ltd* [2011] NSWCA 104 [172].

¹¹⁶ *Nassar v Innovative Precasters Group Pty Ltd* [2009] NSWSC 342 [85] & [87]; *Joint v Stephens* [2008] VSCA 210 [134]; *Hillam v Ample Source International Ltd (No 2)* [2012] FCAFC 73; (2012) 202 FCR 336 [4]; *Morgan v 45 Fleurs Avenue Pty Ltd* (1986) 10 ACLR 692; *Dosike Pty Ltd v Johnson* (1996) 16 WAR 241; *Turnbull v National Roads and Motorists Association Ltd* [2004] NSWSC 577; (2004) 50 ACSR 44 [27].

The fairness or unfairness of conduct is determined objectively¹¹⁷ and should not be determined from the point of view of a particular member.¹¹⁸ A court in its application of the criteria of fairness should judicially apply the concept in accordance with rational principles.¹¹⁹ The application of an objective test to determine the fairness of conduct holds certain implications. Because the test is objective, the subjective intentions of the parties do not play a role in whether or not conduct would be regarded as fair or unfair.¹²⁰

Secondly, the conduct complained of should be viewed in the context of the facts and circumstances of the particular case.¹²¹ To consider the relevant conduct

¹¹⁷ *Dr Leo Shanahan v Jatase Pty Ltd* [2018] NSWSC 1088 [301]; *Mair v Rhodes & Beckett* [2018] VSC 132 (29 March 2018) [508]; *Australian Institute of Fitness Pty Limited v Australian Institute of Fitness (Vic/Tas) Pty Limited (No 3)* [2015] NSWSC 1639 [90]; *Spence v Rigging Rentals WA Pty Ltd* [2015] FCA 1158 [138]; *Corbett v Corbett Court Pty Limited in the matter of Corbett Court Pty Limited* [2015] FCA 1176 [128]; *Hunter v Organic & Natural Enterprise Group Pty Ltd & Ors* [2012] QSC 383 [102]; *Tomanovic v Argyle HQ Pty Ltd; Tomanovic v Global Mortgage Equity Corporation Pty Ltd; Sayer v Tomanovic* [2010] NSWSC 152 [39]; *Vigliaroni & Ors v CPS Investment Holdings Pty Ltd & Ors* [2009] VSC 428 [62]; *Joint v Stephens* [2008] VSCA 210 [138]. See also *Shelton v NRMA* [2004] FCA 1393 [23] where the court cautioned against a 'narrow approach to cases of oppression'.

¹¹⁸ See *Morgan v 45 Fleurs Avenue Pty Ltd* (1986) 10 ACLR 692, 704 where the court formulated the test in the form of a question, namely, 'whether objectively in the eyes of a commercial bystander, there has been unfairness, namely conduct that is so unfair that reasonable directors who consider the matter would not have thought the decision fair'. See also *RBC Investor Services Australia Nominees Pty Ltd v Brickworks Ltd* [2017] FCA 756; (2017) 120 ACSR 517 and *Knights Quest P/L (ACN 116 122 939) and SMS Management P/L (ACN 101 453 865) v Daiwa Can Company and Barokes P/L (ACN 079 714 579)* [2018] VCSA 349 [130].

¹¹⁹ *Netbush Pty Ltd v Fascine Developments Pty Ltd & Ors* [2005] WASC 73 [54]. See also 2.5 above for the approach of the English courts.

¹²⁰ *Joint v Stephens* [2008] VSCA 210 [138]. See also *Jawwhite Pty Ltd v Trabme Pty Ltd* [2018] QSC 174 (2 August 2018) [520] where the court noted that even *bona fide* conduct may be oppressive.

¹²¹ *Lukaszewicz v Polish Club Ltd* [2019] NSWSC 446 [8]; *Mair v Rhodes & Beckett* [2018] VSC 132 (29 March 2018) [510]; *Australian Institute of Fitness (Pty) Limited v Australian Institute of Fitness (Vic)/Tas) Pty Limited (No 3)* [2015] NSWSC 1639 [90]; *Ubertini v Saeco International Group SpA (No 4)* [2014] VSC 47 [494]; *Catalano v Managing Australia Destinations Pty Ltd* [2014] FCAFC 55

in context entails that the conduct must be viewed against the fact that the conduct took place within a company structure.¹²² However, section 232 allows a court to take other considerations into account. Fairness for purposes of the oppression remedy may require the weighing and balancing of various competing interests against each other.¹²³ These varying and often competing interests may be held by various groups (or stakeholders) within a company.¹²⁴

3.6 Considerations taken into account in establishing the fairness (or unfairness) in the context of a company

The concept of fairness is dependent on the context in which it is applied.¹²⁵ For purposes of the oppression remedy, it is important to determine fairness in the context of unique and established company law principles.¹²⁶ The oppression remedy must be applied in the context of the fact that a company is a separate legal

[9]; *In the matter of the New South Wales Bar Association* [2014] NSWSC 1695 [76]; *William Buck (WA) Pty Ltd v Faulkner [No 6]* [2013] WASC 342 [35]. See also *Hunter v Organic & Natural Enterprise Group Pty Ltd & Ors* [2012] QSC 383 [140] confirmed in *Hunter v Organic & Natural Enterprise Group Pty Ltd & Ors* [2013] QCA 331. See further *Chung-Yi Pty Limited v Justin Chih-Yang Chang (No 2)* [2018] NSWSC 1112 [78].

¹²² In *Spence v Rigging Rentals WA Pty Ltd* [2015] FCA 1158 [137] where the court held that fairness should be evaluated within a commercial context. See *Bull v The Quarter Horse Association* [2014] NSWSC 1665 [407] where it is noted that courts are reluctant to interfere with the discretion of the board by replacing the discretion of the board with that of the court. See also *Australian Institute of Fitness Pty Limited v Australian Institute of Fitness (Vic/Tas) Pty Limited (No 3)* [2015] NSWSC 1639 [95]-[97].

¹²³ *Joint v Stephens* [2008] VSCA 210 [136].

¹²⁴ *Solanki v Cufari* [2014] VSC 345 [58].

¹²⁵ See 3.5.5.1 above. RP Austin and IM Ramsay *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 714-15.

¹²⁶ See 3.2 above for a discussion of some of these principles. See 5.4.3 below for the role similar principles play in the determination of fairness or unfairness for purposes of section 163(1) of the Companies Act 71 of 2008.

entity governed by the principle of majority decision-making.¹²⁷ In this context, the powers, rights and duties of directors, and the rights and duties of majority shareholders towards minority shareholders are important considerations.¹²⁸ In some circumstances the expectations of a member are protected by the oppression remedy.¹²⁹

3.6.1 The constitution of a company

3.6.1.1 The constitution as a start for the assessment of rights and interests

The basis for the regulation of the relationship between members is the constitution of a company. Each member of a company is contractually bound to the constitution.¹³⁰ A member must conduct him- or herself in accordance with the constitution. Unless, other considerations apply, courts will give effect to the constitution of a company.¹³¹ Although the constitution is the starting point in determining the rights and obligations that exist between members, other considerations may also come into play. These considerations often take the form of reasonable expectations. The concept of reasonable or legitimate expectations is discussed below.¹³²

¹²⁷ See 3.2 above for a discussion of the principle of separate legal personality and 3.6.2 below for a discussion of the principle of majority rule.

¹²⁸ See the discussion in 3.6.1 below on the constitution of a company as a source of powers, rights, and duties.

¹²⁹ See 3.6.7 below.

¹³⁰ Corporations Act 2001, s 140(1). See 5.5.1 below for the position in South Africa.

¹³¹ Conduct in accordance with the constitution of a company may still be found to be oppressive or unfairly prejudicial. See RP Austin and IM Ramsay *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 717

¹³² See 3.6.7 and more specifically 3.6.7.2 below.

3.6.1.2 The provisions of a company's constitution and unfairly prejudicial conduct

(a) *The power of a court to modify the constitution of a company*

Although the constitution of a company is the starting point in determining the relationship between members, it must be noted that the constitution may contain provisions that may in themselves be oppressive or unfairly prejudicial. Therefore it is important to understand how the provisions of a company's constitution can be oppressive or unfairly prejudicial towards members of the company.¹³³ It must be added that courts are generally reluctant to order the amendment or repeal of certain provisions in the constitutive documents of a company on the basis that they are oppressive or unfairly prejudicial.¹³⁴ A court will only make such an order if the amendment of the constitution or the removal of a particular provision in the constitution will eradicate or mitigate the oppressive or unfairly prejudicial effect of such a provision.¹³⁵

(b) *Oppressive conduct versus the mere presence of an oppressive provision in the constitution of a company*

One of the requirements of these last mentioned provisions of section 232 of the

¹³³ *Medical Research and Compensation Foundation v Amaca Pty Ltd* [2004] NSWSC 1227 [14]. See, for example, *Re Spargos Mining NL* (1990) 6 ACSR 1 and *Sutherland v National Roads and Motorists' Association Ltd* [2003] NSWSC 829; (2003) 47 ACSR 428.

¹³⁴ See *Medical Research and Compensation Foundation v Amaca Pty Ltd* [2004] NSWSC 1227 [17] where the court also stressed the principle that a court has no power to repeal a provision or provisions of the constitution of a company unless it is proven that that particular provision or provisions are oppressive and that it is necessary to repeal that particular provision or provisions in order to address the oppression. See also 3.9.2 below.

¹³⁵ *Medical Research and Compensation Foundation v Amaca Pty Ltd* [2004] NSWSC 1227 [16]. See also 3.9 on the purpose of relief in terms of section 233 of the Corporations Act 2001.

Corporations Act 2001 is that there must be conduct that forms the subject matter of the complaint. The mere inclusion of a provision or an article in the constitutive documents of a company does not trigger the provisions of section 232 and 233.¹³⁶ The conduct may take the form of any positive act or omission.¹³⁷ A complaint directed against the presence of a particular provision in the articles of association does not constitute conduct in the form of a positive act or omission by the directors and such conduct is not conduct of the company.¹³⁸ A change of circumstances since the adoption of the constitutive documents (articles of association) also does not *per se* constitute unfairly prejudicial conduct.¹³⁹

3.6.2 The principle of majority rule

To effectively govern and manage a company the majority should be given the freedom to do the necessary to enhance the value of the company for the benefit of all shareholders without the burden of an obstructive minority.¹⁴⁰ One of the consequences of becoming a member of the company is that members are subject to majority rule.¹⁴¹ Unless otherwise provided by either the Corporations Act 2001 or the constitution of the company, decisions of the company are adopted in accordance with the principle of majority rule.¹⁴²

¹³⁶ *Medical Research and Compensation Foundation v Amaca Pty Ltd* [2004] NSWSC 1227 [23].

¹³⁷ In *Medical Research and Compensation Foundation v Amaca Pty Ltd* [2004] NSWSC 1227 [22] and [24] the court regarded a resolution of the company as conduct for purposes of section 232.

¹³⁸ *Medical Research and Compensation Foundation v Amaca Pty Ltd* [2004] NSWSC 1227 [30].

¹³⁹ *Medical Research and Compensation Foundation v Amaca Pty Ltd* [2004] NSWSC 1227 [25].

¹⁴⁰ *Remrose Pty Ltd v Allsilver Holdings Pty Ltd & Ors* [2005] WASC 251 [63].

¹⁴¹ See 3.2.3 and 3.6.1 above.

¹⁴² See 3.2.3 above.

Being merely a minority shareholder bound to the decisions of the majority does not entitle a minority member to relief in terms of sections 232 and 233 solely because the member suffered prejudice or financial detriment as a result of the principle of majority decision-making or rule.¹⁴³ Conduct of the majority that negatively affects the value of a minority's shareholding does not necessarily constitute oppressive conduct, especially when the conduct or alleged misconduct was undertaken in the pursuit of creating value for the company.¹⁴⁴ Section 232 recognises that the interests of the controlling members do not necessarily coincide with the best interests of the company.¹⁴⁵

3.6.3 Ability to withdraw the capital invested in a company

A member cannot rely on the fact that he or she is unable to dispose of his or her shareholding in the company.¹⁴⁶ As regards the repayment of the capital invested by a member in a company, courts often remind members that taking up shares in a company is generally a long-term investment.¹⁴⁷ Unless an event occurs that makes it impossible for a company to pursue its objectives a member's investment should be available to a company to achieve its objective or objectives.¹⁴⁸ Only then

¹⁴³ See *Australian Institute of Fitness Pty Limited v Australian Institute of Fitness (Vic/Tas) Pty Limited (No 3)* [2015] NSWSC 1639 [94] read with [108] where the court stated that a minority shareholder will not be able to mount a case of oppression only on the basis that the shareholder is a minority shareholder. A member may have a case that merits relief in terms of section 232 and 233 of the Corporations Act 2001 if the minority member can demonstrate that the directors of the company or the majority of the shareholders conduct the affairs of a company in such a manner that benefit their own interests or that of others at the expense of the minority member. See also 3.5.5.2 above.

¹⁴⁴ *Remrose Pty Ltd v Allsilver Holdings Pty Ltd & Ors* [2005] WASC 251 [63].

¹⁴⁵ See 3.5.5.2 above.

¹⁴⁶ *Ubertini v Saeco International Group SpA (No 4)* [2014] VSC 47 [497]; *Ian Allan Byrne v AJ Byrne Pty Limited* [2012] NSWSC 667 [47]; *Lucy v Lomas* [2002] NSWSC 448 [43].

¹⁴⁷ *Lucy v Lomas* [2002] NSWSC 448 [42].

¹⁴⁸ *Lucy v Lomas* [2002] NSWSC 448 [42].

a court would consider to wind-up a company so that any residual capital can be returned to investors and members.¹⁴⁹ Following this approach a member cannot argue that he or she is being oppressed because of the mere fact that he or she cannot regain his or her investment in the company or is unable to find a buyer for the member's shares in a company.¹⁵⁰

3.6.4 Poor management

The management of a company is the responsibility of the board of directors.¹⁵¹ Usually courts are slow to intervene in the decisions made by the board, even when a decision by the board may have a detrimental or adverse effect on a member.¹⁵² The poor or mismanagement of a company is not grounds to obtain relief in terms of the oppression or unfair prejudice remedy.¹⁵³ In order to obtain relief on this basis it has to demonstrate that no reasonable board would have reached the decision or an absence of good faith.¹⁵⁴

3.6.5 The clean hands principle and the conduct of the member

Section 232 does not require a member to approach the court with clean hands.¹⁵⁵

¹⁴⁹ *Lucy v Lomas* [2002] NSWSC 448 [42].

¹⁵⁰ *Lucy v Lomas* [2002] NSWSC 448 [43]; *Tomanovic v Argyle HQ Pty Ltd; Tomanovic v Global Mortgage Equity Corporation Pty Ltd; Sayer v Tomanovic* [2010] NSWSC 152 [40].

¹⁵¹ *Tomanovic v Argyle HQ Pty Ltd; Tomanovic v Global Mortgage Equity Corporation Pty Ltd; Sayer v Tomanovic* [2010] NSWSC 152 [41].

¹⁵² *Tomanovic v Argyle HQ Pty Ltd; Tomanovic v Global Mortgage Equity Corporation Pty Ltd; Sayer v Tomanovic* [2010] NSWSC 152 [41].

¹⁵³ *Donaldson v Natural Springs Australia Limited* [2015] FCA 498 [250]; *Ananda Marga Pracaraka Samgha Ltd v Tomar (No 6)* [2013] FCA 284; (2013) 300 ALR 492 [417].

¹⁵⁴ *Tomanovic v Argyle HQ Pty Ltd; Tomanovic v Global Mortgage Equity Corporation Pty Ltd; Sayer v Tomanovic* [2010] NSWSC 152 [41]. See 3.5.5.2 above.

¹⁵⁵ *Spence v Rigging Rentals WA (Pty) Ltd* [2015] FCA 1158 [138]; RP Austin and IM Ramsay *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 711. See 5.7.5 for the position in South Africa.

This is the position because the conduct of the member seeking relief is only one of various factors that will be taken into consideration to determine the unfairness of the conduct complained of. The conduct of the member seeking relief in terms of section 232 of the Corporations Act 2001 may be significant for the following reasons:

Firstly, it could render the conduct complained of fair even though it is or was prejudicial.¹⁵⁶ Secondly, the conduct of the applicant may affect the nature of the relief a court may consider appropriate in the circumstances of the particular case.¹⁵⁷

3.6.6 The labelling of conduct

When the unfair prejudice remedy is applied, one should always start at the wording in which section 232 is formulated.¹⁵⁸ Over the years, the courts have identified various forms of conduct that can be regarded as oppressive, but these forms of

¹⁵⁶ *Corbett v Corbett Court Pty Limited, in the matter of Corbett Court Pty Limited* [2015] FCA 1176 [131]; *Australian Institute of Fitness Pty Limited v Australian Institute of Fitness (Vic/Tas) Pty Limited (No 3)* [2015] NSWSC 1639 [101] and [105]; *Ubertini v Saeco International Group SpA (No 4)* [2014] VSC 47 [494] and [496].

¹⁵⁷ *Australian Institute of Fitness Pty Limited v Australian Institute of Fitness (Vic/Tas) Pty Limited (No 3)* [2015] NSWSC 1639 [101] and [105]; *Ubertini v Saeco International Group SpA (No 4)* [2014] VSC 47 [494] and [496]. For example, the exclusion of a member from the management of the company may trigger the application of the provisions of sections 232 and 233. However, it should be noted that the exclusion from the management of the company is not per se oppressive as the oppressiveness of the conduct is vested in the exclusion from management of a member without a reasonable offer to be bought out. See *Grego v Copeland & Ors* [2011] VSC 521 [50]; *Tomanovic v Argyle HQ Pty Ltd*; *Tomanovic v Global Mortgage Equity Corporation Pty Ltd*; *Sayer v Tomanovic* [2010] NSWSC 152 [42]; *In the matter of Courtesy Real Estate (NSW) Pty Limited* [2013] NSWSC 1666 [19]. However, the conduct of the excluded member from the management of the company may be justified based on the conduct of the member. In this regard see *Australian Institute of Fitness (Pty) Limited v Australian Institute of Fitness (Vic)/Tas) Pty Limited (No 3)* [2015] NSWSC 1639 [105]; *In the matter of Ledir Enterprises Pty Limited* [2013] NSWSC 1332 [188].

¹⁵⁸ *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* [2011] NSWCA 104 [233].

categories of conduct are only guidelines. The classification or labelling of circumstances which are indicative of when conduct can be regarded as oppressive or justifies relief in terms of section 232 read with section 233 does not substitute the duty of the court to apply the statutory test for relief to the facts and circumstances of each case.¹⁵⁹ The wording of section 232 and the context in which the conduct took place (the facts and circumstances of each case) remain conclusive.

3.6.7 The protection of 'legitimate expectations'

The structure and form of a company is also an important consideration.¹⁶⁰ Due consideration should also be given to the history pertaining to the formation of a company and the nature of the association of the various members.¹⁶¹ In disputes relating to the personal rights of a member, reliance is often placed on sections 232 to 233 of the Corporations Act 2001. The exact legal relationship between parties to a dispute can be established with relative ease by interpreting the constitution of a company.¹⁶² This is the starting point when determining the rights and interests of the parties involved.

However, the matter can become far more complex when the relationship between the parties is not of a pure commercial nature.¹⁶³ The determination of the

¹⁵⁹ *Tomavic v Global Mortgage Equity Corporation Pty Ltd* [2011] NSWCA 104 [185]; *In the matter of ICB Medical Distributors Pty Ltd and The International College of Biomechanics Pty Ltd; of ICB Gait and Posture Clinic Pty Ltd; Foot Steps Orthotics Pty Limited* [2018] NSWSC 1315 [70]. See also *Bull v The Quarter Horse Association* [2014] NSWSC 1665 [331] where the court stated that a breach of the expectations of a party to a dispute may be held as oppressive conduct. *Ian Allan Byrne v AJ Byrne Pty Limited* [2012] NSWSC 667 [50].

¹⁶⁰ See 3.6.7.1 below

¹⁶¹ See 3.6.7.1 below

¹⁶² See 3.6.7.1 below

¹⁶³ See 3.6.7.1 below

legal position of each party relative to another is then not as simple as applying the constitution of the company. In some instances a court would be required to direct its investigations into matters beyond the company structure to establish the relationship between the members as individuals.¹⁶⁴ This is done based on equitable considerations.¹⁶⁵ Not only does the remedy require a court to balance various *rights* of members, but regard must be had to the *interests* of members. In some circumstances a court may be justified in restricting a party in the exercise of his or her rights on equitable considerations.¹⁶⁶

Often parties forming a company do so to achieve some economic purpose or objective.¹⁶⁷ Some expectations are not necessarily embodied in the constitutive documents and shareholders' agreements.¹⁶⁸ When understandings, arrangements or agreements that fall beyond the scope of the articles of association exist between members, conduct in strict compliance with the provisions or articles in the articles of association of the company may constitute oppressive or unfair prejudicial conduct of the affairs of the company.¹⁶⁹ A member may be entitled to relief on the basis of section 232 if the conduct of which a member complains does not conform to the legal expectation of the member.¹⁷⁰ Legitimate or reasonable expectations

¹⁶⁴ See 3.6.7.1 below.

¹⁶⁵ RP Austin and IM Ramsay Ford, *Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 715.

¹⁶⁶ See RP Austin and IM Ramsay Ford, *Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 715.

¹⁶⁷ *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97; (2001) 37 ACSR 672 [419].

¹⁶⁸ *Catto & Ors v Hampton Australia Limited (In Liquidation) & Ors (No 3)* [2004] SASC 242 [81].

¹⁶⁹ *Medical Research and Compensation Foundation v Amaca Pty Ltd* [2004] NSWSC 1227 [29]. See also 3.6.7.1 below.

¹⁷⁰ *Tomanovic v Argyle HQ Pty Ltd; Tomanovic v Global Mortgage Equity Corporation Pty Ltd; Sayer v Tomanovic* [2010] NSWSC 152 [39].

may be created in a variety of contexts.

3.6.7.1 Quasi-partnerships or the role of the personal relationship between members

When a company is incorporated it acquires its own separate juristic personality.¹⁷¹ The company is a legal person separate from its shareholders.¹⁷² The company is managed by the board of directors.¹⁷³ The relationship between the company and its shareholders is regulated by the constitutive documents of the company, namely, the Memorandum and Articles of Association.¹⁷⁴ To establish the relationship between the company and shareholders the point of departure is the constitutive documents of the company.¹⁷⁵ The provisions of the constitutive documents must be strictly enforced.¹⁷⁶ Members have the right that a company's business and

¹⁷¹ See 3.2 above.

¹⁷² See 3.2 above.

¹⁷³ See 3.2 above.

¹⁷⁴ See 3.2 and 3.6.1 above.

¹⁷⁵ *Medical Research and Compensation Foundation v Amaca Pty Ltd* [2004] NSWSC 1227 [29]. See also *Remrose Pty Ltd v Allsilver Holdings Pty Ltd & Ors* [2005] WASC 251 [61] where the court explained that members of the company derive their rights from the constitution and statute of the particular company, but that in addition to the rights of members contained in the constitution or statute of the company, a member may also seek protection against the abuse of his or her rights from the general principles of company law and/or legislation. The sources of these potential abuses are often the controllers of the company in the form of the board and controlling shareholders. The main difference between the board and controlling shareholders is that the board owe fiduciary duties towards the company in contrast with shareholders or in particular controlling shareholders. See also 3.2 and 3.6.3 above.

¹⁷⁶ In *Catto & Ors v Hampton Australia Limited (In Liquidation) & Ors (No 3)* [2004] SASC 242 [84] the court emphasised that on the facts of a particular case is not that of a quasi-partnership 'such as that identified in *Ebrihimi (sic)* in which the strict contractual rights of the shareholders are hedged with equitable obligations. In those cases the relationship and its terms are underpinned by an arrangement existing outside the Articles. In this case, the contract between the parties has full force and effect according to its strict terms'.

affairs be conducted in accordance with Memorandum and Articles of Association.

If one deals with a company where the relationships between the members are only of a commercial nature, the constitution of the company is the primary source that regulates their relationship.¹⁷⁷ A case is far more complex when one deals with a company where the relationship between the members are not of a pure commercial nature.¹⁷⁸ In such circumstances, equity may require a court to look beyond the company structure and recognise the individuals behind the company.¹⁷⁹ A court may then restrict the exercise of rights on equitable grounds.

This is particularly the case when the relationship between the shareholders or members take the form of a quasi-partnership. In such circumstances the exercise of legal rights may be restricted based on equitable considerations.¹⁸⁰ These relationships are marked by the personal nature of the relationship between the members and/or the existence of a relationship based upon mutual trust and confidence between them.¹⁸¹ These relationships are often characterised by an agreement or understanding that all or some of the shareholders will participate in the management of the company and/or that a restriction is placed on the

¹⁷⁷ See *Spence v Rigging Rentals WA Pty Ltd* [2015] FCA 1158 [141] where the court emphasised that the nature of the relationship between the members must be considered to determine commercial unfairness. See also 3.6.3 above.

¹⁷⁸ See also 3.6.3 above.

¹⁷⁹ Courts view relief in terms of section 232 as exceptional. See *Catto & Ors v Hampton Australia Limited (In Liquidation) & Ors (No 3)* [2004] SASC 242 [78].

¹⁸⁰ *Rocco Triulcio v Chase Property Investments Pty Ltd* [2004] NSWSC 311 [31].

¹⁸¹ *Rocco Triulcio v Chase Property Investments Pty Ltd* [2004] NSWSC 311 [31].

transferability of members' interests.¹⁸²

The role of the personal relationship between members also plays an important role in the winding-up of a company on 'just and equitable' grounds. Despite the fact that members may have chosen the company structure to conduct their business, courts have recognised that one cannot ignore the personal nature of the relationship amongst the members thereof. In such circumstances the mutual breakdown of a relationship between the members of a company may justify the winding-up of a company.¹⁸³ The winding-up of the company will be done on 'just and equitable' grounds.¹⁸⁴

From a practical perspective, the oppression remedy is more likely to be relied on in the context of smaller companies in comparison to shareholders in listed companies.¹⁸⁵ The reason for this is that members in listed companies are in a position to dispose of their shareholding far easier than it is for shareholders in smaller companies, which often leaves the shareholders in a smaller company entrapped and unable to withdraw their investment.¹⁸⁶ If such a member succeeds in proving that the affairs of the company are conducted in an oppressive or unfairly prejudicial manner, the court may grant relief in terms of which a member will be

¹⁸² *Rocco Triulcio v Chase Property Investments Pty Ltd* [2004] NSWSC 311 [31] and [33] where the court found that a relationship of a personal nature existed between the members of the company despite the absence of pre-emptive rights in favour of shareholders.

¹⁸³ *Rocco Triulcio v Chase Property Investments Pty Ltd* [2004] NSWSC 311 [32]. See also 3.9.1 below.

¹⁸⁴ *Rocco Triulcio v Chase Property Investments Pty Ltd* [2004] NSWSC 311 [32]-[33]; *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97; (2001) 37 ACSR 672 [420]. 3.9.1 below.

¹⁸⁵ *Remrose Pty Ltd v Allsilver Holdings Pty Ltd & Ors* [2005] WASC 251 [62].

¹⁸⁶ *Remrose Pty Ltd v Allsilver Holdings Pty Ltd & Ors* [2005] WASC 251 [62].

able to withdraw his or her investment from the company.¹⁸⁷

3.6.7.2 Reasonable expectations and changing circumstances

A legal expectation does not have to be present at the time of the formation of a company. A legal expectation can be created at any time subsequent to the formation of the company.¹⁸⁸ Regard must further be given to the fact that a legal expectation of a member is not immutable.¹⁸⁹

Due to the lapse of time and changing circumstances, situations may arise during which it is not possible to give effect to the promises and arrangements and other appropriate forms of relief need to be considered.¹⁹⁰ When 'good reason' exists to extinguish a legal expectation, a member may find it difficult successfully to rely on section 232 for relief based on the relevant expectation.¹⁹¹ The existence of a legal expectation may be challenged in prevailing circumstances.¹⁹²

¹⁸⁷ *Remrose Pty Ltd v Allsilver Holdings Pty Ltd & Ors* [2005] WASC 251 [62]. See, for example, 3.9.4 below for a discussion of buy-out orders in the context of the oppression remedy.

¹⁸⁸ *Fexuto Pty Limited v Bosnjak Holdings Pty Limited & Ors* [2001] NSWCA 97 [420].

¹⁸⁹ *Tomanovic v Argyle HQ Pty Ltd; Tomanovic v Global Mortgage Equity Corporation Pty Ltd; Sayer v Tomanovic* [2010] NSWSC 152 [39]; *Nassar v Innovative Precasters Group Pty Ltd* [2009] NSWSC 342 [96].

¹⁹⁰ See also *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97; (2001) 37 ACSR 672 [90] where the court remarked that 'irreconcilable differences will cause the court to conclude that an understanding or expectation as to the participation in management should be taken to have ceased'.

¹⁹¹ *Tomanovic v Argyle HQ Pty Ltd; Tomanovic v Global Mortgage Equity Corporation Pty Ltd; Sayer v Tomanovic* [2010] NSWSC 152 [39]; *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97; (2001) 37 ACSR 672 [90]; *Guerinoni v Argyle Concrete & Quarry Supplies Pty Ltd* [2000] WASC 170; (2000) 34 ACSR 469; see also *Belgiorno-Zegna v Exben Pty Ltd* [2000] NSWSC 884; (2000) 35 ACSR 305 [142], [151].

¹⁹² *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97; (2001) 37 ACSR 672 [649] and [650].

3.6.7.3 The justification for the enforcement of reasonable expectations

The enforcement of reasonable expectations may potentially be criticised as it creates the impression that the subjective considerations of the parties play a role in determining whether a member has been oppressed or treated in an unfair prejudicial manner.¹⁹³ However, section 232 and 233 entrust the court with the jurisdiction to look beyond legal rights of the parties and to tailor relief that is just and equitable in light of the particular circumstances of a case.¹⁹⁴ The unfair prejudice remedy gives the court a mechanism to give effect to the intention of the members as far as their intentions are not aligned with the rights bestowed on members due to the particular company structure.¹⁹⁵

A substantial number of the reported cases dealt with members that have entered a company on a mutual understanding with their co-shareholders.¹⁹⁶ An example of such mutual understanding is that the company will be managed in a certain or particular manner.¹⁹⁷ These promises or understandings on which the association between the members is based are not necessarily contained in the constitutive documents of a company,¹⁹⁸ but are in many cases unwritten or

¹⁹³ *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* [2011] NSWCA 104 [171]. See 3.5.5 above where it is explained that the test is objective.

¹⁹⁴ *Nassar v Innovative Precasters Group (Pty) Ltd* [2009] NSWSC 342 [85].

¹⁹⁵ *Nassar v Innovative Precasters Group (Pty) Ltd* [2009] NSWSC 342 [88]. See also 3.6.1 read with 3.6.7.1 and 3.6.7.2 above where the point is made that in some circumstances the relationships between members are not exhaustively defined in the constitution of a company, but may be contained in the form of legitimate or reasonable expectations.

¹⁹⁶ See also 3.6.7.1 and 3.6.7.2 above.

¹⁹⁷ See also 3.6.7.1 and 3.6.7.2 above.

¹⁹⁸ See 3.6.7.1 above.

deducted from the conduct between the parties.¹⁹⁹

The parties or members to these arrangements or mutual understandings are bound to their promises based on the requirements of justice and equity. This is usually the situation when the parties formed a company based on certain mutual understandings between themselves as members of the company. Under certain circumstances such mutual understandings create complex disputes because from a company law perspective the members should not be treated as partners to a partnership nor can it be argued that there are more to the relationship between the members as only that of being members of the same company.

It is important to understand that the concept of legitimate expectations is not a criterion for reliance on section 232, but is mere a conclusion of the facts relating to the relationship between the parties.²⁰⁰ A party may be entitled to relief in terms of section 233 in circumstances where there is no breach of an agreement or understanding.²⁰¹

3.6.7.4 Irreconcilable differences as a breach of a legitimate expectation

It should be emphasised that courts do not recognise irreconcilable differences between members as a ground of oppression for purposes of section 232.²⁰² Irreconcilable differences between members do not automatically constitute

¹⁹⁹ See *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97; (2001) 37 ACSR 672 [420] referring to *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360.

²⁰⁰ *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97; (2001) 37 ACSR 672 [62].

²⁰¹ *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97; (2001) 37 ACSR 672 [4].

²⁰² *Solanki v Cufari* [2014] VSC 345 [58].

oppressive conduct by one or more of the members²⁰³ nor does the fact that a member is regularly outvoted.²⁰⁴

3.7 Standing – section 234 of the Corporations Act 2001

3.7.1 A member of a company

Section 232 of the Corporations Act 2001 is not concerned with oppressive conduct towards a person who is not a member of the company.²⁰⁵ A person who is a member may rely on sections 232 and 233 of the Corporations Act 2001.²⁰⁶ A person is a member of a company if such a person is a member at the registration of a company²⁰⁷ or after the registration of the company has agreed to become a member of the company and such person's name is entered into the register of members.²⁰⁸ A member may rely on the provisions of section 232 of the Act

²⁰³ *Ubertini v Saeco International Group SpA (No 4)* [2014] VSC 47 [497]; *Ian Allan Byrne v AJ Byrne Pty Limited* [2012] NSWSC 667 [48]; *Tomavic v Global Mortgage Equity Corporation Pty Ltd* [2011] NSWCA 104 [199]. See also *Catto & Ors v Hampton Australia Limited (In Liquidation) & Ors (No 3)* [2004] SASC 242 [77]. The adoption of policies relating to the business of a company in respect of which legitimate differences of opinions exists, does not trigger relief. In this regard see *Catto & Ors v Hampton Australia Limited (In Liquidation) & Ors (No 3)* [2004] SASC 242 [77]. See further *Mark Gerard Ireland as Executor of the Estate of the late Charles Stuart Gordon v Sandra Jane Retallack & Ors* [2011] NSWSC 846 [20].

²⁰⁴ *Catto & Ors v Hampton Australia Limited (In Liquidation) & Ors (No 3)* [2004] SASC 242 [79] and [87] where the court stated that the majority has the right to exercise and enjoy protection of their rights and interests. See also *Shelton v NRMA* [2004] FCA 1393; (2004) 51 ACSR 278 [24]. See 3.6.2 above regarding the principle of majority rule or decision-making.

²⁰⁵ *Batterham v Nauer, in the matter of Peter James Batterham* [2019] FCA 485 [109]. See also 3.7.2 below.

²⁰⁶ Corporations Act 2001, s 234. See also *Batterham v Nauer, in the matter of Peter James Batterham* [2019] FCA 485 [112] where it was held that a person who relies on section 232 of the Corporations Act 2001 must be a member of the company to which the oppressive conduct relates.

²⁰⁷ Corporations Act 2001, s 231(a).

²⁰⁸ Corporations Act 2001, s 231(b). In terms of section 231(c) of the Corporations Act 2001 a member includes a person who becomes a member in terms of section 167 for purposes of a

irrespective of whether the member has been prejudiced in his or her capacity as such or not.²⁰⁹

3.7.2 Extended standing

Section 234 extends standing for purposes of the oppression remedy to a person whose name has been removed from the register of members as a result of a selective reduction²¹⁰ or if such a person has ceased to be a member of the company and the circumstances which led to the termination of the person's membership are the subject matter of the application.²¹¹ The section also provides for persons to whom shares in the company have been transmitted by will or by the operation of law.²¹² Standing may further be extended to any other person whom the ASIC considers appropriate in light of investigations it is conducting or has conducted into the company's affairs or matters connected with the company's affairs.²¹³

3.7.3 Non-controlling members and the oppression remedy

The introduction of section 232 of the Corporations Act 2001 provided an alternative

company limited by guarantee that is converted to a company limited by shares. See also *Mio Art Pty Ltd v Macequest Pty Ltd & Ors* [2013] QSC 211 [33]. See the position in South Africa in Chapter 5 below.

²⁰⁹ Corporations Act 2001, ss 234(e)(i) and (ii). See 3.5.5 above and 3.7.4 below. Compare with the position in South Africa as discussed in 5.7.1.4 below.

²¹⁰ Corporations Act 2001, s 234(b). See the problems outlined with the South African position in 5.7.1.1 below.

²¹¹ Corporations Act 2001, s 234(c). See the problems outlined with the South African position in 5.7.1.1 below.

²¹² Corporations Act 2001, s 234(d). See 5.7.1.2 below for criticism of the provisions relating to standing in respect of the South African remedy.

²¹³ Corporations Act 2001, s 234(e)(i) and (ii).

remedy to the liquidation of companies on 'just and equitable grounds'.²¹⁴ The object of the remedy is to provide protection to members who are unable to exercise control over a company.²¹⁵ However, the provision does not disqualify other members from utilising it.²¹⁶

²¹⁴ See 3.3 above and more specifically 3.3.2. For the position in England see 2.9 above and 4.8 below for the Canadian position. See 5.2.2 and 5.8 below for the South African position.

²¹⁵ According to the court *In the matter of Richardson & Wrench Holdings Limited* [2013] NSWSC 1990 [37]- [38] a shareholder may be a majority shareholder which may not necessarily have voting control over the company or the ability to exercise control over the company. See also *International Hospitality Concepts Pty Ltd v National Marketing Concepts Inc (No 2)* (1994) 13 ACSR 368, 370-71 where the court held that in certain circumstances the minority may oppress the majority. A shareholder who holds 50% of the shares in a company may rely on the oppression remedy because such a shareholder does not have the power or control to prevent or end the alleged oppression. See *Munstermann v Rayward* [2017] NSWSC 133 [22].

²¹⁶ See *Patterson v Humfrey* [2014] WASC 446 [52]-[53] where the court also stated that because of this philosophy, conceptually, there is nothing that prohibits any member of the company who holds an equal shareholding of 50% in a company from relying on section 232. Contra *Polyresins (Pty) Ltd, Re* (1998) 28 ACSR 671 where the court based its decision on the fact that no authorities existed that entitled majority shareholders to rely on the oppression remedy. For criticism on *Polyresins (Pty) Ltd, Re* (1998) 28 ACSR 671 see RP Austin and IM Ramsay Ford, *Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 708 and especially they discuss case law decided prior to *Polyresins (Pty) Ltd, Re* (1998) 28 ACSR 671 in which the courts granted relief to majority shareholders on the basis of the oppression remedy. The authors cite cases such as *Marks v Roe* (unreported, SC (Vic), Mandie J, 4066/1995, 28 May 1996, BC9602061) where the chairperson of the company failed to convene the necessary annual general meetings and to furnish the majority shareholders with information about the business activities of the company. The authors further cite the case of *International Hospitality Concepts Pty Ltd v National Marketing Concepts Inc (No 2)* (1994) 13 ACSR 368, 370-71 where the court held that circumstances may arise where the minority may oppress the majority. RP Austin and IM Ramsay Ford, *Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 709 argue that situations may arise where the majority or controlling shareholder would be unable to neutralise the conduct complained of. See further *Watson v James* BC9903699 [1999] NSWSC 600. In *Goozee v Graphic* [2002] NSWSC 640 [40], [44] and [45] the court held that a sole shareholder could be subject to oppression because of the conduct the company's directors. See also *In the matter of Richardson & Wrench Holdings Limited* [2013] NSWSC 1990 [39] where the court held that the remedy is not only available to a minority shareholder. According to the court such a reading of section 232 would introduce unjustified

The purpose of the remedy is to allow a court to intervene in the affairs of a company where a member or members do not have the power adequately to prevent or stop oppression or unfair prejudice that they are suffering.²¹⁷ The last mentioned member's or members' position differs from that of majority members or shareholders in that majority members can use their control to prevent or stop the affairs of the company from being conducted oppressively.²¹⁸ Control does not refer to the number of shares a member holds but to the majority of votes a member can exercise.²¹⁹ Because a member who holds 50% of the shares of a company does not theoretically have the ability to exercise control over a company, such a shareholder can rely on the provisions of section 232.²²⁰ Therefore, the principle is that a member can rely on the provisions of section 232 when such a member does not have the ability to address the alleged oppression or unfair prejudice through the use of the member's voting power in the company.²²¹

3.7.4 The capacity in which a member is prejudiced

The capacity in which a member has suffered unfair prejudice is an important aspect of the remedy. Section 232(e) makes it clear that a member can rely on the remedy

restrictions into the interpretation of the wording of the section. The court held '[a]lthough one would not expect that a controlling shareholder would need recourse to the section the complexity of shareholders' and/or directors' relationships within corporate structures are such that I am not willing to rule out the possibility of such an event. I am of the opinion the section can accommodate such an applicant'. See 2.6.1 above for the position in England and 4.5 below for the position in Canada.

²¹⁷ *Patterson v Humfrey* [2014] WASC 446 [53].

²¹⁸ *Patterson v Humfrey* [2014] WASC 446 [53]. See also *Munstermann v Rayward* [2017] NSWSC 133 [22].

²¹⁹ *Patterson v Humfrey* [2014] WASC 446 [53].

²²⁰ *Patterson v Humfrey* [2014] WASC 446 [52]-[53]. See also *Munstermann v Rayward* [2017] NSWSC 133 [22].

²²¹ For a similar position in South Africa see 5.7.1.1 (e) below.

when the member suffered prejudice in his or her capacity as such or in *any other capacity*. Providing members with protection in capacities other than being a member of a company caters for those instances where the defence is raised that the member has not been prejudiced in his capacity as member because, for example, the member is rather prejudiced or affected by the conduct complained of in his capacity as a director.²²² The fact that a member does not have to prove that he or she is prejudiced in his or her capacity as member of the company does not give a member an unqualified right to rely on section 232. Courts do require that a member should demonstrate some relationship between the capacity in which the member has been prejudiced and his or her capacity as member.²²³

3.8 Groups of companies

3.8.1 Introduction

An important aspect relating to section 232 that deserves consideration is the application of the remedy in the context of company groups.²²⁴ Holding companies

²²² RP Austin and IM Ramsay *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 725.

²²³ RP Austin and IM Ramsay *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 726 explain that a member who is also an employee of a company cannot rely on the remedy when the member suffered oppression or is prejudiced because the employment of the member stands independently from his or her membership. A member may rely on section 232 in his or her capacity as an employee in circumstances where the member's employment relationship forms an integral part of his benefits as member. See also *Monster Tyson Pty Ltd v Harbinson* [2014] VSC 278 [67] where the court held that the termination of employment of a member did not affect him in his capacity as member as he was still entitled to participate in the affairs of the company in his capacity as a director. It should also be noted that the court found that the member's employment was lawfully terminated based on his conduct. See 2.6 above for the position in England and 4.5 below for the position in Canada. For the position in South Africa see 5.7.1.4 below.

²²⁴ See 5.7.7 below for a discussion of the statutory unfair prejudice remedy within a group of companies.

often exercise substantial control over subsidiary companies.²²⁵ Control is exercised through the use of the voting rights which a holding company holds in a subsidiary and/or through the power of the holding company to appoint the majority of directors that serve on the board of the subsidiary. Thus, when the oppression remedy is applied within a group of companies it has to be determined whether the term 'affairs'²²⁶ of a company can cover the conduct of affairs of a holding company and/or its subsidiaries. In other words, it has to be determined whether it is possible to attribute the affairs of a subsidiary to that of the holding company and *vice versa*. A further question that arises is whether the nominee directors (nominated by the holding company) have a duty to protect the subsidiary company from the conduct of the holding company.

Prior to the Corporations Act 2001 the court in *Morgan v 45 Fleurs Avenue Pty Ltd*²²⁷ held that a member of a parent company (or holding company) cannot complain of the conduct of a nominee director serving on the board of a subsidiary. To be entitled to such relief the applicant had to be a member of the subsidiary company. It is not sufficient to be a member of the parent company, as the affairs of the subsidiary company cannot be attributed to the affairs of the parent company.²²⁸ The decision in *Morgan v 45 Fleurs Avenue Pty Ltd*²²⁹ can be described as a narrow approach to the application of the oppression remedy within company groups, because the

²²⁵ Section 9 of the Corporations Act 2001 defines a 'holding company' as 'in relation to a body corporate of which the first body corporate is a subsidiary'. A 'subsidiary' is defined in terms of section 9 as 'in relation to a body corporate, means a body corporate that is a subsidiary of the first-mentioned body by virtue of Division 6'.

²²⁶ For a definition of 'affairs' section 9 should be read with section 53 of the Corporations Act 2001.

²²⁷ (1987) 5 ACLC 222.

²²⁸ *Morgan v 45 Fleurs Avenue Pty Ltd* (1987) 5 ACLC 222, 234.

²²⁹ *Morgan v 45 Fleurs Avenue Pty Ltd* (1987) 5 ACLC 222.

implication of this case was that a person can only rely on the oppression remedy if he or she is a member of the particular company whose affairs are conducted in an oppressive or unfairly prejudicial manner. This approach possibly exposed minority members of subsidiaries whose conduct of affairs was substantially dependent on the instructions, approach or policies (control) of the holding company.

The Corporations Act 2001 does not expressly deal with this aspect of the oppression remedy and is silent on the issue. This leaves the interpretation and application of section 232 in the context of groups of companies to the courts. The judgments dealing with the application of section 232 in the context of a group of companies can be divided into different schools of thought, namely, the so-called broader approach²³⁰ and the narrow approach.²³¹ The approach to the application of section 232 to groups of companies was adopted from English case law and considered by Australian courts.²³²

3.8.2 The broader approach

According to the broader approach, the conduct of the holding company or its directors can be imputed by default on its subsidiary because of the holding-subsidiary relationship.²³³ Based on this approach and for purposes of the oppression remedy, no distinction is made between the affairs of the holding company and the subsidiary.²³⁴

²³⁰ See 3.8.2 below.

²³¹ See the reference to the *Morgan* case in 3.8.1 above together with a variation of this approach discussed in 3.8.3 below.

²³² For the position in England see 2.7 above.

²³³ *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324.

²³⁴ *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 342

The broader approach is justified on the basis that policies adopted by the holding (parent company) company determine the steps taken by the subsidiary company.²³⁵ The holding company exercises control over a subsidiary through the adoption and implementation of policies. This approach is further justified on the basis that the remedy should recognise the commercial realities within which business are conducted and that a strict legal-technical approach is not appropriate.²³⁶

When a subsidiary company is formed for the purpose of conducting the same business as that of the holding company, a duty arises on the holding company to conduct its affairs fairly towards the subsidiary company.²³⁷ This is specifically the case when the subsidiary has an independent minority shareholding.²³⁸

The significance of the broader approach is that it is not necessary to consider the conduct of the nominee directors to determine whether their conduct is oppressive or unfairly prejudicial in relation to the affairs of the subsidiary.²³⁹ The mere holding-subsidary relationship is sufficient.

²³⁵ *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 342.

²³⁶ *Fexuto (Pty) Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97; (2001) 37 ACSR 672. See also *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 343.

²³⁷ *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 343.

²³⁸ *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 343; *Dernacourt Investments (Pty) Ltd, Re* (1990) 20 NSWLR 588, 605; *Cumberland Holdings Ltd, Re* (1976) 1 ACLR 361, 376; *Ubertini v Saeco International Group SpA (No 4)* [2014] VSC 47 [506].

²³⁹ *Ubertini v Saeco International Group SpA (No 4)* [2014] VSC 47 [506]; *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 343. In this respect compare this approach to the approach discussed in 3.8.3 below.

3.8.3 Nominee directors and the narrow approach

In accordance with this approach, the conduct of a holding company's affairs cannot be attributed to the subsidiary by default without first considering the conduct of the nominee directors on the board of a subsidiary company that has an independent minority shareholding.²⁴⁰ According to this approach, there must be specific circumstances present to justify the attribution of oppressive conduct in the affairs of the holding company to the affairs of the subsidiary. This will be the case when the directors of the subsidiary failed to protect the interests of the subsidiary against the conduct of the holding company or when the directors of the subsidiary failed to disclose knowledge or information that is material to the minority shareholders of the subsidiary.²⁴¹ This means that the holding-subsidiary relationship is not sufficient to attribute the conduct of the affairs of one company to another.²⁴² A person relying on the oppression remedy must also establish some sort of a breach of duty of a director or directors serving on the board of the relevant company in the holding-subsidiary relationship. Such conduct may include the failure to act or disclose information²⁴³ or the failure to avoid a conflict of interests.²⁴⁴

When serving on the board of the subsidiary company, nominee directors have a duty to the subsidiary and not the holding company.²⁴⁵ When the interests of a holding company and those of its subsidiary company are in conflict, the

²⁴⁰ *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 361.

²⁴¹ *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 362.

²⁴² *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 347. See the discussion of the broader approach in 3.8.2 above.

²⁴³ *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 363.

²⁴⁴ See 3.8.3.2 below.

²⁴⁵ *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 367.

nominee directors of the holding company serving on the board of the subsidiary find themselves in a position of impossibility.²⁴⁶ The conduct of nominee directors is not unfair when they have acted in the interests of the subsidiary.²⁴⁷ In the event of the nominee directors subordinating their duties to the subsidiary company in favour of the interests of the holding company, it may be argued that the affairs of the subsidiary company are or are being conducted in a manner that is oppressive.²⁴⁸ The nominee directors on the board of the subsidiary company cannot argue that even if they would have taken measures to protect the affairs of the subsidiary company, these efforts or measures would not have had any effect on or altered the outcome that resulted from the conduct of the holding company.²⁴⁹

3.8.4 The broad or narrow approach? – the position in Australia

3.8.4.1 Introduction

At first glance, Australian case law appears to be divided on the approach to the application of section 232 in the context of company groups. Neither the broader approach nor the narrow approach has been expressly rejected by Australian courts.²⁵⁰ The broader approach has not been rejected in favour of the narrow approach.²⁵¹ This means that the affairs of a company are not confined to the conduct performed by the nominee or common directors to the boards of the

²⁴⁶ *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 366.

²⁴⁷ *Re Broadcasting Station 2GB Pty Ltd* [1964-5] NSWLR 1648, 1662-1663.

²⁴⁸ *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 367.

²⁴⁹ *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 367.

²⁵⁰ See *Ubertini v Saeco International Group SpA (No 4)* [2014] VSC 47 [516] and [526]

²⁵¹ *Ubertini v Saeco International Group SpA (No 4)* [2014] VSC 47 [516] and [517]. See also 3.8.4.2 below.

relevant companies.²⁵² The broader approach as found in *Scottish Co-operative Wholesale Society Ltd v Meyer*²⁵³ was specifically approved in *Cumberland Holdings Ltd, Re*.²⁵⁴

3.8.4.2 The rejection of the broader approach?

The narrow approach was adopted in *Norvabron Pty Ltd (No 2), Re*.²⁵⁵ Although the case appears to have adopted the narrow approach, it is not authority for the rejection of the broader approach on the basis that the statement of claim in this case focused on the conduct of the directors.²⁵⁶ Although the court referred to *Scottish Co-operative Wholesale Society Ltd v Meyer*²⁵⁷ containing the adoption of the broader approach, it did not expressly reject the approach.²⁵⁸

In *Dernacourt Investments Pty Ltd, Re*²⁵⁹ the court held that the conduct of a holding company or some or all of its directors may be regarded as the affairs of the subsidiary.²⁶⁰ Also, the conduct of the subsidiary or all or some of its directors may be regarded as the conduct of its holding company.²⁶¹ Because the court in *Dernacourt Investments Pty Ltd, Re*²⁶² did not find that the directors were not under a duty to act it cannot be treated as authority for the rejection of the broader

²⁵² *Ubertini v Saeco International Group SpA (No 4)* [2014] VSC 47 [517].

²⁵³ [1959] AC 324.

²⁵⁴ (1976) 1 ACLR 361, 376.

²⁵⁵ (1986) 11 ACLR 279.

²⁵⁶ *Ubertini v Saeco International Group SpA (No 4)* [2014] VSC 47 [520] and [522].

²⁵⁷ [1959] AC 324.

²⁵⁸ *Ubertini v Saeco International Group SpA (No 4)* [2014] VSC 47 [520].

²⁵⁹ (1990) 20 NSWLR 588.

²⁶⁰ *Dernacourt Investments Pty Ltd, Re* (1990) 20 NSWLR 588, 615.

²⁶¹ *Dernacourt Investments Pty Ltd, Re* (1990) 20 NSWLR 588, 615.

²⁶² (1990) 20 NSWLR 588.

approach.²⁶³

3.8.4.3 Conclusion

In conclusion, there is no authority restricting courts to the narrow approach in the application of the oppression remedy within a group of companies.²⁶⁴ What is clear from the application of section 232 to companies within a group, is that it is a commercial reality that companies conduct their business within a group. Circumstances may demand that the conduct or activities of one group member (company) can and must be attributed to other companies within the group.²⁶⁵

3.9 The relief

Only when the jurisdictional facts of section 232 are proven, may a court grant relief in terms of section 233.²⁶⁶ Section 233 of the statutory oppression remedy sets out a list of possible orders that a court can make. A court has a broad discretion to provide relief and is not restricted to the orders listed in the section.²⁶⁷ The wide power or broad discretion entrusted to a court provides the necessary flexibility in

²⁶³ *Ubertini v Saeco International Group SpA (No 4)* [2014] VSC 47 [525].

²⁶⁴ *Ubertini v Saeco International Group SpA (No 4)* [2014] VSC 47 [528].

²⁶⁵ DD Prentice 'The Theory of the Firm: Minority Shareholders Oppression: Section 459-461 of the Companies Act 1985' (1988) 8 *Oxford J of Legal Stud* 55.

²⁶⁶ *North East Equity Pty Ltd v Sirmans* [2018] FCA 1042 (9 July 2018) [13]; *In the matter of the New South Wales Bar Association* [2014] NSWSC 1695 [24]; *Hua Cheng Property Pty Limited, Re* [2014] NSWSC 533 [4] and [40]; *Hunter v Organic & Natural Enterprise Group Pty Ltd & Ors* [2012] QSC 383 [142]. As regards the discretion to grant relief the court in *Shanahan v Jatese Pty Ltd* [2018] NSWSC 1088 [304] clearly stated that '[t]here is no automatic right to obtain a remedy where a breach of s 232 is established'.

²⁶⁷ *Dr Leo Shanahan v Jatese Pty Ltd* [2018] NSWSC 1088 [304]; *Patterson v Humfrey* [2014] WASC 446 [50]; *McLaughlin v Dungowan Manly Pty Ltd* [2011] NSWSC 215 [55]; *Remrose Pty Ltd v Allsilver Holdings Pty Ltd & Ors* [2005] WASC 251 [77].

tailoring relief that it considers fit²⁶⁸ to the particular circumstances of a case.²⁶⁹ It is not a requirement that the relief should be just and equitable.²⁷⁰ The main purpose of relief in terms of section 233 is to end the oppression or unfair prejudice suffered by an applicant.²⁷¹ The form of relief must not be more intrusive than necessary to end the conduct complained of.²⁷²

²⁶⁸ *Vadori v AAV Plumbing* [2010] NSWSC 274 [218]; *Pastizzi Cafe Pty Ltd v Hossain (No 4)* [2011] NSWSC 808 [73]. In *Remrose Pty Ltd v Allsilver Holdings Pty Ltd & Ors* [2005] WASC 251 [78] the court stated that the court will first consider a remedy that is the least intrusive but the remedy must be able to terminate the conduct complained of. See also *Tomanovic v Argyle HQ Pty Ltd; Tomanovic v Global Mortgage Equity Corporation Pty Ltd; Sayer v Tomanovic* [2010] NSWSC 152 [44].

²⁶⁹ *Falkingham v Peninsula Kingswood Country Golf Club Ltd* [2015] VSCA 16 [79]; *McLean v DID Piling Pty Ltd & ORS* [2014] SASC 76 [70]; *William McCausland v Surfing Hardware International Holding Pty Ltd ACN 090 252 752 (No 2)* [2014] NSWSC 163 [45]; *Tomanovic v Argyle HQ Pty Ltd; Tomanovic v Global Mortgage Equity Corporation Pty Ltd; Sayer v Tomanovic* [2010] NSWSC 152 [43].

²⁷⁰ *Spence v Rigging Rentals WA Pty Ltd* [2015] FCA 1158 [139]. It is important that the remark of the court that the relief must be just and equitable in the circumstances of the particular case must be understood to mean that the relief must be fair and reasonable and not that the conduct complained of must justify the winding-up and liquidation of a company on 'just and equitable' basis. See also *Joint v Stephens* [2008] VSCA 210 [136]. See 3.9.1 below for a discussion of relief in the form of a winding-up and liquidation order in the context of oppression proceedings.

²⁷¹ *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [121-2]. See also *Bull v The Quarter Horse Association* [2014] NSWSC 1665 [335] where the court referred to authority stating that the purpose of remedies for oppression is firstly to bring the conduct causing the oppression to an end and secondly to provide for compensation. See also *Vadori v AAV Plumbing* [2010] NSWSC 274 where the court held that the relief must place the applicant as far as possible in the position as if there were no oppression. See further *Tomanovic v Argyle HQ Pty Ltd; Tomanovic v Global Mortgage Equity Corporation Pty Ltd; Sayer v Tomanovic* [2010] NSWSC 152 [39]; *Vigliaroni & Ors v CPS Investment Holdings Pty Ltd & Ors* [2009] VSC 428 [64] the court held that the purpose of relief is to eliminate the oppression complained of as well as any future oppression.

²⁷² *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [121]. See also *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (1998) 28 ACSR 688, 742; *Dernacourt Investments (Pty) Ltd, Re* (1990) 20 NSWLR 588, 620; *Martin v Australian Squash Club Pty Ltd* (1996) 14 ACLC 452, 475.

3.9.1 Winding-up of a company

3.9.1.1 Introduction

The court may grant relief in terms of which the company may be wound up.²⁷³ Such winding-up is regulated in terms of section 461.²⁷⁴ An application for or granting a winding-up order may in some instances be oppressive or unfairly prejudicial to members other than the applicant.²⁷⁵ Therefore the granting of a winding-up order must be carefully considered especially in light of the fact that the relief must be as less intrusive as possible²⁷⁶ and that the statutory oppression remedy provides alternative forms of relief to the winding-up of companies.²⁷⁷

3.9.1.2 The difference in wording

The interrelationship between the winding-up of a company based on the oppression remedy and section 461(1)(k) must be considered to establish the scope of application of these two remedies. Although both section 233 and section 461(1)(k) of the Corporations Act 2001 provide for the winding-up of companies, there are differences in the formulation of the grounds which can be relied on for such orders.

Section 461(1)(k) of the Corporations Act 2001 provides for the liquidation of a company on 'just and equitable' grounds. This difference must also be considered in light of the fact that the purpose of the statutory unfair prejudice remedy is to

²⁷³ Corporations Act 2001, s 233(1)(a).

²⁷⁴ See specifically the Corporations Act 2001, s 461(1)(e)-(f).

²⁷⁵ See Corporations Act 2001, s 467(4). See 3.9.1.3 below.

²⁷⁶ See 3.9 above.

²⁷⁷ See 3.3 and specifically 3.3.2.2 above. See also 3.9.1.3 below.

create an alternative remedy to the liquidation of a company on 'just and equitable' grounds.²⁷⁸ If an identical approach were taken to applications in terms of section 232 as with applications for the liquidation of a company on 'just and equitable' circumstances, the attempt of the legislature to provide for an alternative remedy in section 232 may be neutralised.²⁷⁹

3.9.1.3 A remedy of 'last resort' or an 'extreme step'

There is no principle that bars the liquidation of a company if the applicable legislative criteria are met.²⁸⁰ However, the words 'just and equitable' are indicative of the intention of the legislature to empower a court to subject the rights of an applicant to equitable considerations.²⁸¹

Equitable considerations come into play especially when the liquidation of a solvent and viable company is considered as the liquidation of a company is a remedy of last resort.²⁸² The winding-up of a solvent company does not only affect the interests of the parties to a dispute but also impact on the investments of other members and job security of the employees of the company concerned.²⁸³ When considering relief in the form of a winding-up order in terms of section 233 the

²⁷⁸ *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [121]. See also 3.3 and specifically 3.3.2.2 above regarding the need for a remedy as an alternative to an order for liquidation on 'just and equitable' grounds.

²⁷⁹ *Tomavic v Global Mortgage Equity Corporation Pty Ltd* [2011] NSWCA 104 [177].

²⁸⁰ The court in *Asia Pacific Joint Mining Pty Ltd v Allways Resources Holding Pty Ltd* [2018] QCA 48 [46] specifically stated that there is no presumption against the winding-up of companies, but noted that the winding-up of a solvent company is an 'extreme step'. See also *Hillam v Ample Source International Ltd (No 2)* [2012] FCAFC 73; (2012) 202 FCR 336 [70].

²⁸¹ *Australian Institute of Fitness (Pty) Limited v Australian Institute of Fitness (Vic)/Tas) Pty Limited (No 3)* [2015] NSWSC 1639 [111].

²⁸² *Amazon Pest Control Pty Limited, Re* [2012] NSWSC 1568 [31]-[32].

²⁸³ *Asia Pacific Joint Mining Pty Ltd v Allways Resources Holding Pty Ltd* [2018] QCA 48 [46].

provisions of section 467(4) should also be applied.²⁸⁴ Section 467(4) provides that:

‘Where the application is made by members as contributories of the ground that is just and equitable that the company should be wound up or that the directors have acted in a manner that appears to be unfair or unjust to other members, the Court, if it is of the opinion that:

- (a) the applicants are entitled to relief either by winding up the company or by some other means; and
- (b) in the absence of any other remedy it would be just and equitable that the company should be wound up;

must make a winding up order unless it is also of the opinion that some other remedy is available to the applicants and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.’

The criterion is not whether the liquidation order is an order of last resort but the test is rather whether the remedy is adequate in appropriately addressing the conduct complained of in the circumstances of the case.²⁸⁵ This will require a court to consider the availability of other remedies which could remedy the conduct complained of.²⁸⁶ In this regard a court would seriously consider the ability of parties to transfer their minority shareholding²⁸⁷ and would favour the postponement of proceedings to afford the parties an opportunity to negotiate such a buy-out.²⁸⁸

²⁸⁴ *Asia Pacific Joint Mining Pty Ltd v Allways Resources Holding Pty Ltd* [2018] QCA 48 [63].

²⁸⁵ *Asia Pacific Joint Mining Pty Ltd v Allways Resources Holding Pty Ltd* [2018] QCA 48 [46]. See *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (1998) 28 ACSR 688, 742 where the court emphasised that the winding-up of a solvent company is a remedy of last resort. This principle was not overturned by the Court of Appeal in *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* [2001] NSWCA 97; (2001) 37 ACSR 672.

²⁸⁶ *Asia Pacific Joint Mining Pty Ltd v Allways Resources Holding Pty Ltd* [2018] QCA 48 [46] and [57].

²⁸⁷ *Australian Institute of Fitness (Pty) Limited v Australian Institute of Fitness (Vic)/Tas) Pty Limited (No 3)* [2015] NSWSC 1639 [116].

²⁸⁸ *Australian Institute of Fitness (Pty) Limited v Australian Institute of Fitness (Vic)/Tas) Pty Limited (No 3)* [2015] NSWSC 1639 [115]; *In the matter of Calabria Community Club Ltd* [2013] NSWSC 998 [128].

3.9.1.4 Irreconcilable differences and the winding-up of a company on 'just and equitable' grounds

An understanding of the application of section 232 and the liquidation of a company on 'just and equitable' grounds to circumstances where an irreconcilable breakdown took place between a member and other members of a company, helps to understand the scope of application of the two remedies. In principle, a member cannot rely on section 232 for relief based on an irreconcilable breakdown in the relations between the applicant (member) and other members of a company.²⁸⁹ Despite the fact such a member cannot rely on section 232 for relief, the irreconcilable breakdown in relations may justify the liquidation of a company on 'just and equitable' grounds.²⁹⁰ In terms of section 491 of the Corporations Act 2001, a company can voluntarily be wound-up when a special resolution to that effect is adopted. Because liquidation affects the interests of all members in a similar manner the adoption of a special resolution to initiate the liquidation process cannot be seen as fair or unfair as it 'does not involve the destruction of one interest to the advantage of another'.²⁹¹

²⁸⁹ See 3.6.7.4 above.

²⁹⁰ See *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* [2008] VSCA 86; (2008) 66 ACSR 325 [119] where the court noted that '[w]inding up is the characteristic remedy in circumstances where a working relationship predicated on mutual co-operation, trust and confidence has broken down. Equity would not ordinarily order the continuation of such an association where it would be a futility, would require continuing supervision or would be tantamount to specific enforcement of a contract of personal services'. See also *Knights Quest Pty Ltd v Daiwa Can Company & Anor* [2018] VSC 426 [157]-[160] for an example where the court found that no grounds for oppression existed but ordered the winding-up and liquidation of a company in terms of section 461(1)(k) of the Corporations Act 2001 based on the existence of a deadlock and the inability of the board to function properly. See further *In the matter of Pure Nature Sydney Pty Ltd* [2018] NSWSC 914 [70].

²⁹¹ See *Catto & Ors v Hampton Australia Limited (In Liquidation) & Ors (No 3)* [2004] SASC 242 [94]-[96].

3.9.2 Modification of constitution

An applicant may approach the court in terms of section 232 for an order that the existing constitution of the company be modified or repealed.²⁹² This form of relief deviates from the normal procedures in the Corporations Act 2001 in terms of which the constitution of a company can be modified.²⁹³

3.9.3 Regulation of future affairs

The court may order the regulation of the future affairs of a company.²⁹⁴ Such an order is aimed at the prevention of a repetition of the affairs complained of or to direct a specific course of action in relation to the conduct of the future affairs of a company. In case of an order to regulate the future affairs of a company to end or prevent the conduct complained of, consideration should be given to terminating the association of the members of a company by way of a buy-out or purchase order.²⁹⁵

3.9.4 Orders for the purchase of shares

3.9.4.1 Introduction

An order for the purchase of shares is one of the most practical and useful forms of relief that a court may grant in terms of section 232 read with section 233(1)(d) of the Corporations Act 2001.²⁹⁶ The practical value and object of such an order is to

²⁹² Corporations Act 2001, s 233(1)(b).

²⁹³ The prescribed procedure for the amendment of the constitution by a special resolution is described in section 136 of the Corporations Act 2001.

²⁹⁴ Corporations Act 2001, s 233(1)(c).

²⁹⁵ See in this regard *Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd* (1998) 28 ACSR 688, 742. See 3.9.4 below for a discussion of buy-out or purchase orders.

²⁹⁶ See also Corporations Act 2001, s 233(1)(e).

terminate the association between members.²⁹⁷ The object of the order is not to compensate a shareholder for any loss, but to end the oppression complained of.²⁹⁸ Further, the remedy cannot be used to force a buy-out in contravention of the terms contained in the Memorandum and Articles of Association.²⁹⁹ Usually, the majority members would be ordered to buy the shares of minority members.³⁰⁰ In exceptional circumstances it may be ordered that the minority member (or members) purchase the shares of the majority.³⁰¹

An order for the purchase of shares can be made in terms of section 233(1)(d) and section 233(1)(d) of the Corporations Act 2001. It is important to note that an order in terms of section 233(1)(d) has the effect that purchase of the

²⁹⁷ *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [122]. It is important to note that an order for the purchase of a member's shares usually is an appropriate alternative to the winding-up of a company which is discussed in 3.9.1 above

²⁹⁸ See *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [122]-[123] especially where the court stated that the purpose of the relief in the form a purchase order is not to compensate a shareholder although the order may have such effect. See also *Patterson v Humfrey* [2014] WASC 446 [198]. However, see *Shirim Pty Ltd v Fesena Pty Ltd* [2002] NSWSC 10; BC200200074 (*Shirim*) [12] where the court did hold that one of the purposes of the purchase order is to compensate the oppressed shareholder. See further *Wain & Ors v Drapac & Ors (No. 2)* [2013] VSC 381 [39] where the court noted that '[a]t the heart of these principles is that the price to be paid is compensatory in nature and is aimed at redressing the wrong done (the oppressive conduct)'. In *Re Hollen Australia Pty Ltd* [2009] VSC 95 [84] the court held that relief in terms of section 233 has the objective of compensating a member for oppression suffered is a relevant factor for a court to consider when deciding whether relief in the form of a purchase order or in the form of a winding-up order should be made. See further *Rankine v Rankine* (1995) 124 FLR 340, 345 where the court remarked that relief in the form of a purchase or buy-out order has the effect of compensating the member who has suffered oppression. For a discussion of the adjustments a court can make see 3.9.4.2 (b) below.

²⁹⁹ *Catto & Ors v Hampton Australia Limited (In Liquidation) & Ors (No 3)* [2004] SASC 242 [80].

³⁰⁰ *Patterson v Humfrey* [2014] WASC 446 [199].

³⁰¹ *Patterson v Humfrey* [2014] WASC 446 [199]. See also *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [122] where the court noted, that although it would be unusual, it can be ordered in terms of section 233(1)(d) that 'the oppressor sell to the oppressed'.

relevant shares be transferred between the parties to the dispute. Such a purchase or transfer of shares does not affect the capital of a company in the sense that that assets are transferred or distributed to a member. An order in terms of section 233(1)(e) does affect the capital of company as the reduction of capital takes places as a result of the company being compelled to purchase the relevant shares from a member or members.

3.9.4.2 The valuation of shares subject to purchase orders

(a) Introduction

As discussed, a court has the power in terms of section 233 to make an order in terms of which the shares of a member be purchased by either the company³⁰² or other members of the company.³⁰³ Section 233 does not prescribe the terms on which such a purchase of shares should take place.³⁰⁴ The section is also silent on the manner in which the value of shares is to be determined.³⁰⁵

The terms and valuation of shares in terms of which the purchase of shares will take place is thus left to the discretion of a court. A court will have regard to the traditional methods of valuing the shares of a member of a company.³⁰⁶ It is the duty of a court to formulate a purchase order that is fair based on the facts and circumstances of each case.³⁰⁷

³⁰² Corporations Act 2001, s 233(e). See also 3.9.5 below.

³⁰³ Corporations Act 2001, s 233(d).

³⁰⁴ *United Rural Enterprises v Lopmand* [2003] NSWSC 910 [36].

³⁰⁵ *United Rural Enterprises v Lopmand* [2003] NSWSC 910 [36].

³⁰⁶ *Wain & Ors v Drapac & Ors (No. 2)* [2013] VSC 381 [39].

³⁰⁷ See 3.9 above. See also Richard Brockett 'The Valuation of Minority Shareholdings in an Oppression Context – a Contemporary Review (2012) 24:2 *Bond Law Review* 101, 114.

It may be argued that the legislature has deliberately chosen not to regulate the valuation of shares or stipulating the terms that will apply to purchase orders. The adoption of this approach is to ensure that the exercise of a court's discretion is not unnecessarily limited or restricted.³⁰⁸ The discretion of a court is only bound to the principle that this discretion should be exercised judicially and that the order is fair in light of the facts and circumstances of each case.³⁰⁹ Fairness is thus the determining factor in the determination of the terms and conditions of a purchase order.

As previously explained, the value set for the purchase of the shares in terms of a buy-out order must be fair in the context of all the circumstances of the case.³¹⁰ A court has a discretion to set a price for the sale of the shares that will not necessarily reflect the actual value or real worth of the shares in the open market.³¹¹ A court in the exercise of its discretion will have regard to factors such as the need to make any adjustments to compensate for the effect of the conduct complained of,³¹² the date to be used as basis for the valuation,³¹³ the possible application of a minority discount,³¹⁴ the procedures in the constitution of a company pertaining to

³⁰⁸ See 3.5 above where it is pointed out that the provisions of the oppression remedy are interpreted to enhance the remedy and that they should not be interpreted in such a way as to introduce restrictions unjustifiably. See also 3.9 above. See Richard Brockett 'The Valuation of Minority Shareholdings in an Oppression Context – a Contemporary Review (2012) 24:2 *Bond Law Review* 101, 114 who emphasises that a court has a broad discretion in determining the value of shares for purposes of the oppression remedy.

³⁰⁹ *United Rural Enterprises v Lopmand* [2003] NSWSC 910 [36].

³¹⁰ *Wain & Ors v Drapac & Ors (No 2)* [2013] VSC 381 [46].

³¹¹ *Wain & Ors v Drapac & Ors (No 2)* [2013] VSC 381 [39] and [46].

³¹² See 3.9.4.2 (b) below.

³¹³ See 3.9.4.2 (c) below.

³¹⁴ See 3.9.4.2 (d) below.

the valuation of shares a company³¹⁵ and any other relevant factor.³¹⁶

(b) Adjustments to the value of the shares of a member

The problem with using ordinary principles of valuation is that it does not take into account the necessary adjustments that have to be made to determine the fair value of the relevant shares in light of the circumstances of each case.³¹⁷ The value that a court will place on the value of shares subject to a buy-out order does not necessarily reflect the market or actual value of the shares, but in some circumstances may include compensation or any other adjustment that is fair.³¹⁸ The purpose of compensation in this form is to neutralise the effect of the unfair prejudicial conduct or consequences suffered by the member as a result thereof.³¹⁹

(c) The date of valuation

Usually the date of the commencement of legal proceedings is used as the date for the valuation of the shares that are subject to a purchase order.³²⁰ However, the

³¹⁵ See 3.9.4.2 (f) below.

³¹⁶ See 3.9.4.2 (e) below.

³¹⁷ *Wain & Ors v Drapac & Ors (No 2)* [2013] VSC 381 [44]. See *Shirim Pty Ltd v Fesena Pty Ltd* [2002] NSWSC 10; BC200200074 (*Shirim*) [13] where the court held that the ordinary principles of valuation are inadequate in the context of the oppression remedy.

³¹⁸ *Wain & Ors v Drapac & Ors (No 2)* [2013] VSC 381 [39]. See also *Shirim Pty Ltd v Fesena Pty Ltd* [2002] NSWSC 10; BC200200074 (*Shirim*) [12]. See further 3.9.10 below for a discussion of a court's power to order the payment of compensation.

³¹⁹ *Wain & Ors v Drapac & Ors (No. 2)* [2013] VSC 381 [39]; *In the matter of North Coast Transit Pty Limited* [2013] NSWSC 1119 [24]. See *Shanahan v Jatese Pty Ltd* [2018] NSWSC 1088 [329] where the court held that the assessment of the value of shares must be done on the basis that the oppressive conduct did not occur.

³²⁰ *Shirim Pty Ltd v Fesena Pty Ltd* [2002] NSWSC 10; BC200200074 (*Shirim*) [14]. The approach is supported by Richard Brockett 'The Valuation of Minority Shareholdings in an Oppression Context – a Contemporary Review (2012) 24:2 *Bond Law Review* 101, 120-121 and Steven Sirianos

date to be used as basis for the valuation of the relevant shares must be just and fair to parties involved.³²¹ This means that the date is dependent on the circumstances of each case.³²²

(d) Minority discount

The general principle is that a minority discount is not applied to value of the shares of a minority shareholder whose shares are subject to a buy-out order.³²³ The advantage of this approach is that oppressive conduct on the part of the majority shareholders is not incentivised.³²⁴ The second reason why a minority discount should be applied is that the share in question is not sold voluntarily.³²⁵ In appropriate circumstances a court may apply a discount to the value of the shares

'Problems of Share Valuation under Section 260 of the Corporations Law' (1995) 13 *Company and Securities Law Journal* 88, 106.

³²¹ *Grego v Copeland & Ors* [2011] VSC 521 [62]; *Short v Crawley (No 30)* [2007] NSWSC 1322 [1237]. See Richard Brockett 'The Valuation of Minority Shareholdings in an Oppression Context – a Contemporary Review (2012) 24:2 *Bond Law Review* 101, 121 who argues that courts rejected the notion that the date of valuation of shares subject to a buy-out order must be done with reference to the date of the commencement of the legal proceedings in terms of the oppression remedy. This is evident from the case law accepting alternative dates as a basis for the valuation of shares for purposes of a buy-out order.

³²² *Grego v Copeland & Ors* [2011] VSC 521 [62]; *Foody v Horewood & Ors* (2007) 62 ACSR 576. See also Richard Brockett 'The Valuation of Minority Shareholdings in an Oppression Context – a Contemporary Review 2012 (24) 2 *Bond Law Review* 101, 122.

³²³ *In the matter of North Coast Transit Pty Limited* [2013] NSWSC 1119 [23]; *Mopeke Pty Ltd v Airport Fine Foods Pty Ltd* [2007] NSWSC 153 [96]. See, however, *Roberts v Walter Developments Pty Ltd* (1997) 15 ACLC 882, 906 where the court did apply a discount to a minority shareholding, but remarked that the application of a minority discount will normally be inappropriate.

³²⁴ Steven Sirianos 'Problems of Share Valuation under Section 260 of the Corporations Law' (1995) 13 *Company and Securities Law Journal* 88, 103. Richard Brockett 'The Valuation of Minority Shareholdings in an Oppression Context – a Contemporary Review (2012:24 2 *Bond Law Review* 101, 115.

³²⁵ Richard Brockett 'The Valuation of Minority Shareholdings in an Oppression Context – a Contemporary Review (2012) 24:2 *Bond Law Review* 101, 123.

subject to a buy-out order.³²⁶ This will usually be the case where the conduct of the minority shareholder caused a reduction in the value of the company.³²⁷

(e) Other factors taken into consideration in determining fair value

In determining a fair value of shares, a court may consider the nature of the oppressive or unfairly prejudicial conduct, the nature of the relationship between the parties, the reason for the breakdown of the relationship, the expectations a party had in relation to playing an active role in the management of the company and the restrictions that are placed on a party to divest its interest in the company.³²⁸ To ensure that a party is fairly compensated a court may also take into consideration the profits, remuneration or dividends that a party had been entitled to by virtue of its membership.³²⁹ To determine a price that is fair a court must consider the intention of the parties at the formation of the company and any prior conduct of any of the parties.³³⁰

(f) The valuation of shares and the constitution of a company

The discretion of the court pertaining to the valuation of shares is wide and only subject to the principle that it has to be exercised judicially.³³¹ This is demonstrated by the fact that a court may even deviate or ignore methods or procedures agreed

³²⁶ *In the matter of North Coast Transit Pty Limited* [2013] NSWSC 1119 [23].

³²⁷ Richard Brockett 'The Valuation of Minority Shareholdings in an Oppression Context – a Contemporary Review (2012) 24:2 *Bond Law Review* 101, 123.

³²⁸ *Wain & Ors v Drapac & Ors (No. 2)* [2013] VSC 381 [43].

³²⁹ *Wain & Ors v Drapac & Ors (No. 2)* [2013] VSC 381 [44].

³³⁰ *Wain & Ors v Drapac & Ors (No. 2)* [2013] VSC 381 [47].

³³¹ *United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* [2003] NSWSC 910; (2003) 47 ACSR 514 [36].

to in the constitution or articles of association of a company.³³² This may be because the sale of the particular shares is not voluntary and may be inappropriate in the context of the specific case.

3.9.5 Reduction of a company's share capital

Section 233(1)(e) provides for an order in terms of which a reduction of the company's share capital can be made.³³³

3.9.6 A member seeking an order to institute or intervene in legal proceedings on behalf of a company

3.9.6.1 Introduction

The provisions of section 233 of the Corporations Act 2001 makes it possible for a member to approach a court to seek relief in the form of an order authorising a member to institute or intervene in legal proceedings on behalf of a company. This relief should be considered in light of the traditional approaches to the oppression (or unfair prejudice) remedy and the derivative action.

3.9.6.2 The traditional approach to the statutory personal remedy and statutory derivative claim

Originally the oppression or unfair prejudice remedy was aimed at the protection of the personal rights and interests of members. The derivative claim or action was aimed at protecting the rights of the company. The distinction between these two remedies was often justified on the basis that a company is a legal entity separate

³³² *In the matter of North Coast Transit Pty Limited* [2013] NSWSC 1119 [23].

³³³ See 3.9.4.2 above for an explanation of the difference of an order in terms of section 233(1)(d) and (e).

and distinct from its members.³³⁴ The implication was that when a wrong was committed against a company (or when the rights of a company were infringed), the cause of action vested in the company.³³⁵ This meant that only the company could enforce its rights against the wrongdoer. The members of a company cannot enforce the rights of a company as these rights do not belong to or vest in them.³³⁶

When the statutory personal action and the statutory derivative action are viewed as two distinct actions (or remedies), each having its own functions in terms of the Corporations Act 2001, it could be argued that one remedy cannot replace or usurp the functions of the other.³³⁷ In short, the argument is that the provisions of the one should not be interpreted in such a manner as to circumvent the specific requirements of the other. The argument places further emphasis on the proposition that a clear distinction must be maintained between the statutory derivative action and the statutory personal remedy.³³⁸

³³⁴ From a theoretical perspective, section 237 enforces the separate legal personality of a company.

³³⁵ For example, where a director's duty is breached the cause of action belongs to the company and it is the company that should institute legal proceedings based on such a breach, provided that it is in the best interests of the company. Although the duties of directors are owed to the company, a breach of such a duty does not only prejudice a company but may also have a prejudicial effect on the interests of the members of a company. When a duty owed to the company is breached the cause of action resides with the company and therefore it is the company that should seek redress. A member cannot rely on the cause of action belonging to the company to obtain relief.

³³⁶ See also 3.2.2 above for a discussion of a company as a body corporate.

³³⁷ See 3.3.4.1 and 3.3.4.2 above for a discussion of previous provisions dealing with the statutory personal remedy and the criticism against making provision for the institution of legal proceedings on behalf of the company in terms of the personal remedy.

³³⁸ See 3.3.4.1 and 3.3.4.2 above.

3.9.6.3 The statutory approach to the statutory personal remedy and statutory derivative claim

(a) Introduction

The fact that section 233(1)(g) of the Corporations Act 2001 now expressly provides for relief in the form of authorising a member to institute or defend legal proceedings on behalf of a company blurs the distinction between the personal remedy and the derivative claim. This provision creates an overlap between the statutory personal action in section 232 read with section 233 and the statutory derivative action in section 237 of the Corporations Act 2001.³³⁹ This approach by the legislature creates doubt as to whether the traditional distinction between the two remedies is maintained for purposes of the Corporations Act 2001. This doubt is reinforced by the fact that it can be argued that the position in *Foss v Harbottle*³⁴⁰ has been abolished specifically to overcome the problems and uncertainty created by the principles set out in this judgment.³⁴¹

(b) The abolishment of the rule in *Foss v Harbottle*³⁴²

The abolishment of the principles in *Foss v Harbottle*³⁴³ and the replacement thereof by statutory provisions have important implications for those who wish to rely on the

³³⁹ From a practical point of view, the same conduct may justify relief in terms of section 232 read with section 233 ('the statutory personal action') and sections 237 and 237 ('statutory derivative action').

³⁴⁰ (1843) 2 Hare 461, 67 ER 189.

³⁴¹ See *Fexuto Pty Limited v Bosnjak Holdings Pty Limited & Ors* [2001] NSWCA 97 [131] where the court accepted the statement made in *Saul D Harrison & Sons plc, Re* [1995] 1 BCLC 14, 18 that statutory reform aimed to 'outflank' the position resulted from the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189.

³⁴² (1843) 2 Hare 461, 67 ER 189.

³⁴³ (1843) 2 Hare 461, 67 ER 189.

statutory derivative claim in section 237. Prior to the statutory personal remedy and the statutory derivative action, the principles and rules as contained in *Foss v Harbottle*³⁴⁴ also applied to company law in Australia.³⁴⁵ Section 236 now expressly provides that '[t]he right of a person at general law to bring, or intervene in, proceedings on behalf of the company is abolished'.³⁴⁶ The effect of this provision is that the derivative action is now only regulated by statute.³⁴⁷

(c) *The provisions of section 237 of the Corporations Act 2001*

In order fully to appreciate the implications of the overlap between section 232 read with 233 and section 237 the basic provisions regarding the statutory derivative claim need to be outlined. A court may authorise a person to bring, or intervene in, proceedings on behalf of a company only if the requirements of section 237(2) are met. Section 237(2) provides that the court 'must' grant an order authorising a person to bring, or to intervene in, proceedings of a company if it is satisfied that the company itself will probably not bring the proceedings.³⁴⁸ Further, the court needs to be convinced that the member is acting in good faith³⁴⁹ and that it is in the best interests of the company that the member is authorised to commence with, defend or intervene in legal proceedings.³⁵⁰ To assist the court, section 237(3) creates a rebuttable presumption of when it will not be in the best interests of the company to

³⁴⁴ (1843) 2 Hare 461, 67 ER 189.

³⁴⁵ *Fexuto Pty Limited v Bosnjak Holdings Pty Limited & Ors* [2001] NSWCA 97 [131].

³⁴⁶ Corporations Act 2001, s 236 (3). See 5.9.15 below for the South African position.

³⁴⁷ For the position relating the principles in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 in England see Chapter 2 above.

³⁴⁸ Corporations Act 2001, s 237(2)(a).

³⁴⁹ Corporations Act 2001, s 237(2)(b).

³⁵⁰ Corporations Act 2001, s 237(2)(c).

authorise a member to bring or intervene in proceedings on behalf of the company. The subject matter of the application must also relate to a 'serious question to be tried'.³⁵¹ Before a court will make such an order the applicant must show that he or she has at least 14 days before the application was made, given written notice to the company of the intention to bring such an application.³⁵² This notice must further state the reasons for his or her intention to apply for relief in terms of section 237.³⁵³ If the applicant has not given written notice to the company, the member must satisfy the court that it is 'appropriate' to grant relief despite non-compliance with section 237(2)(i).³⁵⁴

Section 239 expressly deals with the availability of the derivative action in the event of the ratification or approval of conduct that would otherwise have been actionable in terms of the statutory derivative action.³⁵⁵ Section 239 states that the ratification or approval of conduct does not disqualify an applicant in terms of section 237, with leave of a court, from commencing or intervening in proceedings involving the company.³⁵⁶ However, the ratification of conduct would be taken into consideration when a court has to adjudicate a matter brought on behalf of the company in terms of section 237.³⁵⁷ When a court has to consider the effect of the ratification of conduct that may be subject to legal proceedings, it will consider

³⁵¹ Corporations Act 2001, s 237(2)(c).

³⁵² Corporations Act 2001, s 237(2)(e)(i).

³⁵³ Corporations Act 2001, s 237(2)(e)(i).

³⁵⁴ Corporations Act 2001, s 237(2)(e)(ii).

³⁵⁵ In terms of the principles in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 a member would have been unable to institute proceedings on behalf of a company if the members of the company ratified or approved the conduct complained of.

³⁵⁶ Corporations Act 2001, s 239(1)(a).

³⁵⁷ Corporations Act 2001, s 239(2).

whether the members were properly informed about the details of the conduct that is proposed to be ratified or approved by the members of a company.³⁵⁸ The court must further consider whether the members that ratified or approved the relevant conduct were 'acting for proper purpose'.³⁵⁹

(d) *The overlap between the statutory personal action and the derivative claim*

A reading of section 233 of the Corporations Act 2001 shows that the relationship between the oppression remedy and the derivative claim has now changed. An interesting feature of section 233 is that it expressly empowers a court to grant relief to authorise a member to institute proceedings on behalf of a company.³⁶⁰ One of the concerns regarding this legislative approach is that section 233(1)(g) will make section 237 of the Corporations Act 2001 redundant or alternatively that section 233(1)(g) may be abused to bypass the requirements of section 237. Australian courts held that the fact that a particular course of action is actionable by a company does not exclude relief in terms of sections 232 read with 233.³⁶¹ Companies are protected from the abuse because the jurisdictional requirements of section 232 have to be proven before a court has a discretion to order relief in terms of section 233(1)(g). A court will also consider alternative remedies and take into account the relationship between the grounds upon which a member relies and the nature of the

³⁵⁸ Corporations Act 2001, s 239(a).

³⁵⁹ Corporations Act 2001, s 239(b).

³⁶⁰ Corporations Act 2001, s 233(1)(g). The section specifically provides:

'(g) authorising a member, or a person to whom a share in the company has been transmitted by will or operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company.'

³⁶¹ *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo & Anor* [2013] QSC 225 [51]-[53].

relief sought.³⁶² Other discretionary factors include the desirability to involve the company in protracted litigation.³⁶³ Even when proceedings are brought in terms of sections 236 and 237 the court will take consideration other available remedies such as an order in terms of section 233(1)(f).³⁶⁴ This is an indication that the strict division between the personal remedy and the derivative claim is not maintained. These remedies are further not mutually exclusive.

3.9.7 Aspects of the payment of compensation in terms of section 233

A court may order that compensation is payable in terms of the statutory oppression remedy. For purposes of relief it is important to differentiate between compensation payable to a member and compensation payable to the company.

3.9.7.1 Relief (compensation) for the company

Obtaining relief for a company in the form of compensation based on the oppression or unfair prejudice remedy is an issue closely related to the question whether the application of the statutory unfair prejudice remedy or statutory derivative action is mutually exclusive.³⁶⁵ Section 233 entrusts a court with a very wide discretion in tailoring appropriate relief in the context of the facts and circumstances of each case. However, section 233 does not expressly include an order in terms of which a member can seek relief in the form of the payment of compensation by third

³⁶² *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo & Anor* [2013] QSC 225 [53].

³⁶³ *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo & Anor* [2013] QSC 225 [53].

³⁶⁴ In terms of this section the company can be ordered to 'institute, prosecute, defend, or discontinue specified proceedings'. See *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo & Anor* [2013] QSC 225 [53].

³⁶⁵ See also 3.9.6 above for a discussion of the interrelationship between the statutory oppression remedy and the statutory derivative action.

parties to the company.³⁶⁶ This may imply that section 237 limits the scope of relief that may be granted in terms of section 233.³⁶⁷ To allow applicants to rely on sections 232 and 233 to apply for relief for a company may have the effect that section 237 is circumvented.³⁶⁸ It can be argued that the payment of compensation to a company in terms of section 233 cannot be seen as a circumvention of the statutory derivative action.³⁶⁹ Such an approach does not necessarily expose a company to frivolous litigation because the jurisdictional grounds in section 232

³⁶⁶ In *Mio Art Pty Ltd v BMD Holdings Pty Ltd & Ors* [2014] QSC 55 the court held [73] that section 233 does not create a freestanding right to seek compensation against third parties for causes of action that vest in a company. Although section 233 does not expressly provide for relief in the form of compensation it does not mean that relief may not include an order for the compensation for losses suffered as a result for the conduct complained of [88]. According to the court [87] the discretion of a court under section 233 is not boundless and is limited by the grounds in section 232 and the persons who in terms of section 234 may apply for relief. The court held [88] that oppressive 'conduct does not create a free standing right to compensation against third parties not involved in the company's internal affairs who are otherwise not obliged to refrain from the conduct or responsible for the alleged detriment or loss'.

³⁶⁷ A similar argument was raised in *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo & Anor* [2013] QSC 225 [39]. However, the court [43] refused to accept that the scope of a court's powers under section 233 is limited by the provisions of the statutory derivative action in sections 236 and 237. The availability of the statutory derivative action is merely a factor [43] that would be taken into consideration when exercising its discretion in terms of section 233.

³⁶⁸ See however *Campbell v BackOffice Investments Pty Ltd* [2008] NSWCA 95 [119] where the court emphasised that the provisions of section 232 read with section 233 should not be applied in a manner that will make the provisions of sections 236 read with 237 redundant, but it must be noted that the provisions of section 233 are wide enough for a court to order relief for the benefit of a company. See also *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo & Anor* [2013] QSC 225 [52] where the court took the stance that although a company will benefit from the proceedings it does not mean that the legal proceedings were brought on behalf of the company.

³⁶⁹ For a similar argument see *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo & Anor* [2013] QSC 225 [39]. The court in *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo & Anor* [2013] QSC 225 [51] held that a member must prove the requirements of section 232 and thereafter a court has a wide discretion in terms of section 233. An award for compensation would not be granted if other forms of relief are more appropriate than an action in terms of section 237.

have to be established before an order in terms of section 233 can be made.³⁷⁰ Secondly, reliance on section 232 read with section 233 is not proceedings instituted or brought on behalf of the company.³⁷¹ The only effect of such an order is that the company, in relation to which the proceedings are brought, benefits from the order.³⁷²

3.9.7.2 Relief (compensation) for members

To make an order for compensation to be payable in terms of section 233 directly to a member or members is problematic.³⁷³ The question is specifically relevant in the context of the application of section 232 read with section 233 when a breach of a director's duties took place. As the court described, a compensation order which is partly payable directly to shareholders and partly directly to the company would in essence entitle a member to a share of compensation which in actual fact should have been paid to the company. Such a direct payment to shareholders would unjustifiably prejudice the interests of the creditors of a company.

Further, an order for the direct payment of compensation to shareholders has the effect of contravening a number of the provisions of the Corporations Act 2001. These provisions include the provisions regulating the distribution of assets, the payment of liabilities during the winding-up process, provisions dealing with the

³⁷⁰ See also *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo & Anor* [2013] QSC 225 [51].

³⁷¹ *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo & Anor* [2013] QSC 225 [52].

³⁷² *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo & Anor* [2013] QSC 225 [52].

³⁷³ See *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo & Anor* [2013] QSC 225 [42] where it was argued by one of the parties that compensation cannot be awarded directly to a member in terms of section 233. See also the *obiter* remarks of the court [54] where it expressed the opinion that it is not convinced that the direct payment of compensation to shareholders for loss suffered by the company is the generally accepted legal position.

reduction of capital and with distributions in general. The aim of these provisions is to ensure that the rights and interests of the company's creditors are protected and treated equally.

When the claim is based upon a cause of action that is only available to the shareholder or member and not the company, a court would be justified to make an order for the direct compensation of the shareholder as the shareholder has suffered a loss separately and distinct from the company.³⁷⁴ In the exercise of its discretion in terms of section 233 to order the winding-up of a company or to order a compulsory buy-out, a court will take into consideration the need to compensate a shareholder or shareholders.³⁷⁵

3.9.8 Appointment of a receiver

The appointment of a receiver or a receiver and manager of all of some of the company's property may also be sought as a form of relief.³⁷⁶ In *MacLean v MacLean*³⁷⁷ a receiver was appointed as an interim measure to stabilise the management of the affairs of a company pending the resolving of the disputes between the shareholders of a company during a subsequent trial.³⁷⁸ The

³⁷⁴ *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo & Anor* [2013] QSC 225 [58].

³⁷⁵ See the reference of *Hollen Australia Pty Ltd, Re* [2009] VSC 95 [84] in *LPD Holdings (Aust) Pty Ltd v Phillips, Hickey and Toigo & Anor* [2013] QSC 225 [57].

³⁷⁶ Corporations Act 2001, s 233(1)(h). See also RP Austin and IM Ramsay *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 729.

³⁷⁷ [2017] FCA 194.

³⁷⁸ *MacLean v MacLean* [2017] FCA 194 [47]. In this case four family members held all the shares in the company. Each family member held 25% of the shares. One of the shareholders was the sole director of the company. This shareholder was the husband of one of the other three shareholders and the father of the other. The marriage relationship between the director-shareholder and his wife became strained to such a degree that he allegedly assaulted her and caused her to obtain various domestic violence orders. Initially the day-to-day management of the company was conducted by

advantage of such an order is that it would place the management of the affairs of the company in independent hands.³⁷⁹ The appointment of a receiver must be carefully considered as it may be regarded as an act of default for the purposes of certain security agreements.³⁸⁰

3.9.9 Restraining order

A court may issue an order that prohibits specific conduct.³⁸¹

3.9.10 Order to compel specific conduct

In terms of section 233(1)(j) a court may order the payment of money as compensation to a shareholder.³⁸²

3.10 Fair offers

3.10.1 Introduction

The making of fair offers for the purpose of settling disputes plays an important role in oppression or unfair prejudice proceedings. The refusal of a reasonable buy-out offer may be detrimental to the case of the applicant.³⁸³ The effect of such an offer

the three shareholders who were not directors of the company. Only later the director-shareholder became involved. His involvement in the management of the company was described as disruptive. Amongst others he frustrated the payments of due and payable accounts. He further did not take steps to implement an agreement to appoint all other shareholders as directors of the company. See also section 420 of the Corporations Act 2001 for the powers of a receiver.

³⁷⁹ RP Austin and IM Ramsay *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 729.

³⁸⁰ RP Austin and IM Ramsay *Ford, Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 729. See also *Lukaszewicz v Polish Club Ltd* [2019] NSWSC 446 [287] where the court stated [286] that the appointment of a receiver should be regarded as a remedy of last resort.

³⁸¹ Corporations Act 2001, s 233(1)(j).

³⁸² *Shanahan v Jatese Pty Ltd* [2018] NSWSC 1088 [324]-[325]. See also 3.9.7 above

³⁸³ *Tomanovic v Argyle HQ Pty Ltd; Tomanovic v Global Mortgage Equity Corporation Pty Ltd; Sayer v Tomanovic* [2010] NSWSC 152 [42]. For a discussion of a reasonable offer see 3.9 below.

may impact on a finding on whether or not the complainant has suffered oppression or was unfairly prejudiced.³⁸⁴ Further, the offer may impact on the cost order that a court is prepared to grant.³⁸⁵ Fair offers are an important factor to consider when members wish to end their association with the minority members.

3.10.2 The offer

When a court has to determine whether or not conduct is oppressive or unfairly prejudicial to a member or members of a company, it may take into consideration any reasonable or fair offers that have been made to resolve the dispute between the parties. However, it must be stressed that the wording of the Corporations Act 2001 remains the primary source of the cause of action based on oppression.³⁸⁶ The absence of a reasonable or fair offer does not form part of the components or elements of oppression.³⁸⁷ A fair offer is only one of the factors that a court takes into account to determine whether the conduct complained of is oppressive or unfairly prejudicial.³⁸⁸ The elements of a reasonable offer are now briefly discussed.³⁸⁹

³⁸⁴ See *Nassar v Innovative Precasters Group Pty Ltd* [2009] NSWSC 342; (2009) 71 ACSR 343. The exclusion of a member from the management of a company in light of the arrangement or understanding that the applicant will be entitled to participate in the management of the company is not *per se* oppressive or unfairly prejudicial. Such exclusion will only be found to be oppressive or unfairly prejudicial if it took place in the absence of a reasonable offer to buy the shares of the minority member or members at fair value.

³⁸⁵ *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* [2011] NSWCA 104.

³⁸⁶ *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* [2011] NSWCA 104 [234].

³⁸⁷ *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* [2011] NSWCA 104 [235].

³⁸⁸ *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* [2011] NSWCA 104 [234].

³⁸⁹ The principles in *O'Neill v Phillips* [1999] WLR 1092 were influential in the approach of Australian courts to fair offers in oppression or unfair prejudice proceedings. See RP Austin and IM Ramsay Ford, *Austin and Ramsay's Principles of Corporations Law* (17th ed, 2018) 719-20.

3.10.3 The components of a fair offer

(a) *Invitations to settlement negotiations*

A fair offer does not have to take the form of an effective buy-out of the applicant's shares.³⁹⁰ The parties may negotiate a fair settlement in a form other than that of a buy-out.³⁹¹ The offer does not have to be an offer in a legal-technical sense in that it will upon unconditional acceptance constitute a binding contract.³⁹² An offer may also take the form of a willingness to negotiate an exit mechanism.³⁹³ An offer can take the form of an invitation to enter negotiations to structure a reasonable approach upon which an applicant can exit from a company based on a mutual agreement.³⁹⁴ The fact that the nature of an offer is such that it will not lead to a legally binding contract may, however, affect the weight that may be attributed to such an offer as a factor to determine unfairness.³⁹⁵

(b) *Exit provisions in the constitution of a company*

The constitution of a company may contain procedures that regulate the position

³⁹⁰ *Nassar v Innovative Precasters Group Pty Ltd* [2009] NSWSC 342 [101].

³⁹¹ See *Nassar v Innovative Precasters Group Pty Ltd* [2009] NSWSC 342 [101] where the court emphasised that a fair offer can take the form of a buy-out settlement or an alternative arrangement can be made as long as such alternative arrangement is fair.

³⁹² *Nassar v Innovative Precasters Group Pty Ltd* [2009] NSWSC 342; (2009) 71 ACSR 343 [103].

³⁹³ *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* [2011] NSWCA 104 [242]; *Nassar v Innovative Precasters Group Pty Ltd* [2009] NSWSC 342 [103].

³⁹⁴ *Belgiorno-Zegna v Exben Pty Ltd* [2000] NSWSC 884; (2000) 35 ACSR 305 [139]. See also *Nassar v Innovative Precasters Group Pty Ltd* [2009] NSWSC 342 [105]-[106] where the court held that a failure to provide a detailed and fair offer meeting the requirements of the criteria in *O'Neill v Phillips* [1999] WLR 1092 does not automatically translate into conduct that is oppressive or unfairly prejudicial.

³⁹⁵ *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* [2011] NSWCA 104 [242].

when a member wishes to withdraw his or her investment from a company.³⁹⁶ The provisions may describe the circumstances under which a member may disinvest from the company. The constitution may further contain provisions on the procedures that such a member has to follow. One of the important aspects of a member withdrawing his or her investment from a company is the valuation of the shares held by the member. Usually, such shares are repurchased by the company or alternatively, depending on the provisions of the company's constitution, are bought by existing shareholders of the company. Although such provisions will be enforced the enforcement of such provisions and procedures must be fair in the circumstance of the case.³⁹⁷ The enforcement of exit provisions in the constitution of a company must be fair and constitute a fair arrangement.

3.10.4 An Australian perspective on the application of the principles in *O'Neill v Phillips*³⁹⁸

The approach in *O'Neill v Phillips*³⁹⁹ was criticised in *Tomanovic v Global Mortgage Equity Corporation Pty Ltd*.⁴⁰⁰ According to the court, the 'two-step reasoning process' is not an acceptable approach in determining oppression or unfair prejudice.⁴⁰¹ The court further emphasised that the wording of section 232 is the criterion that must be used to establish oppression or unfair prejudice.⁴⁰² The *obiter*

³⁹⁶ See, for example, *Nassar v Innovative Precasters Group Pty Ltd* [2009] NSWSC 342.

³⁹⁷ See also 3.9.4.2 (f) above.

³⁹⁸ [1999] WLR 1092.

³⁹⁹ [1999] WLR 1092.

⁴⁰⁰ [2011] NSWCA 104.

⁴⁰¹ See *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* [2011] NSWCA 104 [228] where the court held that '[r]ather, one decides whether the conduct of the affairs of the two relevant companies is oppressive to, unfairly prejudicial to, or unfairly discriminatory against the Tomanovic interests as a single exercise in evaluation'.

⁴⁰² *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* [2011] NSWCA 104 [228].

remarks in *O'Neill v Phillips*⁴⁰³ mainly apply to cases where the conduct complained of is the exclusion of the applicant from the management of a company.⁴⁰⁴

3.11 Arbitration

3.11.1 Introduction

Alternative dispute resolutions mechanisms, such as arbitration, are internationally recognised⁴⁰⁵ mechanisms to resolve commercial disputes expeditiously⁴⁰⁶ and cost effectively.⁴⁰⁷ Arbitration proceedings further provide parties with an opportunity to ventilate issues relating to a dispute privately, especially when issues of a commercially sensitive nature arise.⁴⁰⁸ Parties to commercial disputes are encouraged to make use of arbitration proceedings when available and applicable.⁴⁰⁹ This philosophy is also clear when the Commercial Arbitration Act 2011 and Commercial Arbitration Act 1984 are compared.⁴¹⁰

⁴⁰³ [1999] WLR 1092.

⁴⁰⁴ In *Tomanovic v Global Mortgage Equity Corporation Pty Ltd* [2011] NSWCA 104 [237] the court emphasised that *O'Neill v Phillips* [1999] WLR 1092 dealt with a matter where the only conduct complained of was the exclusion of a member from the management of a company.

⁴⁰⁵ See, for example, the International Arbitration Act 1974.

⁴⁰⁶ *Acd Tridon v Tridon Australia* [2002] NSWSC 896 [226].

⁴⁰⁷ *Acd Tridon v Tridon Australia* [2002] NSWSC 896 [227]. The court further [245] considered the International Arbitration Act 1974 and the Commercial Arbitration Act 1984 (NSW) and held that the International Arbitration Act 1974 does not exclude the concurrent jurisdiction of the domestic legislation of a state.

⁴⁰⁸ *Acd Tridon v Tridon Australia* [2002] NSWSC 896 [219] and [220] where the court remarked that the private nature of arbitration proceedings may be a consideration when making an order to that effect. This was not an issue in the matter before the court.

⁴⁰⁹ See section 2D(a) of the International Arbitration Act 1974 (Cth).

⁴¹⁰ See *Brazis & Ors v Rosati & Ors* [2014] VSCA 264 [32] where the court noted that the discretion of the court to refuse stay of proceedings under section 53(1) of the Commercial Arbitration Act 1984 had been replaced with a new regime in the Commercial Arbitration Act 2011 where the court does not have a discretion to stay proceedings. See also *Acd Tridon v Tridon Australia* [2002] NSWSC

3.11.2 The role of public policy in arbitration proceedings

The disputes that may be susceptible to arbitration are only restricted by the principle of arbitrability. The principle of arbitrability entails that a dispute must be able to be subjected to arbitration and that the dispute does not involve issues of public policy.⁴¹¹

3.11.3 The prerequisites for arbitration

Arbitration proceedings are dependent on the consensual agreements of parties to a dispute.⁴¹² Therefore, before a dispute is referred to arbitration it needs to be established whether the particular dispute or matter is covered by the applicable arbitration agreement or clause.⁴¹³ To determine whether a dispute falls within the ambit of an arbitration agreement, the formulation of the arbitration agreement or clauses must be carefully constructed.⁴¹⁴

3.11.4 Arbitration clauses and the right to approach a court

Tension may arise between the right of a party to approach a court to adjudicate a dispute and the enforcement of an arbitration clause that forms part of a voluntary

896 [243] on section 53 of the Commercial Arbitration Act 1984 where the discretion of the court was emphasised.

⁴¹¹ See *Acd Tridon v Tridon Australia* [2002] NSWSC 896 [192] where the court noted that the fact that a dispute arises under the Corporations Act does not necessarily mean that public policy prevents the dispute from being arbitrated.

⁴¹² *Acd Tridon v Tridon Australia* [2002] NSWSC 896 [195].

⁴¹³ See *Acd Tridon v Tridon Australia* [2002] NSWSC 896 [195] where the court found that some of the disputes between the parties were not covered by the relevant arbitration agreement.

⁴¹⁴ In *CPB Contractors Pty Ltd v Rizzani De Eccher Australia Pty Ltd* [2017] NSWSC 1798 [85] the court held that arbitration agreements or clauses must be interpreted by considering the wording of the clause or agreement. No special rules or liberal approaches of interpretation apply in favour of arbitration. See also *Four Colour Graphics Australia Pty Ltd v Gravitas Communications Pty Ltd* [2017] FCA 224 [23] and [24].

agreement between the parties.⁴¹⁵ When a court refuses to enforce an arbitration clause or agreement between the parties, it does not have the power to subject a party who wishes to rely on the arbitration clause to any other form of proceedings save for court proceedings.⁴¹⁶

3.11.5 The nature of an arbitrator's powers and the reference to a 'court' in the Corporations Act 2001

The nature of the jurisdiction and powers of an arbitrator are contractual.⁴¹⁷ An arbitrator cannot adjudicate on the validity of arbitration agreements as the validity of an arbitration agreement or clause strikes directly at the source of the arbitrator's jurisdiction.⁴¹⁸ The contractual nature of an arbitrator's power has important implications for the enforcement of orders and awards. The main difference between a court order and an arbitration award in terms of a statutory provision lies in the enforcement of such an order or award. A court can enforce its own order while an arbitration award only has contractual force between the parties to the agreement or contract and cannot directly be enforced by a court.⁴¹⁹

When a party seeks to enforce an arbitration clause in the context of section 232 of Corporations Act 2001 an interesting interrelationship is created between sections 232 and 233 of the Corporations Act 2001 and section 8 of the Commercial

⁴¹⁵ *Acd Tridon v Tridon Australia* [2002] NSWSC 896 [202] where the court held that the parties to an agreement may define which disputes may be subjected to arbitration and confirmed that case law in Australia confirms the enforcement of agreements relating to arbitration.

⁴¹⁶ See *Acd Tridon v Tridon Australia* [2002] NSWSC 896 [208] where the court made reference to section 7 of the International Arbitration Act.

⁴¹⁷ *Acd Tridon v Tridon Australia* [2002] NSWSC 896 [179]; *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No5)* (1998) 90 FCR 1, 14.

⁴¹⁸ *Acd Tridon v Tridon Australia* [2002] NSWSC 896 [186] and [187].

⁴¹⁹ *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No5)* (1998) 90 FCR 1, 14.

Arbitration Act 2011.⁴²⁰ Both sections 232 and 233 of the Corporations Act 2001 refer to the orders a *court* can make. This raises the question whether an arbitrator can exercise a power that appears to be specifically allocated to a court in terms of legislation.

Section 233 provides examples of the orders a court may make. Because section 233 expressly entrusts a *court* with broad and wide powers, it may be argued that the relief may only be granted by a court. However, in *Acd Tridon v Tridon Australia*⁴²¹ the court made an *obiter* remark that the power contained in a particular statutory provision of the Corporations Act 2001 is not necessarily and exclusively a function of a court.⁴²² It is further within the prerogative of the parties to agree that an arbitrator is empowered to exercise the same powers and functions of a court under a specific statutory provision.⁴²³ Therefore, parties may agree that a dispute may be determined in accordance with the powers and functions that may be

⁴²⁰ Section 8 of the Commercial Arbitration Act 2011 provides:-

(1) A court before which an is brought in a matter which is the subject of an arbitration agreement must, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless if finds that the agreement is null and void, inoperative or incapable of being performed.

Where an action referred to in subsection (1) has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.'

⁴²¹ [2002] NSWSC 896 [193].

⁴²² See also *700 Form Holdings Pty Ltd, Re* [2014] VSC 385 [74], [75] and [76]; *Robotunits Pty Ltd v Mennel* [2015] VSC 268 [66]. In *WDR Delaware Corporation v Hydrox Holdings Pty Ltd; In the Matter of Hydrox Holdings Pty Ltd* [2016] FCA 1164 [192] the court stated that '[h]owever, I would not regard these public policy considerations as preventing parties to a dispute from referring questions to arbitration merely because those questions arise under the Corporations Act. I see nothing special about the Corporations Act that would distinguish it, as a whole, from other legislation such as the Trade Practices Act'.

⁴²³ *700 Form Holdings Pty Ltd, Re* [2014] VSC 385 [74]; *Robotunits Pty Ltd v Mennel* [2015] VSC 268 [66].

exercised by a court under the Corporations Act 2001.⁴²⁴ The powers that a court enjoys under the provisions of the Corporations Act 2001 are powers that can be exercised by a court under general law.⁴²⁵ These powers are not of such a special nature that the exercise thereof must be measured against the criterion of the public interest, such as the power to order the winding-up of a company.⁴²⁶

It is possible for an arbitrator to determine the factual issues of a dispute and then to refer the matter to a court to make an order specific and appropriate to the findings of the arbitrator.⁴²⁷ Some forms of relief may not be granted by an arbitrator due to public policy considerations.⁴²⁸ For example, an arbitrator does not have the power to make an order for the winding-up and liquidation of a company based on public policy considerations.⁴²⁹

3.12 Conclusion

3.12.1 The relevance of the English law in the development of the Australian statutory oppression remedy

The development of the Australian statutory oppression remedy shares many

⁴²⁴ *In the matter of Infinite Plus Pty Ltd* [2017] NSWSC 470 [63]; *Robotunits Pty Ltd v Mennel* [2015] VSC 268 [66]. See also *Acd Tridon v Tridon Australia* [2002] NSWSC 896 [180] and [181].

⁴²⁵ *Acd Tridon v Tridon Australia* [2002] NSWSC 896 [193].

⁴²⁶ *Acd Tridon v Tridon Australia* [2002] NSWSC 896 [193]; *WDR Delaware Corporation v Hydrox Holdings Pty Ltd; In the Matter of Hydrox Holdings Pty Ltd* [2016] FCA 1164 [193].

⁴²⁷ *Acd Tridon v Tridon Australia* [2002] NSWSC 896 [216]. See also *Rinehart v Welker* [2012] NSWCA 95 [170].

⁴²⁸ *Acd Tridon v Tridon Australia* [2002] NSWSC 896 [192].

⁴²⁹ *Acd Tridon v Tridon Australia* [2002] NSWSC 896 [192]. According to the court, relief [196] of an 'in rem nature' such as the rectification of a share register cannot be granted by an arbitrator. See also *WDR Delaware Corporation v Hydrox Holdings Pty Ltd; In the Matter of Hydrox Holdings Pty Ltd* [2016] FCA 1164 [192] and [194]; *Rinehart v Welker* [2012] NSWCA 95 [172]; *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 [18].

similarities with the South African statutory unfair prejudice remedy. Both the Australian and South African remedy were significantly influenced by the statutory oppression or unfair prejudice remedy in England.⁴³⁰

Initial forms of the statutory oppression remedy introduced in Australia closely followed statutory forms of the equivalent remedy in England.⁴³¹ English law did not only have a direct influence on the statutory development of the oppression remedy, but also substantially influenced the approach of Australian courts in the application of the remedy. Many examples can be found where Australian courts relied on prominent English judgments pertaining to the statutory oppression remedy in seeking guidance on the interpretation and application of the Australian equivalent of the remedy.⁴³² Therefore an understanding of the English statutory unfair prejudice remedy is imperative to form a proper comprehension of the current form and application of the Australian oppression remedy.⁴³³

3.12.2 The continued use of the term ‘oppressive’

The statutory development of the Australian statutory oppression remedy shows that the legislature initially described the conduct at which the remedy was directed as *oppressive*.⁴³⁴ Despite the criticism of this term in the predecessors of section

⁴³⁰ See 3.3 above for the development of the Australian oppression remedy. See 5.2 below for the development of the South African unfair prejudice remedy.

⁴³¹ See 3.3 above and more specifically 3.3.2 above.

⁴³² For example, see 3.6.5 above for the clean hands principle; 3.6.7 above with regard to the protection of legitimate expectations; 3.8 above as to the application of the oppression remedy within a group of companies; 3.9.4.2 regarding the valuation of shares for purposes of a purchase order; 3.10 above in respect of the relevance of fair offers in oppression proceedings.

⁴³³ For a detailed analysis of the English unfair prejudice remedy (or oppression remedy) see Chapter 2 above.

⁴³⁴ See 3.5 above.

232 of the Corporations Act 2001, it is notable that the term has been retained in the current form of the Australian oppression remedy.⁴³⁵ Despite the retention of this term, it is significant to note that additional terms or concepts were introduced to describe the conduct that may trigger relief in terms of the statutory oppression remedy.⁴³⁶ It should be noted that while the oppression remedy in the jurisdictions of Australia,⁴³⁷ Canada⁴³⁸ and South Africa⁴³⁹ refer to both oppressive and unfair prejudicial conduct as grounds for relying on the oppression remedy, the English legislature omitted the oppression concept in its entirety.⁴⁴⁰

In the development of the oppression remedy, the legislature expanded the nature of conduct that could be subject to relief for purposes of the remedy.⁴⁴¹ The result of this reform was that a member could rely on conduct that is either oppressive, unfairly prejudicial or that is unfairly discriminatory or alternatively if the conduct is 'contrary to the interests of the members as a whole'.⁴⁴² This development can be ascribed to the criticism to which the concept oppressive was subjected.⁴⁴³ To prevent the remedy from being interpreted too restrictively the

⁴³⁵ See 3.3.5 above where it is explained that the term oppressive or oppression was seen as a restrictive term that did not enhance the application the remedy. Compare with 2.3.3.4 read with 2.6.3.2 above containing a discussion of the use of the terms oppressive or oppression to describe conduct to which unfair prejudice (or oppression) remedy applies.

⁴³⁶ See 3.5.1 read with 3.5.5 above.

⁴³⁷ See for the position in Australia in section 232 of the Corporations Act 2001 as discussed in 3.4 and 3.5 above.

⁴³⁸ For the position in Canada see 241 of the Canada Business Corporations Act (RSC 1985 c C-44) as discussed in 4.7 below.

⁴³⁹ For the position in South Africa see section 163 of the Companies Act 71 of 2008 as discussed in 5.3 read with 5.7.2 and 5.7.3 below.

⁴⁴⁰ See 994 of the Companies Act 2006 read with 2.6.3.2 above for the position in England.

⁴⁴¹ See 3.3.3 and 3.3.4 above. For the current position see 3.4 – 3.6 above.

⁴⁴² See 3.5 above.

⁴⁴³ For similar criticisms in the context of the English unfair prejudice remedy see 2.3.3.4 above.

legislature had to make its intention in relation to the scope of application of the remedy clear.

3.12.3 Alternative forms of relief

The one major drawback to previous versions of the statutory oppression remedy was that a direct link existed between the grounds for relief in the form of the winding-up of a company and the grounds for relief on the basis of oppressive conduct.⁴⁴⁴ The statutory development of the oppression remedy demonstrated that the winding-up of companies based on oppressive grounds is not appropriate in all circumstances. It should be noted that relief in the form of the winding-up of a company remains expressly listed as a form of relief that a court may grant.⁴⁴⁵ However, courts are reluctant to wind-up a sustainable company where there are other forms of relief available that would adequately remedy the conduct complained of.⁴⁴⁶

It is further important that although the grounds for the winding-up a company on 'just and equitable' grounds⁴⁴⁷ and the winding-up of a company in terms of the statutory oppression remedy may overlap, there are important differences between the grounds for the winding-up of a company on 'just and equitable' grounds and the winding-up of a company based on oppression.⁴⁴⁸ The Corporations Act 2001 makes it clear that the existence of the statutory oppression remedy does not bar a member from obtaining an order for the winding-up of a company based on

⁴⁴⁴ See 3.3 above.

⁴⁴⁵ See 3.9.1 above.

⁴⁴⁶ See 3.9.1.3 above.

⁴⁴⁷ See Corporations Act 2001, s 461(1)(k).

⁴⁴⁸ See 3.9.1.2 above.

commercially unfair conduct or conduct that is 'contrary to the interests of the members as a whole'⁴⁴⁹. This is evident from section 461 of the Corporations Act 2001. However, a court must in the exercise of its discretion to wind-up a company in terms of section 233 carefully consider whether relief in the form of the winding-up and liquidation of a company would rectify the conduct complained of. When a court exercises its discretion in terms of section 461⁴⁵⁰ consideration should be given to the appropriateness of alternative forms of relief.⁴⁵¹ This is especially important in light of the fact that a winding-up order would affect the interests of other members that may not necessarily be parties to the proceedings before the court.

3.12.4 Relief against future and threatening conduct

It is also important that early versions of the Australian oppression remedy did not only provide relief of a reactive nature but also forms of relief of a proactive nature such as the order regulating the future affairs of the company and orders for the amendment of the constitution of a company.⁴⁵² Further, the statutory oppression remedy was made expressly applicable to actual or proposed conduct or resolutions.⁴⁵³

3.12.5 The oppression remedy as stepping stone for derivative proceedings

Another important progressive step in the development of the oppression remedy

⁴⁴⁹ Corporations Act 2001, s 232(d).

⁴⁵⁰ See Corporations Act 2001, s 461(1)(e)-(f).

⁴⁵¹ See Corporations Act 2001, s 467(4).

⁴⁵² See 3.3 above.

⁴⁵³ See 3.3.3 above. For the current position see 3.5 and in particular 3.5.3 above. For criticism against the South African position in this regard see 5.9.2.3 and 5.9.2.4 below.

in Australia was the introduction of relief in the form of authorising a member to institute, intervene in or defend legal proceedings on behalf of the company.⁴⁵⁴ This approach was taken in direct reaction to problems associated with the application of the common law principles in *Foss v Harbottle*.⁴⁵⁵ The discussion of the overlap between the statutory oppression remedy and the statutory derivative action revealed that from a practical perspective it may at times be very difficult to distinguish between conduct that prejudiced the interests of a company when the same conduct also prejudiced the interests of the members of a company.⁴⁵⁶ This is especially the case when the company suffered harm as a result of the conduct of its directors which will hold the power to avoid that the company institutes legal proceedings against them.

The introduction of the ground that reliance can be placed on the statutory oppression remedy when conduct or a resolution complained of is 'contrary to the interests of the members as a whole'⁴⁵⁷ establishes a theoretical basis which enables a member to seek relief in the form of authorisation to conduct legal proceedings on behalf of a company as a form of personal relief.⁴⁵⁸ This aspect was lacking from previous drafts of the statutory oppression remedy and was also clearly lacking from the application of the legal principles in *Foss v Harbottle*.⁴⁵⁹

It is significant that section 233 provides for the authorisation of a member to

⁴⁵⁴ See 3.9.6 above.

⁴⁵⁵ (1843) 2 Hare 461, 67 ER 189. See 3.9.6 above.

⁴⁵⁶ See 3.9.6 above.

⁴⁵⁷ See 3.9.6 above.

⁴⁵⁸ See 3.9.6 above.

⁴⁵⁹ (1843) 2 Hare 461, 67 ER 189.

institute, intervene in or defend legal proceedings on behalf of a company.⁴⁶⁰ According to the courts this was done to ‘outflank’ a technical application of the principles in *Foss v Harbottle*.⁴⁶¹ This approach further acknowledges that in some instances it will be extremely difficult to distinguish between the interests of a member and the company. There is no real risk for the abuse of this form of relief as the jurisdictional grounds first have to be proven and even then a court still has a wide discretion regarding the nature and form of relief to be granted, if at all.⁴⁶² The fact that relief is granted to the benefit of the company based on the oppression remedy is not indicative of proceedings of a derivative nature.⁴⁶³

3.12.6 Aspects relating to the formulation of the statutory oppression remedy

The current form of the statutory oppression remedy is formulated broadly to cover a wide range of conduct. Although the remedy is formulated in wide terms the provisions relating to the statutory oppression remedy are articulated in a simple and logical manner. The first part of section 232 clearly states the type and nature of conduct that is covered by the remedy.⁴⁶⁴ Primarily it covers conduct in relation to a company’s affairs but includes conduct on behalf of the company.⁴⁶⁵ Actual and proposed conduct and/or actual or proposed resolutions are also expressly included for purposes of section 232.⁴⁶⁶ In order to qualify for possible relief, the conduct

⁴⁶⁰ Corporations Act 2001, s 233(1)(g). See also section 233(1)(f) in terms of which a court can directly order a company to institute or defend legal proceedings.

⁴⁶¹ (1843) 2 Hare 461, 67 ER 189. See 3.9.6.3 above.

⁴⁶² See 3.9.6.3 above.

⁴⁶³ See 3.9.6.3 above.

⁴⁶⁴ See 3.5.1 and 3.5.2 above read with 3.5.5 above.

⁴⁶⁵ See 3.5.1 and 3.5.2 above.

⁴⁶⁶ See 3.5.3 above.

described in section 232(a)-(c) must be either contrary to the interests of the members of the company as a whole or commercially unfair.⁴⁶⁷ This clearly states the criteria against which the result of effect of the conduct complained of would be scrutinised before a court can consider appropriate relief where necessary.⁴⁶⁸ This implies that there must be a causal link between the conduct and the effect thereof.

To determine whether conduct is oppressive, unfairly prejudicial or unfairly discriminatory the concept of commercial unfairness is used as criterion.⁴⁶⁹ The conduct must be objectively evaluated in the corporate law context.⁴⁷⁰ Whether conduct is commercially unfair or not is not dependent on whether the conduct is unlawful or not.⁴⁷¹

The tense in which section 232 is formulated is indicative of the nature of conduct that is covered by the section and is not necessarily prescriptive of the time at which the conduct complained of had to present.⁴⁷² As in other jurisdictions section 232 covers the protection of reasonable or legitimate expectations.⁴⁷³

3.12.7 Standing

To rely on the provisions of the statutory oppression remedy a shareholder must be a registered member.⁴⁷⁴ Section 234 does provide for instances where a shareholder is not required to be a registered member of the company to be enable

⁴⁶⁷ See 3.5.1 read with 3.5.5 above.

⁴⁶⁸ *Catalano v Managing Australia Destinations (Pty) Ltd* [2014] FCAFC 55 [9].

⁴⁶⁹ See 3.5.5. above.

⁴⁷⁰ See 3.5.5 read with 3.6 above.

⁴⁷¹ See 3.5.5 above.

⁴⁷² See 3.5.2 above.

⁴⁷³ See 3.6.7 above.

⁴⁷⁴ See 3.7 above.

to rely on the provisions of the remedy.⁴⁷⁵ It is further important to note that a member may rely on section 232 in circumstances where he or she has been oppressed in capacities other than that of a member provided that the capacity in which the member suffered from oppressive conduct is closely related to his or capacity as member.⁴⁷⁶ Controlling members in the company may also rely on the provisions of section 232.⁴⁷⁷ The fact that a member is a controlling member may have a bearing on the question whether the particular member suffered oppression.⁴⁷⁸

3.12.8 Purchase or buy-out orders

As regards the relief that a court may grant in terms of earlier versions of the oppression remedy, it became clear at a very early stage in the development of the remedy that the winding-up of a company may often be inappropriate. Therefore alternative forms of relief were introduced such as an order to purchase the shares of a member by the company or other members of a company.⁴⁷⁹

As with its predecessors, section 233 makes specific provision for ordering a transfer of the shares of a member.⁴⁸⁰ It may be ordered that a member's shares be purchased by other members of the company⁴⁸¹ or by the relevant company itself.⁴⁸² This is the most often used form of relief. The only contentious part of this form of

⁴⁷⁵ See 3.7.2 above.

⁴⁷⁶ See 3.7.4 above.

⁴⁷⁷ See 3.7.3 above.

⁴⁷⁸ See 3.7.3 above.

⁴⁷⁹ See 3.3.2.2 above and 3.12.7 below.

⁴⁸⁰ See 3.9.4 above.

⁴⁸¹ See 3.9.4 above.

⁴⁸² See 3.9.5 above.

relief is the valuation of shares. Many factors and principles influence the valuation of shares. The main principle is that it is the duty of a court to determine a fair value of the relevant shares in the context of the facts and circumstances of a particular case.⁴⁸³ Although the primary object of such an order is to end the association of a member with a company and other members of a company, the effect thereof would be to compensate a member.⁴⁸⁴ This is because adjustments have to be made to the value a member's shares to neutralise the effect of the conduct complained of.⁴⁸⁵ Although the court has a discretion to order the payment of compensation, a member does not have a freestanding right for the payment of compensation.⁴⁸⁶

3.12.9 Company groups

The question of whether and when the oppression remedy can be applied in the context of a group of companies also arose. Both a broad and narrow approach can be found in Australian case law.⁴⁸⁷ Although some judgments favour the narrow approach to the application of the oppression remedy in a group company structure, none of these cases rejected the broad approach.⁴⁸⁸ The application of the broad approach is supported as it is aligned with the commercial realities of business and does not introduce judicial restrictions which are not provided for by the statutory oppression remedy as found in the Corporations Act 2001. According to the broader approach the oppression remedy can be applied based solely on the fact that

⁴⁸³ See 3.9.4.2 above.

⁴⁸⁴ See 3.9.4.2 (a) above

⁴⁸⁵ See 3.9.4.2 (a) and (b) above

⁴⁸⁶ See 3.9.4.2 (b), 3.9.7 and 3.9.10 above.

⁴⁸⁷ See 3.8.2 and 3.8.3 above.

⁴⁸⁸ See 3.8.3 read with 3.8.4.2 above.

companies are in a holding-subsiidiary relationship.⁴⁸⁹

3.12.10 Reasonable offers

As with other jurisdictions, the rejection of a reasonable offer plays an important role in the exercise of a court's discretion in terms of the oppression remedy. The rejection of a reasonable offer may affect the finding of a court whether there is any oppression suffered and/or the making of appropriate cost orders.⁴⁹⁰ In some instances, a rejection of a fair value may also possibly impact on the valuation of shares to determine the fair value of a member's shares in a company for purposes of a purchase or buy-out order. The well-known English case of *O'Neill*⁴⁹¹ received attention from Australian cases. The Australia courts acknowledge many of the principles in *O'Neill*,⁴⁹² but found its application to be limited.⁴⁹³ According to Australian courts the principles in *O'Neill*⁴⁹⁴ are often only relevant in the context of cases where the making of a purchase order would qualify as appropriate relief. As with other jurisdictions the reasonable offer does not have to take the form of a formal legally binding offer.⁴⁹⁵ The reasonableness of such an offer will be determined in light of the context of the specific case. Where possible parties to an oppression dispute must be given the opportunity to negotiate an appropriate form of relief such as the exit or withdrawal of one or more members from a company.

⁴⁸⁹ See 3.8.2 and 3.8.4 above.

⁴⁹⁰ See 3.10.2 above.

⁴⁹¹ *O'Neill v Phillips* [1999] WLR 1092.

⁴⁹² *O'Neill v Phillips* [1999] WLR 1092.

⁴⁹³ See 3.10.4 above.

⁴⁹⁴ *O'Neill v Phillips* [1999] WLR 1092.

⁴⁹⁵ See 3.10.3 above.

3.12.11 Arbitration

The application of the oppression remedy in alternative dispute resolution proceedings such as arbitration has also been considered. Those who object to the arbitration of oppression disputes argue that arbitration agreements deny parties the right to access to courts and that oppression disputes involve issues of public policy.⁴⁹⁶ The Commercial Arbitration Act 2011 is clear that parties are well within their rights to agree that disputes between themselves be referred to arbitration as long as the dispute is covered by an arbitration agreement and the dispute does not raise issues of public policy.⁴⁹⁷ As a rule, the statutory oppression remedy does not raise issues of public policy and the powers exercised by a court in terms of sections 232 and 233 of the Corporations Act 2001 are of such a nature that they can be exercised by a court as a general rule.⁴⁹⁸ Further the reference to a 'court' in the statutory oppression remedy does not exclude disputes from being subjected to arbitration.⁴⁹⁹ However, the courts did point out that an arbitrator does not have the power to award relief in the form of a winding-up order as relief of such a nature raise issues of public policy.⁵⁰⁰

⁴⁹⁶ See 3.11.2 above.

⁴⁹⁷ See 3.11.3 above.

⁴⁹⁸ See 3.11.5 above.

⁴⁹⁹ See 3.11.5 above.

⁵⁰⁰ See 3.11.5 above.

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CANADA

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4.1 Introduction*

The Canada Business Corporations Act RSC, 1985, c C-44 applies throughout Canada.¹ One of the purposes of the Canada Business Corporations Act² is to reform and revise the law that applies to businesses in Canada.³ It is a further purpose of the Act to achieve uniformity in the laws pertaining to business corporations in Canada.⁴

The statutory form of the Canadian unfair prejudice remedy is contained in section 241 of the Canada Business Corporations Act.⁵ Because section 241 of the Canada Business Corporations Act⁶ is formulated in almost identical terms to section 163 of the Companies Act 71 of 2008, the judicial interpretation and application of the first mentioned provision are of crucial importance in the critical evaluation of the latter.⁷ As is pointed out later in this chapter, the Canadian approach to the unfair prejudice remedy can be commended in many respects, but one has to be conscious of some important differences between the Canadian remedy and the equivalent of the remedy in other jurisdictions. This chapter contains a critical evaluation of the Canadian unfair prejudice remedy.

** Reference to case law is mainly made to the neutral citations of cases. For convenience the reported citation of a case is also provided and the Westlaw database citation is cited for readers who have access to the database.

¹ *Psychogios v Condia* 2013 QCCS 4299, 2013 CarswellQue 9005 (QCCS) [44].

² RSC 1985 c C-44.

³ Canada Business Corporations Act (RSC 1985 c C-44), s 4.

⁴ Canada Business Corporations Act (RSC 1985 c C-44), s 4.

⁵ RSC, 1985, c C-44.

⁶ RSC, 1985, c C-44.

⁷ An evaluation of section 163 of the Companies Act 71 of 2008 is provided in Chapter 5 below.

This Chapter mainly focuses on the federal law in Canada. Occasionally reference is also made to the law pertaining to similar remedies in some of the Canadian provinces. This is especially the case where a specific legal position pertaining to the statutory unfair prejudice remedy has not yet been developed or considered to such an extent as to provide adequate guidance on the possible interpretation and application of the relevant federal law. In most case this is possible as the formulation of the statutory unfair remedy in many of the Canadian provinces is similar to the statutory unfair prejudice remedy contained in the Canada Business Corporations Act.⁸

4.2 The development of the statutory unfair prejudice remedy in Canada – a brief overview

British Columbia adopted the first Canadian version of the oppression remedy in 1960.⁹ It followed a similar wording to that of section 210 of the Companies Act 1948.¹⁰ Section 185 of the Companies Act RSBC 1960, c 67 provided that:

- (1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself) or in a case falling within section 183 of this Act, the inspector, may make an application to the Court by petition for an order under this section.
- (2) If on any such petition the Court is of opinion
 - (a) that the company's affairs are being conducted as aforesaid; and
 - (b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the marking of a winding-up order on the ground that is was just

⁸ RSC, 1985, c C-44.

⁹ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 1-2. See also *Keho Holdings Ltd v Noble* 1987 ABCA 84, [1987] AWLD 859, 1987 CarswellAlta 107 (ABCA) [14].

¹⁰ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 1-2. See also *Keho Holdings Ltd v Noble* 1987 ABCA 84, [1987] AWLD 859, 1987 CarswellAlta 107 (ABCA) [14]. See further 2.3.3 above for a discussion of section 210 of the Companies Act 1948.

and equitable that the company should be wound up, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future or for the purchase of the shares of any members of the company by other members of the company or by the company, for the reduction accordingly of the company's capital or otherwise.'

The introduction of the oppression remedy was not welcomed in all the provinces of Canada.¹¹ In 1967 the introduction of the oppression remedy in Ontario was rejected on the basis that it invited unnecessary court intervention in the affairs of a corporation and the Ontario Business Corporations Act¹² was introduced in 1970 without making provision for the oppression remedy.¹³

However, the oppression remedy was introduced on a federal level with the adoption of the Canada Business Corporations Act SC 1974-75-76, c33.¹⁴ The oppression remedy in the Canada Business Corporations Act SC 1974-75-76, c33 differed from its British predecessor and its equivalent provision in British Columbia. Section 234(2) of the Canada Business Corporations Act SC 1974-75-76, c33 provided that a complainant may be entitled to relief if 'the court is satisfied that in respect of a corporation or any of its affiliates

- (a) any act or omission of the corporation or any of its affiliates effects a result,
- (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
- (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of'.

¹¹ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 1-2.

¹² RSO 1970 c 53.

¹³ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 1-2.

¹⁴ See specifically section 234. See also DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 1-3. See further *Keho Holdings Ltd v Noble* 1987 ABCA 84, [1987] AWLD 859, 1987 CarswellAlta 107 (ABCA) [14].

The Canada Business Corporations Act SC 1974-75-76, c33¹⁵ extended the remedy to complainants other than shareholders.¹⁶ Further, an additional ground was introduced to cover conduct that unfairly disregarded the interests of the complainant.¹⁷ The enactment of the Canada Business Corporations Act SC 1974-75-76, c33 led to the introduction of similar provisions in all other provinces in Canada except for Quebec and Prince Edward Island.¹⁸

4.3 The basics of corporations law in Canada

Corporations are juristic persons separate from their directors and shareholders.¹⁹ One of the consequences of separate juristic personality is that when a wrong is committed against a corporation it is the corporation that must institute legal proceedings against the wrongdoer.²⁰ Another consequence of the separate legal personality of a corporation is that a corporation is supervised and managed by its directors.²¹ The statutory power and duty of directors to supervise and manage a corporation means that the shareholders of a corporation cannot dictate to the board of a corporation.²² The duty of each director of a corporation is to supervise and manage the corporation by acting honestly and in good faith in the best interests of

¹⁵ Proclaimed into force on 15 December 1975.

¹⁶ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 1-3.

¹⁷ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 1-3.

¹⁸ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 1-3.

¹⁹ *Cogeco Câble Inc c CFCF Inc* [1996] RJQ 1360, [1996] AQ No 1069, 1996 CarswellQue 672 (QCCS). See 5.4.3.2 below for a similar position in South Africa.

²⁰ *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189. See also 2.3.1 above for a discussion of the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189.

²¹ Canada Business Corporation Act RSC 1985 c C-44, s 102. See 5.4.3.2 and 5.4.3.3 below for a similar position in South Africa.

²² *820099 Ontario Inc v Harold E Ballard Ltd* [1991] OJ No 266, 1991 3 BLR (2d) 113, 123, 1991 CarswellOnt 142 (ONCJ.GD) [102]; *Teck Corp v Millar* [1972] BCJ No 566, 1972 33 DLR (3d) 288, 1972 CarswellBC 284 (BCSC) [85].

the corporation.²³ A director must further discharge his or her powers or duties with the care, diligence and skill that a reasonable prudent person would in comparable circumstances.²⁴ The principle of majority rule is one of the cornerstones of the efficient management of a corporation.²⁵ However, this principle is subject to the conduct of the majority being fair and honest.²⁶

4.4 The purpose and objective of the statutory unfair prejudice remedy

4.4.1 The balancing of various rights and interests

The purpose of the oppression remedy has been described as to create a balance between the rights of shareholders *vis-a-vis* the corporation, while maintaining the ability of the corporation efficiently to conduct its business and management.²⁷ In

²³ Canada Business Corporations Act (RSC 1985 c C-44), s 122(1)(a). See 5.4.3.2 below for a similar position in South Africa.

²⁴ Canada Business Corporations Act (RSC 1985 c C-44), s 122(1)(b). See 5.4.3.2 below for a similar position in South Africa.

²⁵ See *Goldex Mines Ltd v Revill* 1974 54 DLR (3d) 672, 1974 7 OR (2d) 216, 1974 CarswellOnt 871 (ONCA) [32] where the court stressed the importance of the principle that corporations are governed by majority rule. Of equal importance is that the majority should act fairly and honestly. The court [32] further described fairness as 'the touchstone of equitable justice and when the test of fairness is not met, the equitable jurisdiction of the court can be invoked to prevent or remedy the injustice which misrepresentation or other dishonestly has caused'. See 5.4.3.2 below for a similar position in South Africa.

²⁶ *Goldex Mines Ltd c Revill* 1974 54 DLR (3d) 672, 1974 7 OR (2d) 216, 1974 CarswellOnt 871 (ONCA) [32].

²⁷ See DH Petersen *Shareholder Remedies in Canada* (1989) 18.1 as quoted by the court in *Loewen, Ondaatje, McCutcheon & Co c Sparling* [1992] 3 SCR 235, 1992 97 DLR (4th) 616, 1992 CarswellQue 126 (SCC) [40]. See also *Cogeco Câble Inc c CFCF Inc* [1996] RJQ 1360, [1996] AQ No 1069, 1996 CarswellQue 672 (QCCS). See further *First Edmonton Place Ltd v 315888 Alberta Ltd* [1988] AWLD 1140, 1988 40 BLR 28, 1988 CarswellAlta 103 (ABCQB) [36] where the court held in relation to section 234 of the Business Corporations Act SA 1981 c B-15 (also known as the Alberta Business Corporations Act), that the legislature attempted to balance the interests of minority and majority

the application of the remedy the rights and interests of other stakeholders must also be considered.²⁸

The objective of a court in applying the oppression remedy is aimed at '[a]chieving a rational and equitable balance between the often differing and conflicting interests of the various participants'.²⁹ The remedy is wide and broad enough to subject any corporate conduct to judicial scrutiny.³⁰ The remedy must be interpreted to give effect to its purpose³¹ and should not be given an unduly

shareholders. The court [36] further confirmed that the principle of majority rule remains a fundamental principle of corporate law. However, the conduct of the majority must be fair.

²⁸ *Cogeco Câble Inc c CFCF Inc* [1996] RJQ 1360, [1996] AQ No 1069, 1996 CarswellQue 672 (QCCS) [85]. A liberal approach to the interpretation of the remedy against unfairly prejudicial or oppressive conduct is preferred. See *Abraham and inter Wide Inv't Ltd, Re* 1985 20 DLR (4th) 267, 1985 30 BLR 177, 1985 CarswellOnt 145 (OntHCJ); *Stech v Davies* [1987] 5 WRR 563, 1987 53 Alta LR (2d) 373, 1987 CarswellAlta 175 (ABCQB). The court in *Keho Holdings Ltd v Noble* 1987 ABCA 84, [1987] AWLD 859, 1987 CarswellAlta 107 (ABCA) [19] emphasised that the internal disputes of a corporation must be resolved on the principles of equity rather than the enforcement of strict legal rights. See also *Astral Enterprises Inc v DMSC Medcorp Inc* 2003 CarswellQue 3302 (QCCS) [25]; *Banque Nationale du Canada c Titley* 2004 CarswellQue 10132 (QCCS) [39].

²⁹ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 1-5.

³⁰ In *Besner c JA Besner & Sons (Can) Ltd* [1993] RJQ 1759, 1993 15 BLR (2d) 261, 1993 CarswellQue 29 (QCSC) [54] it was found that although the initial application of the oppression remedy was to resolve disputes between majority and minority shareholders, based on its formulation and wording, the remedy is not necessarily restricted to such disputes. The wide and open terms of the remedy enables it to keep abreast with the dynamic nature of the duties and responsibilities of directors and shareholders. It is the function of the courts to determine whether there was oppressive or unfair prejudicial conduct or unfair disregard of interests. This is to focus the court on enforcing the 'real object of the law' as opposed to enforcing mere 'democratic' structures. See also Robert WV Dickerson *Proposals for a New Business Corporations Law for Canada* (Volume 1, 1971) 158-59.

³¹ *Canada (Director appointed under s 252 of Canada Business Corporations Act) v Royal Trustco Ltd* [1984] OJ No 3129, 1984 1 OAC 279, 1984 CarswellOnt 90 (OAC) [39] and [41]. See also *Canada (Director appointed under s 252 of Canada Business Corporations Act) v Royal Trustco Ltd* [1986] 2 SCR 537, 1986 18 OAC 156, 1986 CarswellOnt 1488 (SCC).

restrictive interpretation.³² It is not the purpose of the oppression remedy to put the court or the minority shareholders of a corporation in charge of the corporation.³³ A court must be cautious in exercising its power merely because a decision legitimately adopted by the majority is unpopular with the minority.³⁴

4.4.2 Section 241 of the Canada Business Corporations Act³⁵ as a right

It's important to note that section 241 does not create rights which the complainant does not already enjoy.³⁶ The section only creates a remedy to protect shareholders, in particular minority shareholders, from unjust treatment.³⁷ In exercising the remedy, a court must be cautious not to assume the function of the board of directors or interfere with the legitimate exercise of control by the majority in the corporation.³⁸ In short the remedy is the right to be treated on an equitable basis.³⁹

³² *Canada (Director appointed under s 252 of Canada Business Corporations Act) v Royal Trustco Ltd* [1984] OJ No 3129, 1984 1 OAC 279, 1984 CarswellOnt 90 (OAC) [39] and [41]. *Canada (Director appointed under s 252 of Canada Business Corporations Act) v Royal Trustco Ltd* [1986] 2 SCR 537, 1986 18 OAC 156, 1986 CarswellOnt 1488 (SCC). See also *Ferguson and Imax Systems Corp* [1983] OJ No 3156, 1983 150 DLR (3d) 718, 1983 CarswellOnt 926 (ONSC) [28]; *Keho Holdings Ltd v Noble* 1987 ABCA 84, [1987] AWLD 859, 1987 CarswellAlta 107 (ABCA) [19].

³³ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 1-8.

³⁴ *Brant Investments Ltd v KeepRite Inc* [1987] CLD 1054, 1987 60 OR (2d) 737, 1987 CarswellOnt 135 (OntHCJ) [79].

³⁵ RSC, 1985, c C-44.

³⁶ *Kruco Inc v R* [1998] 3 CTC 2319, 1998 79 ACWS (3d) 1071, 1998 CarswellNat 629 (Tax Court of Canada) [31].

³⁷ *Brant Investments Ltd v KeepRite Inc* [1987] CLD 1054, 1987 60 OR (2d) 737, 1987 CarswellOnt 135 (OntHCJ) [78].

³⁸ *Brant Investments Ltd v KeepRite Inc* [1987] CLD 1054, 1987 60 OR (2d) 737, 1987 CarswellOnt 135 (OntHCJ) [78].

³⁹ *Kruco Inc v R* [1998] 3 CTC 2319, 1998 79 ACWS (3d) 1071, 1998 CarswellNat 629 (Tax Court of Canada) [31]; *BCE Inc, Re* 2008 CarswellQue 12596 (SCC) [82]. See also *Dubois v Lucid*

4.5 The statutory unfair prejudice remedy

The unfair prejudice remedy is found in Part XX that deals with the remedies, offences and punishment under the Canada Business Corporations Act⁴⁰. Section 241 of the Act⁴¹ provides as follows:

- ‘(1) A complainant may apply to a court for an order under this section.
- (2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
 - (a) any act or omission of the corporation or any of its affiliates effects a result,
 - (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
 - (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.’

4.6 Standing

Only a complainant may rely of the provisions of section 241 of the Canada Business Corporations Act.⁴² For purposes of section 241 of the Act,⁴³ a complainant is defined in section 238.⁴⁴ The remedy is usually relied on by minority

Distributors Inc 2018 BCSC 1582, 2018 298 ACWS (3d) 754, 2018 CarswellBC 2456 (BCSC) [58] where the court held that the remedy against oppression is ‘an equitable remedy. It seeks to ensure fairness-what is “just and equitable”. It gives a court broad, equitable jurisdiction to enforce not just what is legal but what is fair’. See further 4.4.1 above.

⁴⁰ RSC, 1985, c C-44.

⁴¹ RSC, 1985, c C-44.

⁴² RSC, 1985, c C-44. See *Likhatchev c. Karnasfrooshan* 2019 QCCS 1386, 2019 CarswellQue 3160 [31].

⁴³ RSC, 1985, c C-44.

⁴⁴ In section 238 of the Canada Business Corporations Act (RSC 1985 c C-44) a ‘complainant’ is defined as:

- ‘(a) a registered holder or beneficial owner, and a former registered holder or beneficial owner, of a security of a corporation or any of its affiliates,

shareholders (or security holders).⁴⁵ This does not imply that only minority shareholders can rely on the remedy. The remedy can find application in situations where all the shareholders hold equal shares in a corporation.⁴⁶ The remedy is available to majority security holders.⁴⁷ However, a majority security holder may find it difficult to convince a court that he or she is prejudiced by oppressive or unfairly prejudicial conduct.⁴⁸ This is based on the ability of a majority security holder to use its control in the corporation to protect him- or herself from the alleged conduct.⁴⁹

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- (b) a director or an officer or a former director or officer of a corporation or any of its affiliates,
 - (c) the Director, or
 - (d) any other person who, in the discretion of a court, is a proper person to make an application under this Part.'

⁴⁵ In section 2(1) of the Canada Business Corporations Act (RSC 1985 c C-44) a 'security' is defined as 'a share or any class or series of shares or a debt obligation of a corporation and includes a certificate evidencing such a share or that obligation'. The same section defines a 'debt obligation' as 'a bond, debenture, note or other evidence of indebtedness or guarantee of a corporation, whether secured or unsecured'. See 5.7.1.1 below where the point is made that the oppression or unfair prejudice remedy in South Africa is limited to shareholders and not the holders of securities as is the case in Canada.

⁴⁶ *152581 Canada Ltd v Matol World Corporation* [1996] QJ No 4017, [1997] RJQ 161, 1996 CarswellQue 1211 (QCCS) [85]-[86].

⁴⁷ See M Rice 'The Availability of the Oppression Remedy to Majority Shareholders in Ontario' (1989) 16 *Can Bus LJ* 58, 64-65 who cautions against the availability of the oppression remedy to majority shareholders. The author suggests that a court should consider the alternative remedies available to a majority shareholder relying on the oppression remedy. Compare to the position in England as discussed in 2.6.1.2 above.

⁴⁸ *152581 Canada Ltd v Matol World Corporation* [1996] QJ No 4017, [1997] RJQ 161, 1996 CarswellQue 1211 (QCCS) [85]-[86]. See also *Gandalman Investments Inc v Fogle* 1985 22 DLR (4th) 638, 1985 33 ACWS (2d) 467, 1985 CarswellOnt 1628 (OntHCJ) [8]. For a contrary point of view see *Vedova v Garden House Inn Ltd* 1985 29 BLR 236, 1985 31 ACWS (2d) 102, 1985 CarswellOnt 140 (Ont HC) [8] where the court held that the oppression remedy should be used 'as a method of mediating between opposing groups of shareholders acting from a position of equality'.

⁴⁹ See 5.7.1.1 (e) below for the position of controlling shareholders in South Africa.

4.6.1 Registered holders and beneficial owners

A reading of section 238 reveals that the remedy is available to a registered holder or beneficial owner⁵⁰ of a security holder of the corporation or any of its affiliates.⁵¹

This definition further includes a former registered holder or beneficial owner of a security of the corporation or any of its affiliates.⁵²

4.6.2 Directors and other officers

The remedy is also extended to a director⁵³ or officer⁵⁴ or former director or officer of a corporation or any of its affiliates.⁵⁵ The incorporation of a director in the unfair prejudice remedy is to cover situations where it is argued that the conduct complained of affected the complainant in his or her capacity as director and not as

⁵⁰ In section 2(1) the term 'beneficial ownership' is defined as 'ownership through any trustee, legal representative, agent or mandatary, or other intermediary'. See also *Psychogios v Condina* 2013 CarswellQue 9005 [44] where the court held that a person is a beneficial owner of shares, if that person has the right to be registered as the owner of the shares and therefore can act as a complainant in terms of section 238(a). See further *Léger c Garage Technology Ventures Canada Lp (Capital st-Laurent, lp)* 2012 QCCA 1901, [2012] RJQ 2030, 2012 CarswellQue 15066 (QCCA) [49]. See 2.6.1.1 above for the position in England regarding the standing of beneficial shareholders.

⁵¹ Canada Business Corporations Act (RSC 1985 c C-44), s 238(a). Compare to the position in South Africa as discussed in 5.7.1.1 below. The oppression or unfair prejudice remedy is restricted to a shareholder whose name appears on the register of securities.

⁵² Canada Business Corporations Act (RSC 1985 c C-44), s 238(a). In contrast with the Canadian position beneficial owners do not enjoy standing in terms of the provisions of section 163 of the South African Companies Act 71 of 2008. See 5.7.1.2 below.

⁵³ In section 2(1) a 'director' is defined as 'a person occupying the position of director by whatever name called and "directors" and "board of directors" includes a single director'.

⁵⁴ An 'officer' is defined in section 2(1) as 'an individual appointed as an officer under section 212, the chairperson of the board of directors, the president, a vice president, the secretary, the treasurer, the comptroller, the general counsel, the general manager, a managing director, of a corporation, or any other individual who performs functions for a corporation similar to those normally performed by an individual occupying any of those offices'.

⁵⁵ Canada Business Corporations Act (RSC 1985 c C-44), s 238(b). See 5.7.1.3 below for a discussion of the standing of a director in terms of the South African oppression or unfair prejudice remedy.

shareholder. This argument is countered by the recognition in the statute that conduct that affect the interests of a director or directors may in some circumstances justify relief. This approach will particularly find application when the directors are also shareholders of a corporation. The facts of each case must be carefully considered when deciding whether conduct affecting a director also unfairly prejudices the interests of a shareholder.⁵⁶

4.6.3 The director

The director also has standing to be a complainant in terms of section 241.⁵⁷ In terms of 2(1) the 'Director' is defined as 'the Director appointed under section 260'. Section 260 provides that '[t]he Minister may appoint a Director and one or more Deputy Directors to carry out the duties and exercise the powers of the Director under this Act'.

4.6.4 Other persons

4.6.4.1 A proper person

Besides the persons defined as complainants in section 238, a court may exercise its discretion by extending standing to any 'other person' to make an application in

⁵⁶ In *Miller v F Mendel Holdings Ltd* [1984] 2 WWR 683, 1984 26 BLR 85, 1984 CarswellSask 110 (SKQB) [47] the court held that the removal of a complainant as director of the board does not necessarily mean that the complainant is entitled to relief in terms of the unfair prejudice or oppression remedy. This is because the complainants were not entitled to be directors of the corporation. The plaintiffs could further prove that they were prejudiced in their capacity as shareholders. However, the court noted that the removal as directors of a corporation could be taken into consideration when the circumstances of the case are viewed as a whole to determine whether the affairs of the corporation or company are conducted in a manner that 'is oppressive or unfair to the plaintiffs as shareholders'.

⁵⁷ Canada Business Corporations Act (RSC 1985 c C-44), s 238(c).

terms of section 241.⁵⁸ Thus, the provisions of section 238(d) read with section 241 allow persons other than shareholders, directors or officers of the company to act as a complainants of oppressive and/or unfair prejudicial conduct.⁵⁹

4.6.4.2 A creditor

A creditor is not specifically defined as a complainant in section 238. Therefore, a creditor does not by default enjoy standing for purposes of section 241.⁶⁰ It is important to note that section 241(2)(c) specifically recognises that a corporation's affairs can be conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of a creditor. The interests of a creditors become more prominent as the financial position of a corporation deteriorates⁶¹ and in light of the fact that the directors of a corporation do not have a specific fiduciary duty to the creditors of a corporation.⁶²

For a creditor to be able to rely on the provisions of section 241 it has to convince a court that it is 'a proper person' for purposes of section 238.⁶³ A court

⁵⁸ Canada Business Corporations Act (RSC 1985 c C-44), s 238(d). See also *Likhatchev c. Karnasfrooshan* 2019 QCCS 1386, 2019 CarswellQue 3160; *Distribution Fomazz inc c Farias* 2014 QCCS 150, 2014 238 ACWS (3d) 627, 2014 CarswellQue 364 (QCCS) [33].

⁵⁹ *Distribution Fomazz inc c Farias* 2014 QCCS 150, 2014 238 ACWS (3d) 627, 2014 CarswellQue 364 (QCCS) [34]; *Psychogios v Condina* 2013 CarswellQue 9005 (QCCS) [41].

⁶⁰ *Distribution Fomazz inc c Farias* 2014 QCCS 150, 2014 238 ACWS (3d) 627, 2014 CarswellQue 364 (QCCS) [34].

⁶¹ *People's Department Stores Ltd, (1992) Inc, Re* 2004 SCC 68, [2004] 3 SCR 461, 2004 CarswellQue 2862 (SCC) [49].

⁶² *People's Department Stores Ltd, (1992) Inc, Re* 2004 SCC 68, [2004] 3 SCR 461, 2004 CarswellQue 2862 (SCC) [51] and [53]. The judgment in *People's Department Stores* was based on the availability of other remedies contained in the Act that specifically protect the interests of creditors.

⁶³ Canada Business Corporations Act (RSC 1985 c C-44), s 238(d). For cases dealing with the recognition of a creditor as a complainant see *People's Department Stores Ltd, (1992) Inc, Re* 2004 SCC 68, [2004] 3 SCR 461, 2004 CarswellQue 2862 (SCC) [48]-[51] and *Nortel Networks Corp, Re*

has a discretion to grant standing to a creditor, provided that it is satisfied that the creditor has a sufficient interest in the affairs of corporation.⁶⁴ The purpose of the Canada Business Corporations Act⁶⁵ is to protect complainants from prejudicial conduct that affects the corporation of which the complainant is a shareholder or creditor.⁶⁶ To determine whether a creditor is a proper person for purposes of section 238(d), a court will consider the conduct complained of in light of the

2014 ONSC 6973, 2014 248 ACWS (3d) 21, 2014 CarswellOnt 17291 (ONSC) [349]. It is important to note that a creditor may qualify as a security holder or owner for purposes of section 238(a) of Canada Business Corporations Act (RSC 1985 c C-44). See *Casurina Ltd Partnership v Rio Algom Ltd* [2002] OJ No 3229, 2002 115 ACWS (3d) 9832002 CarswellOnt 2746 (ONSC) [96] where the court held that a security of a corporation includes 'debt obligations of the corporation'. In *Apotex Inc v Laboratories Fournier SA* 2006 153 ACWS (3d) 200, 2006 54 CPR (4th) 241, 2006 CarswellOnt 7164 (ONSC) [38] the court held that a creditor should have been a creditor of the corporation at the time of the alleged or complained conduct. This is especially important in light of the potential argument that the complainant has become a creditor as result of oppressive conduct. See also *Awad v Dover Investments Ltd* [2004] OJ No 3847, 2004 47 BLR (3d) 55, 2004 CarswellOnt 3805 (ONCJ.GD) [46] and [48]. According to the court in *Apotex Inc v Laboratories Fournier SA* 2006 153 ACWS (3d) 200, 2006 54 CPR (4th) 241, 2006 CarswellOnt 7164 (ONSC) [42] to have held otherwise would have created the possibility that any person would have qualified as a complainant for purposes of the oppression remedy based on a breach of contract or conduct that constituted a tort. Such an approach would extend the oppression remedy beyond its purpose or objective.

⁶⁴ *Distribution Fomazz inc c Farias* 2014 QCCS 150, 2014 238 ACWS (3d) 627, 2014 CarswellQue 364 (QCCS) [34]; *C3F Consultants inc v Nokia Siemens Networks Canada Inc/Nokia Siemens Reseaux Canada inc* 2012 QCCA 978, [2012] RJQ 1013, 2012 CarswellQue 5179 (QCCA) [25]. The court held in *Standal's Patents Ltd v 160088 Canada Inc* [1993] JQ No 2223, 1993 45 ACWS (3d) 425, 1993 CarswellQue 2070 (QCSC) [243] that a creditor does not have to take judgment against the corporation to qualify as a creditor for purposes of section 241. See also *Apotex Inc v Laboratories Fournier SA* 2006 153 ACWS (3d) 200, 2006 54 CPR (4th) 241, 2006 CarswellOnt 7164 (ONSC) [38] where the court rejected the argument that a creditor should be a judgment creditor to able to be afforded standing for purposes of the oppression remedy. The court remarked [39] that a person does not qualify as a complainant in the form of a creditor, 'at the time of the oppressive actions that are being complained about'.

⁶⁵ RSC, 1985, c C-44.

⁶⁶ *Nortel Networks Corp, Re* 2014 ONSC 6973, 2014 248 ACWS (3d) 21, 2014 CarswellOnt 17291 (ONSC) [358].

reasonable expectations of the creditor.⁶⁷ The mere allegation that the company owes a debt, which it fails to pay, to the creditor is not sufficient to grant a person standing in terms of section 238(d) as a creditor for purposes of section 241 of the Canada Business Corporations Act.⁶⁸

4.6.4.3 Employee

The oppression or unfair prejudice remedy is primarily aimed at the protection of the interests of security holders, directors or officers of the corporation.⁶⁹ The remedy is not available to employees to cover instances of wrongful dismissal.⁷⁰ However, there may be circumstances that justify the application of the remedy in instances where the complainant is wrongfully dismissed from his or her employment.⁷¹ A complainant can rely on the unfair prejudice remedy in the event of dismissal, if the termination of an employee's employment is designed to or formed part of a pattern

⁶⁷ *Likhatchev c. Karnasfrooshan* 2019 QCCS 1386, 2019 CarswellQue 3160 [39]; *Manufactures Life Insurance Co v AFG Industries Ltd* 2008 163 ACWS (3d) 750, 2008 44 BLR (4th) 277, 2008 CarswellOnt 171 (ONSC) [31].

⁶⁸ RSC, 1985, c C-44. In *Likhatchev c. Karnasfrooshan* 2019 QCCS 1386, 2019 CarswellQue 3160 [45] the court found that the failure to pay a debt is not necessarily oppressive or a breach of a reasonable expectation.

⁶⁹ *Mohan v Philmar Lumber (Markham) Ltd* [1991] OJ No 3451, 1991 50 CPC (2d) 164, 1991 CarswellOnt 445 (ONCJ.GD) [2].

⁷⁰ *Beaubien v Campbell* 2003 SKQB 213, [2003] 11 WWR 638, 2003 CarswellSask 313 (SKQB) [90]; *Clitheroe v Hydro One Inc* 2002 21 CCEL (3d) 197, 2002 118 ACWS (3d) 193, 2002 CarswellOnt 3919 (ONSC) [25]. See also *Nanef v Con-Crete Holdings Ltd* [1993] OJ No 1756, 1993 11 BLR (2d) 218, 1993 Carswell 157 (ONCJ.GD) [113]. See further *Welichka v Bittner Investments Ltd* [1988] AWLD 844, 1988 90 AR 224, 1988 CarswellAlta 528 (ABCQB) [7] where the court noted that a wrongful dismissal of an employee is not necessarily oppressive or unfair prejudicial conduct.

⁷¹ *Clitheroe v Hydro One Inc* 2002 21 CCEL (3d) 197, 2002 118 ACWS (3d) 193, 2002 CarswellOnt 3919 (ONSC) [27] where the court described these circumstances or situations as 'rare'. See also *Mohan v Philmar Lumber (Markham) Ltd* [1991] OJ No 3451, 1991 50 CPC (2d) 164, 1991 CarswellOnt 445 (ONCJ.GD) [3].

of oppressive or unfairly prejudicial conduct. This will be the case when the employment of the complainant is closely connected to his or her capacity as shareholder, officer or director of the corporation.⁷²

4.7 The statutory grounds in section 241

4.7.1 Introduction

Section 241 of the Canada Business Corporations Act (RSC 1985 c C-44) embodies the statutory unfair prejudice remedy in terms of which a complainant can apply to court for relief. The grounds on which a complainant may rely are stated in section 241(2).

4.7.2 Section 241(2)(a)

The first ground on which reliance can be placed, is that any act or omission of the *corporation* or any of its affiliates effects a *result* that is 'oppressive' or 'unfairly prejudicial' to, or 'unfairly disregards' the interests of any security holder, creditor, director or officer.⁷³

4.7.3 Section 241(2)(b)

In terms of section 241(2)(b) a complainant can prove that the *business or affairs* of the corporation or any of its affiliates are or have been carried on or conducted in a

⁷² *Benedetti v North Park Electronics (1980) Ltd* [1997] OJ No 597, 1997 69 ACWS (3d) 82, 1997 CarswellOnt 559 (ONCJ.GD) [51]; *Nanef v Con-Crete Holdings Ltd* [1993] OJ No 1756, 1993 11 BLR (2d) 218, 1993 Carswell 157 (ONCJ.GD) [113] and [125]. In *Mohan v Philmar Lumber (Markham) Ltd* [1991] OJ No 3451, 1991 50 CPC (2d) 164, 1991 CarswellOnt 445 (ONCJ.GD) [1] the court specifically noted that the applicant failed to demonstrate 'an intertwining of his employment and his interests in the corporation as an undivisible package'.

⁷³ Canada Business Corporations Act (RSC 1985 c C-44), s 241(2)(a). See 4.6 above for a discussion of the standing of a complainant for purposes of section 241. Compare with section 163(1)(a) of the Companies Act 71 of 2008 as discussed in 5.7.2.2 (a) below.

manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holders, creditor, director or officer.⁷⁴

4.7.4 Section 241(2)(c)

Section 241(2)(c) provides for those circumstances where the *powers* of the directors of the corporation or any of its affiliates are or have been exercised in a *manner* that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer.⁷⁵

4.7.5 The differences between the statutory grounds in section 241(2)

Section 241(2)(a) focuses on the *result* flowing from the conduct complained of while section 241(1)(b) and (c) emphasises the *manner* with which the conduct has been carried out.⁷⁶ Although the grounds are set out in three separate subsections, the differences between these sections are for all practical purposes insignificant.⁷⁷ The only difference is, that should a complainant be unable to prove a result or effect for purposes of section 241(2)(a), the complainant should rather rely on section 241(2)(b) and (c). Section 241(2)(b) and (c) speaks to the *manner* with which the acts complained of were conducted and does not require that a result must be proven.⁷⁸

⁷⁴ Canada Business Corporations Act (RSC 1985 c C-44), s 241(2)(b). Compare with section 163(1)(b) of the Companies Act 71 of 2008 as discussed in 5.7.2.2 (b) below.

⁷⁵ Canada Business Corporations Act (RSC 1985 c C-44), s 241(2)(c). Compare with section 163(1)(a) of the Companies Act 71 of 2008 as discussed in 5.7.2.2 (c) below.

⁷⁶ See in this regard *Brant Investments Ltd v KeepRite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA) [31] regarding the wording of section 234(2) of the CBCA.

⁷⁷ *Brant Investments Ltd v KeepRite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA) [31].

⁷⁸ *Brant Investments Ltd v KeepRite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA) [31].

4.7.6 Establishing the meaning of conduct that is ‘oppressive’, ‘unfairly prejudicial’ or ‘unfairly disregards the interests’ of a complainant

4.7.6.1 Introduction

The onus rests upon the complainant to prove that he or she is entitled to relief in terms of section 241.⁷⁹ For a complainant to rely on the remedy the complainant has to prove ‘in equity, wrongful conduct, causation⁸⁰ and compensable injury’.⁸¹

As pointed out above, a complainant can only succeed with a petition in terms of section 241 if it can prove that the conduct he or she complains of is oppressive or unfairly prejudicial to or unfairly disregards the interests of a security holder, creditor, director or officer. Before a court can apply the provisions of section 241, the meaning of the concepts ‘oppressive’, ‘unfairly prejudicial’ and ‘unfairly disregards’ must be determined.⁸²

⁷⁹ See *Astral Enterprises Inc v DMSC Medcorp Inc* 2003 CarswellQue 3302 (QCCS) [29]

⁸⁰ *Hercules Management Ltd v Ernst & Young* [1997] 2 SCR 165, [1997] 8 WWR 80, 1997 CarswellMan 198 (SCC) [37].

⁸¹ See *BCE Inc, Re* 2008 CarswellQue 12596 (SCC) [90] read with [92]-[93] where the court described oppressive conduct as ‘burdensome, harsh and wrongful’, ‘a visible departure from the standards of fair dealing’ and an ‘abuse of power’. According to the court, the addition of terms such as unfair prejudice and unfair disregard of the interests of a complainant is indicative of the fact that the remedy is not aimed at conduct of the most serious nature. See further *Besner c JA Besner & Sons (Can) Ltd* [1993] RJQ 1759, 1993 15 BLR (2d) 261, 1993 CarswellQue 29 (QCSC) [56] where the court also held that the remedy is not limited to conduct that is ‘burdensome, harsh and wrongful’ as the function of the remedy is to consider and adjudicate disputes based on the fairness of the conduct complained of. The court further explained [56] that the concept of unfairly disregards is wider than oppression and refers to a disregard of a person’s interests without cause or not to pay attention to the interests of the particular complainant.

⁸² See *Esierman v Ara Farms* [1988] 5 WWR 97, 1988 52 DLR (4th) 498, 1988 CarswellSask 294 (SKCA) [14] where the court remarked that the terms ‘unfairly prejudicial’ and ‘unfairly disregards’ do not originate from English legislation.

4.7.6.2 Oppressive conduct

The term ‘oppressive’ did not originate from Canadian legislation, but is derived from the English Companies Act 1948.⁸³ The term was first introduced in Canadian company law in 1960 by the Companies Act of British Columbia.⁸⁴

Prior to the proclamation of the Canada Business Corporations Act 1974-75-76 (Can) c 33 on 15 December 1975, the evaluation of conduct against the oppression standard was not generally available throughout Canada.⁸⁵ The term ‘oppressive’ was described to mean ‘burdensome, harsh and wrongful’.⁸⁶ This meaning implied conduct that was abusive and suggested bad faith.⁸⁷ This was

⁸³ *Keho Holdings Ltd v Noble* 1987 ABCA 84, [1987] AWLD 859, 1987 CarswellAlta 107 (ABCA) [14]. See also *Brant Investments Ltd v KeepRite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA) [33] where the court stated that ‘[i]n considering whether conduct is “oppressive”, one can appropriately look to the English cases decided before 1980 which defined that word in a similar context. Adopting the definition applied by Lord Simonds in the *Scottish Co-operative* case [at p 71 All ER] – namely, “burdensome, harsh and wrongful” – it is unlikely that an act could be found to be oppressive without there being an element of bad faith involved. However, in considering the alternative question of whether any act is unfairly prejudicial to, or unfairly disregards the interests of one of the protected persons or groups, I am of the view that a requirement of lack of *bona fides* would unnecessarily complicated the application of the provision and add a judicial gloss that is inappropriate given the clarity of the words used’. See 2.3.3 above for a discussion of section 210 of the Companies Act 1948. See 4.2 above. For a discussion of the use of the term ‘oppressive’ in the context of section 163 of the Companies Act 71 of 2008 see 5.7.3.2 below.

⁸⁴ Companies Act RSBC 1960 c 67, s 185. See *Keho Holdings Ltd v Noble* 1987 ABCA 84, [1987] AWLD 859, 1987 CarswellAlta 107 (ABCA) [14].

⁸⁵ *Keho Holdings Ltd v Noble* 1987 ABCA 84, [1987] AWLD 859, 1987 CarswellAlta 107 (ABCA) [14].

⁸⁶ *Scottish Co-operative Wholesale Society Ltd v Meyer* [1958] 3 All ER 66, 71 and 86; [1959] AC 324 (HL). This case decided in terms of section 210 of the Companies Act 1948. See 2.3.3 above for a discussion of section 210 of the Companies Act 1948.

⁸⁷ *BCE Inc, Re* 2008 CarswellQue 12596 (SCC) [67]. See also *Standal’s Patents Ltd c 160088 Canada inc* [1991] RJQ 1996, 1991 Carswell 1837 (QCCS) [19] where the court held that a complainant does not have to prove bad faith on the part of the oppressor successfully to rely on section 241. See further *152581 Canada Ltd v Matol World Corporation* [1996] QJ No 4017, [1997]

specifically the case prior to 1980. The approach of the courts to ‘oppressive’ conduct changed with the introduction of the phrase ‘unfairly prejudicial to the interests of some part of the members’.⁸⁸ After the incorporation of the term unfairly prejudicial, proof of bad faith was no longer required.⁸⁹ In Canada the terms ‘oppressive’ and ‘oppression’ are also regarded as conduct marked by abuse or bad faith.⁹⁰ Oppressive conduct refers to a very specific type of conduct. The prejudice or injury flowing from ‘oppressive’ conduct can be described as a ‘wrong of the most serious sort’.⁹¹

4.7.6.3 Unfair prejudicial conduct

In contrast with the term ‘oppressive’ – especially prior to 1980 – it is not required by the complainant to prove that the conduct complained of was committed in bad

RJQ 161, 1996 CarswellQue 1211 (QCCS) [82]-[83]; *Brant Investments Ltd v Keeprite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA). In *Vedova v Garden House Inn Ltd* 1985 29 BLR 236, 1985 31 ACWS (2d) 102, 1985 CarswellOnt 140 (Ont HC) [8] the court described oppression as referring to an inequality of bargaining power or authority while unfairness refers to a duty to act equitably or impartially in the exercise of power. See also *Banque Nationale du Canada c Titley* 2004 CarswellQue 10132 (QCCS) [43] where it was held that intent or bad faith does not need to be proven.

⁸⁸ See *Brant Investments Ltd v KeepRite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA) [26]. See also section 459(1) of the Companies Act 1985 (UK) as discussed in 2.3.5 above.

⁸⁹ See *Brant Investments Ltd v KeepRite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA) [33] where the court cited *Palmer v Carling O’Keefe Breweries of Canada Ltd* 1989 32 OAC 113, 1989 56 DLR (4th) 128, 1989 CarswellOnt 119 (ONDC) as an example where relief can be granted in terms of the oppression remedy despite the absence of bad faith on the part of the persons whose conduct was the subject of the complaint. The court in *Brant* [47] held that a complainant does not have to prove bad faith to obtain relief.

⁹⁰ *BCE Inc, Re* 2008 CarswellQue 12596 (SCC) [67]. See also *Menlin v Menlin* 2018 ABQB 1056; 2018 CarswellAlta 3186 [58].

⁹¹ *BCE Inc, Re* 2008 CarswellQue 12596 (SCC) [92].

faith to establish that the conduct is or was unfairly prejudicial.⁹² When evaluating whether conduct is unfairly prejudicial, the use of the term can be regarded as making reference to ‘a less culpable state of mind, that nevertheless has unfair consequences’ in comparison to what is required to find that conduct is ‘oppressive’.⁹³ However, bad faith as motive could be relevant to find that the conduct complained of is unfair.⁹⁴ Conduct can be unfairly prejudicial in the absence of bad faith.⁹⁵ In *Brant*⁹⁶ the court confirmed the latter approach by referring with approval to the following comment made in *Gillespie*:⁹⁷

‘Obviously, not every adverse consequence to the complaint from conduct of the majority will give rise to relief under s 247. The term “unfairly” as much as the term “oppressive” invites and requires consideration of the

⁹² See *Palmer v Carling O’Keefe Breweries of Canada Ltd* 1989 CarswellOnt 119 (ONDC) [46] where the court held in relation of section 247 of the Ontario Business Corporations Act, SO 1982, c 4 that a complainant does not have to prove bad faith for purposes of an ‘oppression case’ before a court may grant relief.

⁹³ *BCE Inc, Re* 2008 CarswellQue 12596 (SCC) [67]. See also *Menlin v Menlin* 2018 ABQB 1056; 2018 CarswellAlta 3186 [58].

⁹⁴ See in this regard *Brant Investments Ltd v KeepRite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA) [33] regarding the wording of section 234(2) of the Canada Business Corporations Act 1974-75-76 (Can) c 33.

⁹⁵ See in this regard *Brant Investments Ltd v KeepRite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA) [31] and [47] regarding the wording of section 234(2) of the Canada Business Corporations Act, SC 1974-75-76, C 33. In *Low v Ascot Jockey Club Ltd* [1986] BCWLD 1498, 1986 1 BCLR (2d) 123, 1986 CarswellBC 54 (BCSC) [30] the court, while dealing with section 224(1) of the British Columbia Company Act, RSBC 1979, c 59 held that an investigation into the motive or intent of the parties whose conduct is complained of is unnecessary. The essence of the inquiry is the effect of the conduct. The court [30] specifically stated ‘[t]he best way to put my opinion is to say that malice or intent on the part of the respondents to do harm is not necessary ingredient of the petitioner’s case at least in the circumstances such as those now before me. I do not doubt that there might be cases in which the purpose of the acts complained of would be relevant to determining whether it was oppressive’.

⁹⁶ See in this regard *Brant Investments Ltd v KeepRite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA) [38] regarding the wording of section 234(2) of the Canada Business Corporations Act, SC 1974-75-76, C 33.

⁹⁷ *Gillespie v Overs* [1987] CLD 1217, [1987] OJ No 747, 1987 CarswellOnt 3404 (OntHCJ) [142].

quality of the acts of the alleged wrong doer and not merely of the adverse effects of those acts upon the interests of the complainant. Although the thresholds are clearly different for oppression and for what Anderson J referred to ... as the “wider range of conduct” and the theory more modern statutory provisions and are probably different as between “conduct unfairly prejudicial” and “conduct unfairly disregarding” ... the court is required to have regard to the propriety of the conduct complained of where the complaint involves any of the three categories.’

To broaden the scope of application of the ‘oppression remedy’, the phrases or concepts ‘unfair prejudice’ and ‘unfair disregard’ were added to the provision.⁹⁸ In *Mason v Intercity Properties Ltd*⁹⁹ the court stated that ‘[r]elief may be given to a minority shareholder upon proof of unfair prejudice to or disregard of his or her interests, both of which is less rigorous grounds than oppression’.

4.7.6.4 Unfair disregard of interests

A complaint may also be brought against conduct that unfairly disregarded or disregards the interests of the complainant. An unfair disregard of the interests of a complainant means that the interests of the complainant are ignored or not considered.¹⁰⁰

⁹⁸ *BCE Inc, Re* 2008 CarswellQue 12596 (SCC) [93]. The court provided the following examples which according to the court is not oppressive conduct but may be found to be unfairly prejudicial: ‘[S]queezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a “poison pill” to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors’ fees higher than the industry norm.’

⁹⁹ 1987 CarswellOnt 134 (ONCA) [13].

¹⁰⁰ *Alharayeri v Black* 2014 QCCS 180, 2014 CarswellQue 419 (QCCS) [41]; *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [67]. In 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [94] the court cited examples such as the improper reduction of the shareholders’ dividend or the failure to deliver property belonging to the complainant. See also *Stech v Davies* 1987 CarswellAlta 175 (ABCQB) [17] where the court found the term ‘unfair disregard’ for purposes of sections 207 and 234 of the Business Corporations Act, SA 1981, cB-15 to mean ‘to unjustly and without cause pay no attention to, ignore or treat as of no importance the interests of security holders, creditors, directors, or officers of a corporation’.

In *BCE Inc, Re*¹⁰¹ the court described the unfair disregard of interests as ‘ignoring an interest as being of importance, contrary to the stakeholders’ reasonable expectations’.¹⁰² The use of the concepts of unfair prejudice in conjunction with the term oppression can be regarded as a ‘relaxation’ of the latter term.¹⁰³

4.7.6.5 Unfairness (or fairness) as a criterion for unfair prejudicial conduct

To establish whether a complainant is entitled to relief in terms of section 241 three interpretational approaches to section 241(1) can be identified from case law.

(a) *The first interpretational approach*

According to the first approach the concepts of oppressive, unfairly prejudicial and unfairly disregard of the interests of the complainant are interpreted as individual concepts.¹⁰⁴ The weakness of this approach is that the terms or concepts cannot

¹⁰¹ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC).

¹⁰² *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [67]. The court [94] cited conduct such as ‘favouring a director by failing to prosecute claims, improperly reducing a shareholders’ dividend, or failing to deliver property belonging to the claimant’.

¹⁰³ See *Mason v Intercity Properties Ltd* [1987] OJ No 448, 1987 22 OAC 161, 1987 CarswellOnt 134 (ONCA) [6] where the court noted that ‘[r]elief may be given to a minority shareholder upon proof of unfair prejudice to, or a disregard of his or her interests, both of which is less rigorous grounds than oppression’. See also *No 20 CR Ventures Ltd v Andrex Developments (1985) Ltd* 2019 BCSC 405, 2019 CarswellBC 617 [45] decided in terms of the Business Corporations Act SBC 2002 c 57, where the court stated that unfair disregard of interests is of a less serious nature than conduct that is oppressive or unfairly prejudicial. It is interesting to note that the court in *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [94] described the ‘unfair disregard’ of the interests of a complainant ‘as the least serious of the three injuries, or wrongs, mentioned in s 241’.

¹⁰⁴ In *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [54] the court cautioned that these concepts cannot be placed in individual compartments and do not provide principles which can provide guidance as to when court intervention is justified. In *Diligenti v RWMD Operations Kelowna Ltd* [1976] BCJ No 38, 1976 1 BCLR 36, 1976 CarswellBC 3 (BCSC) [35] the court explained that the term ‘oppressive’ cannot be equated to ‘unfairly prejudicial’ as the latter term

be compartmentalised or specifically defined.¹⁰⁵ The terms and concepts are rather descriptive of each other, but this does not assist in the formulation of principles to determine whether conduct is oppressive or unfairly prejudicial.¹⁰⁶

(b) *The second interpretational approach*

The second approach is to interpret the individual concepts in such a manner as to form a composite whole whereupon cases will then be adjudicated upon principles.¹⁰⁷ This is because the terms and concepts in section 241 overlap to some degree.¹⁰⁸

(c) *The third interpretational approach*

A third approach is to consider the principles that underpin the remedy and in particular the reasonable expectations of the complainant is of critical importance.¹⁰⁹ Once it is found that a reasonable expectation had been breached one has to consider whether such a breach is oppressive, unfairly prejudicial or unfairly disregards the interests of the complainant.¹¹⁰

was specifically incorporated by the legislature with the intention that ‘the court should give those qualifying or defining words an effect different from and going beyond that given to the word “oppressive” if not, the expression used would have been the same’.

¹⁰⁵ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [54].

¹⁰⁶ See M Koehnen *Oppression and Related Remedies* (2004) 79-80 and 84 as quoted in *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [54].

¹⁰⁷ See *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [90]-[91].

¹⁰⁸ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [91].

¹⁰⁹ Ordinary remedies are available to enforce rights and duties, but specific remedies need to be created to protect and enforce reasonable expectations. See *BCE Inc, Re* 2008 CarswellQue 12596 (SCC) [56].

¹¹⁰ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [56], [68] and [95] for a summary of the inquiry into oppressive conduct.

(d) Fairness as criterion for unfair prejudicial conduct

The use of the notion of unfair prejudicial conduct or unfair disregard of the interests of a complainant together with the concept ‘oppression’ emphasises that the conduct complained of must be considered in the light of fairness. The unfair prejudice remedy is an equitable remedy, with the aim to enforce not only legal rights but to ensure fairness.¹¹¹ Fairness is, amongst others, determined with reference to the business realities applicable to the facts and circumstances of each case.¹¹² This has the result that the fairness of the conduct complained of will depend on the facts of each case.¹¹³

The purpose of the remedy is to address unfairness that resulted from oppressive conduct.¹¹⁴ This implies that a complainant can rely on the unfair prejudice remedy even in circumstances where the conduct is lawful or committed in good faith.¹¹⁵ The availability of the remedy is not dependent on the intent of the alleged transgressors or the legality of the conduct.¹¹⁶

¹¹¹ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [58]. See also *Wright v Donald S Montgomery Holdings Ltd* 1998 39 BLR (2d) 266, 1998 51 OTC 241, 1998 CarswellOnt 370 (ONCJ.GD) [20]; *Keho Holdings Ltd v Noble* 1987 ABCA 84, [1987] AWLD 859, 1987 CarswellAlta 107 (ABCA) [19].

¹¹² *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [58]. The court [59] pointed out the fact that the determination of oppression is fact specific.

¹¹³ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [58]-[59].

¹¹⁴ *Distribution Fomazz inc c Farias* 2014 QCCS 150, 2014 238 ACWS (3d) 627, 2014 CarswellQue 364 (QCCS) [42].

¹¹⁵ *Distribution Fomazz inc c Farias* 2014 QCCS 150, 2014 238 ACWS (3d) 627, 2014 CarswellQue 364 (QCCS) [42]. When the principles of fairness are breached, the court’s equitable jurisdiction is triggered to prevent or remedy injustice. See in this regard *Goldex Mines Ltd c Revill* 1974 54 DLR (3d) 672, 1974 7 OR (2d) 216, 1974 CarswellOnt 871 (ONCA).

¹¹⁶ *Distribution Fomazz inc c Farias* 2014 QCCS 150, 2014 238 ACWS (3d) 627, 2014 CarswellQue 364 (QCCS) [42].

To determine whether the conduct complained of falls within the ambit of section 241 will depend on the facts and circumstances of each case.¹¹⁷ A complainant will be entitled to relief in terms of section 241 when it can prove ‘a visible departure from the standards of fair dealing and a violation of the conditions of fair play’.¹¹⁸

Section 241 does not only aim to enforce legal rights but to enforce and protect what is fair.¹¹⁹ The conduct complained of does not necessarily have to be unlawful for section 241 to apply.¹²⁰ The conduct of the complainant may in certain

¹¹⁷ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC). In *Guerrera v Damiani* 2012 QCCA 2007, 2012 232 ACWS (3d) 673, 2012 CarswellQue 11929 (QCCA) [9] it was confirmed that a court hearing a petition in terms of section 241 has a wide discretion. The question whether or not conduct is oppressive will depend on the facts of each case. In dealing with the position of an oppressed creditor, the court held in *Distribution Fomazz inc c Farias* 2014 QCCS 150, 2014 238 ACWS (3d) 627, 2014 CarswellQue 364 (QCCS) [40]-[41] that the reasonable expectations of a creditor will be considered together with all the relevant circumstances of the case. The nature and history of the corporation and the relationship between the corporation and the oppressed creditor will be taken into consideration. In *Sweibel v Futi* 2013 QCCS 2029, 2013 CarswellQue 4611 (QCCS) the court found that the misappropriation of funds, unilateral changes to the directors of a corporation and the unilateral borrowing of money may trigger relief in terms of section 241. See also *Georges S Petty Management Ltd v Repap Enterprises Inc* 1998 CarswellQue 3808 (QCCS) [170].

¹¹⁸ *Basha v Singh* 2016 QCCS 1564, 2016 CarswellQue 2981 (QCCS) [71].

¹¹⁹ In *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [58] it was emphasised that the oppression remedy is an equitable remedy primarily aimed at achieving fairness which can be equated to what is just and equitable within a particular set of circumstances. The only difference is that the court has a much wider discretion in tailoring relief. A court [58] should not only consider the legal rights at play but also the relevant commercial realities. In *Léger c Garage Technology Ventures Canada Lp (Capital st-Laurent, lp)* 2012 QCCA 1901, [2012] RJQ 2030, 2012 CarswellQue 15066 (QCCA) [55] the court held that disputes in terms of section 241 should be adjudicated based on the principles of fairness. The application of section 241 is not dependent upon the lawfulness of the conduct but is rather evaluated against the notion of fairness. See in this regard *Desjardines Ducharme Stein Monast v Empress Jewellery (Canada) Inc* [2004] RJQ 1243, 2004 CarswellQue 939 (QCCS) [39]. See also 4.4.2 above. See further 4.8 below for a discussion of ‘interests’.

¹²⁰ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [71]. See also *1043325 Ontario Ltd v CSA Building Sciences Western Ltd* 2014 CarswellBC 1906, 2014 244 ACWS

circumstances impact on the fairness of the conduct.¹²¹

4.7.6.6 The evaluation of the conduct of directors

(a) *The fiduciary duty of directors and the duty to act fairly*

The directors of a corporation have the fiduciary duty to act in the best interests of a corporation. The duty is primarily owed to the corporation. The duty further includes the duty to treat stakeholders fairly.¹²²

To evaluate whether directors complied with their duty to act in the best interests of the corporation it must be kept in mind that ‘the best interests of the corporation’ is a broad and contextual concept.¹²³ The duty should not be confined the pursuit of short-term profit but to create share value in the long term, especially when the corporation is a going concern.¹²⁴ In considering the best interests of the corporation it may in some circumstances be appropriate for directors to consider

(3d), 2014 CarswellBC 1906 (BCCA) [59] in the consideration of section 227 of the Business Corporations Act, which is similar to the oppression remedy in the Canada Business Corporations Act RSC 1985, c C-44 where the court explained that ‘[t]he remedy the court may grant is an equitable one. It has a broad equitable jurisdiction to do not what is legal, but what is fair, and should consider business realities, not narrow legalities’.

¹²¹ According to *Banque Nationale du Canada c Titley* 2004 CarswellQue 10132 (QCCS) [39] the court will take into consideration whether the conduct complained of has been pre-empted by the complainant or whether the complainant repudiated terms of an agreement to which the complainant has freely and voluntarily agreed to, or to force a purchase of shares. A shareholder will not be successful in relying on the grounds in section 241 when there is a difference in approach regarding the commercial objectives and operations of the corporation and when such differences are legitimate and the results are not prejudicial to the complainant.

¹²² In *People’s Department Stores Ltd (1992) Inc, Re* 2004 CarswellQue 2862 (SCC) (SCC) [42] the court held that directors may consider the interests of various groups of stakeholders in determining what is the best interests of the corporation.

¹²³ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [38].

¹²⁴ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [38] and [102].

the impact of a corporate decision on shareholders or any other particular group of stakeholders.¹²⁵ Narrowly viewed the fiduciary duty of directors entails that the corporation must at least comply with all its statutory duties.¹²⁶ Fiduciary duties arise between parties or persons by agreement or as a result of particular circumstances or the nature of the relationship between parties or relevant persons.¹²⁷ Usually, the beneficiary of a duty must enforce the duty.¹²⁸

(b) Conflicting stakeholder interests

The interests of various stakeholders may potentially come in conflict. Because only shareholders usually hold voting rights, in contrast with other stakeholders, this may lead to unsatisfactory results in some instances.¹²⁹ However, stakeholders should be protected against corporate conduct that attempts to resolve conflicts between stakeholders in a manner that ‘abusively or unfairly maximize a particular group’s interest at the expense of other stakeholders’.¹³⁰ From this perspective, a corporation is unique. Firstly, the corporation, as the beneficiary of the fiduciary duties of directors, will in some instances be unable to enforce such duties against directors.¹³¹ Further, the activities of the corporation impacts on a variety of

¹²⁵ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [40]; *People’s Department Stores Ltd (1992) Inc, Re* 2004 CarswellQue 2862 (SCC) [42].

¹²⁶ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [38].

¹²⁷ See in this regard *Brant Investments Ltd v KeepRite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA) [18] regarding the wording of section 234(2) of the CBCA.

¹²⁸ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [41]. See the discussion of the statutory unfair prejudice remedy and the statutory derivative claim in 4.12 below.

¹²⁹ In *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [41] the court remarked that the exercise of voting rights is a form of control that shareholders can exercise over a corporation.

¹³⁰ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [64].

¹³¹ See 4.12 below.

stakeholders who are not necessarily shareholders who hold voting rights in the company. For these reasons, the legislature has introduced statutory remedies to protect shareholders and other stakeholders of a corporation. The breach of a fiduciary duty in the context of section 241 must be considered in a broader context and in light of the wide formulation of the provision.¹³²

In some circumstances an overlap may exist between the interests of shareholders and stakeholders, but when a conflict of interests exists between the various stakeholders the duty owed by the directors to the corporation takes preference.¹³³ The directors of a corporation do not owe separate fiduciary duties to the individual stakeholders of a corporation.

The business judgment rule acknowledges that the interests of other stakeholders may be considered during corporate decision-making.¹³⁴ This duty of directors includes the duty to treat stakeholders fairly.¹³⁵ Section 241 does not

¹³² See in this regard *Brant Investments Ltd v KeepRite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA) [18] regarding the wording of section 234(2) of the CBCA.

¹³³ In *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [81] and [82] the court held that the interests of various stakeholders of the corporation may often come into conflict with each other. In some instances, a conflict may arise between the interests of the stakeholders and the interests of the corporation. Once the interests of the corporation are affected or impacted upon, the directors should resolve the conflict in a manner that is in the best interests of the corporation. This fiduciary duty of directors includes the duty to deal 'equitably and fairly' with the stakeholders of the corporation. This approach is in line with the duty of a corporation to be seen as 'a responsible citizen'.

¹³⁴ See *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [84]. The court [86] in *BCE* further stated that other considerations come into play when the company will not continue as a going concern. See also *Banque Nationale du Canada c Titley* 2004 CarswellQue 10132 (QCCS) [40]. See also 4.7.6.6 (c) below.

¹³⁵ In *Levenzon v Korres* 2014 QCCS 258, 2014 CarswellQue 592 (QCCS) [70] it was held that the wording of section 241 is wide enough to provide protection to a security owner and therefore it is not necessary to establish whether a fiduciary duty towards the security owner is breached.

create a separate legal duty towards individual stakeholder groups.¹³⁶ To impose such a duty on directors to all the various stakeholders of a company may place the directors in an impossible situation. When acting in the best interests of a corporation, it is recognised that the directors may have to act in the interests of one group of stakeholders at the cost of other stakeholders.¹³⁷

(c) *The best interests of a corporation and the business judgment rule*

To determine whether a director has exercised his or her power or discretion in the best interests of the corporation one needs to be mindful of the business judgment rule. This rule gives effect to the judgement of directors as long as it is exercised within a range of reasonable alternatives.¹³⁸ The rule is based on the notion that the directors of a corporation are in the best possible position to determine the best interests of the corporation, and based on the fact that directors carry the duty to manage the business and affairs of a corporation.¹³⁹

¹³⁶ See in this regard *Brant Investments Ltd v KeepRite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA) [16] regarding the wording of section 234(2) of the Canada Business Corporations Act SC 1974-75-76 c 33.

¹³⁷ See in this regard *Brant Investments Ltd v KeepRite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA) [17] regarding the wording of section 234(2) of the Canada Business Corporations Act SC 1974-75-76 c 33.

¹³⁸ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [40]. In *CW Shareholdings Inc v WIC Western International Communications Ltd* [1998] OJ No 1886, 1998 160 DLR (4th) 131, 1998 CarswellOnt 1891 (ONCJ.GD) [57]-[59] the court explained that the business judgment rule protects the decisions of the board against court intervention provided that the decision was made honestly in good faith and on reasonable grounds.

¹³⁹ In *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [40] the court stated in relation to the business judgment rule that '[i]t reflects that directors, who are mandated under s 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions'.

Often a court does not have the background knowledge or expertise of the directors who have had to consider and decide on the matter.¹⁴⁰ A court should be slow to interfere with the discretion of the directors, unless it is clear that such an exercise of discretion is abusive, unreasonable or exercised in a non-judicial manner.¹⁴¹ When a court assess the business judgment of directors, it should be taken into consideration that a court is considering the relevant matter or exercise of power or discretion at a different time and place.¹⁴² However, this does not imply that the courts do not have the ability to provide an objective assessment of the

¹⁴⁰ See in this regard *Brant Investments Ltd v KeepRite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA) [75] regarding the wording of section 234(2) of the CBCA. See also *UPM-Kymmene v UPM-Kymmene Miramichi Inc* 2002 214 DLR (4th) 496, 2002 27 BLR (3d) 53, 2002 CarswellOnt 2096 (ONSC) [152].

¹⁴¹ *Trackcom Systems Inc v Trackcom Systems International Inc* 2014 QCCA 1136, 2014 CarswellQue 5192 (QCCA) [36]; *Spitzer v Magny* 2012 QCCA 2059, 2012 232 ACWS (3d) 230, 2012 CarswellQue 12282 (QCCA) [3]. When considering complaints in terms of the unfair prejudice remedy, a court must exercise its discretion in accordance with the normal principles of corporate law. Firstly, it should be recognised that it is the function of the board of directors to manage the company. Secondly, corporations are governed by the principle of majority rule. A court must be cautious not to usurp the powers of the board of directors or unjustifiably to intervene in the legitimate exercise of power within the company. See in this regard *Brant Investments Ltd v KeepRite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA) [78] where this principle was confirmed. In *Banque Nationale du Canada c Titley* 2004 CarswellQue 10132 (QCCS) [40] the court held that a court 'should not intervene in the operations of a Company unless the conduct complained of has resulted in a prejudice, injury, detriment, or damage of the complainant'. The court in *Budd v Gentra Inc* 1998 111 OAC 288, 1991 43 BLR (2d) 27, 1998 CarswellOnt 3069 (ONCA) [32] described the oppression remedy as a form of judicial control in circumstances where the corporate powers in a corporation are abused. It empowers the court to intervene in the affairs of a corporation and to override the decisions of those responsible for the corporate governance of a corporation.

¹⁴² See in this regard *Brant Investments Ltd v KeepRite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA) [75] regarding the wording of section 234(2) of the Canada Business Corporations Act SC 1974-75-76 c 33.

facts relevant to provisions of the unfair prejudice remedy.¹⁴³

The decisions of the board or director will not be subjected to a ‘microscopic’ examination.¹⁴⁴ The court in *BCE Inc, Re*¹⁴⁵ held that ‘[p]rovided that, as here, the directors’ decision is found to have been within the range of reasonable choices that they could have made in weighing conflicting interests, the court will not go on to determine whether their decision was the perfect one’.¹⁴⁶ A court will not substitute the decision of the directors with its own, even when consequences or events transpired that create doubt regarding the correctness of a decision of the board.¹⁴⁷

4.8 ‘Interests’ and ‘reasonable expectations’

4.8.1 Interests

The aim of section 241 is the protection of ‘interests’.¹⁴⁸ Interests for purposes of section 241 are not confined to legal interests.¹⁴⁹ Interests include the reasonable

¹⁴³ See in this regard *Brant Investments Ltd v KeepRite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA) [75] regarding the wording of section 234(2) of the Canada Business Corporations Act SC 1974-75-76 c 33.

¹⁴⁴ See in this regard *Brant Investments Ltd v KeepRite Inc* 1991 1 BLR (2d) 225, 1991 26 ACWS (3d) 1261, 1991 CarswellOnt 133 (ONCA) [76] regarding the wording of section 234(2) of the Canada Business Corporations Act SC 1974-75-76 c 33.

¹⁴⁵ 2008 CarswellQue 12596 (SCC).

¹⁴⁶ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [112].

¹⁴⁷ *Pente Investment Management Ltd v Schneider Corp* [1998] OJ No 4142, 1998 42 OR (3d) 177, 1998 CarswellOnt 4035 (ONCA) [36].

¹⁴⁸ In *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [45] the court stated that the remedy does not only protect legal rights but also aims to protect the equitable interests of stakeholders that are affected by oppressive conduct originating from the corporation or its directors. See 5.7.4 below for a discussion of interests in the context of the South African oppression- or unfair prejudice remedy.

¹⁴⁹ *BCE Inc v 1976 Debentureholders* 2008 CarswellQue 12596 (SCC) [45] and [102].

expectations¹⁵⁰ of a complainant. The interests of a stakeholder do not necessarily have to be contained in a contract or be of a contractual nature.¹⁵¹

Section 241 protects the legal and equitable interests of a wide range of stakeholders.¹⁵² It is further important that the interests of the various potential complainants should be distinguished from one another and not limited or restricted to the protection of the rights and interests of shareholders.¹⁵³ For example, to establish the interests of a shareholder, the nature of a share and the rights attached thereto are of specific importance to determine the interests of a shareholder.

Directors may consider the interests of stakeholders when exercising their powers or adopting resolutions.¹⁵⁴ The interests of shareholders, the corporation and other stakeholders should not be conflated. While rights and obligations are protected and enforced without the need to resort to special remedies, the 'oppression remedy' is concerned with the protection of the expectations of stakeholders.¹⁵⁵

Stakeholders of a corporation should acknowledge that the shareholders are entitled to maximise profit and shareholder value.¹⁵⁶ However, this may not be done by engaging in unfair conduct towards other stakeholders of the corporation.¹⁵⁷ The duty to act in the best interests of the corporation is owed exclusively to the

¹⁵⁰ See 4.8.2 below.

¹⁵¹ See 4.8.2 below.

¹⁵² *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [45].

¹⁵³ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [45].

¹⁵⁴ See 4.7.6.6 above.

¹⁵⁵ *BCE Inc, Re v* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [61]. See 4.8.2 below for a discussion of 'reasonable expectations'. See further 4.7.6.6. (b) and (c) above for a discussion in the consideration of stakeholder interests by directors.

¹⁵⁶ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [64].

¹⁵⁷ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [64].

corporation.¹⁵⁸ The fact that the directors took a decision or exercised a power which benefits one group of stakeholders above the other or has as consequence the prejudice of a particular portion of stakeholders does not necessarily mean that the directors have acted in breach of their fiduciary duty.¹⁵⁹

4.8.2 Reasonable expectations

Reliance may be placed on section 241 to obtain relief when the conduct of a corporation or its directors unfairly violates the interests of shareholders or breaches the reasonable expectations of stakeholders.¹⁶⁰ To prove such a reasonable expectation, the evidence placed before a court must support the existence of an expectation.¹⁶¹ Representations, made over a period, may create a reasonable expectation with a particular stakeholder.¹⁶²

Once a violation or breach of an expectation is proven, it has to be determined whether the violation or breach falls within the ambit of section 241.¹⁶³

¹⁵⁸ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [37]. See also *People's Department Stores Ltd (1992) Inc, Re* 2004 SCC 68, [2004] 3 SCR 461, 2004 CarswellQue 2862 (SCC) [43]. See 4.7.6.6 (a) and (b) above.

¹⁵⁹ See 4.7.6.6 above. See also *People's Department Stores Ltd (1992) Inc, Re* 2004 SCC 68, [2004] 3 SCR 461, 2004 CarswellQue 2862 (SCC) [109] where the court held that because the oppression remedy is based on the notion of equity, it applies to a broader range of situations compared with the fiduciary duties of a director and the standard of care required by section 122(1) of the Canada Business Corporations Act.

¹⁶⁰ In *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [71]. The court further noted that not all harmful or prejudicial conduct will qualify as oppressive conduct for purposes of section 241. See 5.7.6 below for a discussion of the protection of reasonable expectations in the South African context.

¹⁶¹ *Caughlin v Canadian Payroll Systems Inc* 2019 MBQB 6; 2019 CarswellMan 14 [46]-[47].

¹⁶² *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [79].

¹⁶³ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [68]. The court summarised the enquiries into a claim for oppression as follows: '(1) Does the evidence support the reasonable expectation asserted by the claimant? and (2) Does the evidence establish that the

This is done by taking into account the totality of the evidence before the court and circumstances of each case. It is important to note that the remedy protects reasonable expectations and not the subjective wishes of a shareholder and that not every failure to meet a reasonable expectation will result in oppressive or unfair prejudicial conduct.¹⁶⁴

The court takes various factors into account to establish whether a breach of a reasonable expectation is oppressive, unfairly prejudicial or unfairly disregards the interests of the complainant.¹⁶⁵ Amongst these factors, the court will consider prevailing commercial practices to determine whether there is a departure from normal practices or a frustration of legal rights.¹⁶⁶ The size and nature of a

reasonable expectation was violated by conduct falling within the terms “oppression”, “unfair prejudice” or “unfair disregard” of the relevant interest?’. The expectations of shareholders are often intertwined with the interests of shareholders. See also *Tri-Mac Holdings Inc v Ostrom* 2018 NSSC 177, 2018 296 ACWS (3d) 160, 2018 CarswellINS 557 (NSSC) [24]; *Alharayeri v Black* 2014 QCCS 180, 2014 CarswellQue 419 (QCCS) [39]-[41]; *Mennillo v Intamodal inc* 2016 SCC 51, [2016] 2 SCR 438, 2016 CarswellQue 10615 (SCC) [9]. However, it should be noted that not all expectations are protected by the remedy save for those that can be considered as part of the shares held by the shareholders. See in this regard *820099 Ontario Inc v Harold E Ballard Ltd* [1991] OJ No 266, 1991 3 BLR (2d) 113 at 123, 1991 CarswellOnt 142 (ONCJ.GD) [129]; *10443325 Ontario Ltd v CSA Building Sciences Western Ltd* 2016 BCCA 258, [2016] BCWLD 4927, 2016 CarswellBC 1607 (BCCA) [60]-[61]. See further *Toor v 1176520 Alberta Ltd* 2018 ABQB 483, [2018] AWLD 2720, 2018 CarswellAlta 1201 (ABQB) [30] in the context of section 242 of the Business Corporations Act, RSA 2000, c B-9.

¹⁶⁴ *McKinstry v York Condominium Corp No 472* [2003] OJ No 5006, 2003 68 OR (3d) 557, 2003 CarswellOnt 4948 (ONSC) [33]. See also *Noble v North Halton Golf and Country Club Limited* 2018 ONSC 3565, 2018 297 ACWS (3d) 314, 2018 CarswellOnt 12170 (ONSC) [126].

¹⁶⁵ See *Banque Nationale du Canada c Titley* 2004 CarswellQue 10132 (QCCS) [45] where the court stated that reliance may also be placed on section 241 when there is a breach of a reasonable expectation; a breach of a trust relationship based on confidence between shareholders; where the shareholders lost confidence in the management of the company’s affairs; or where a deadlock exists between the shareholders due to an irreconcilable conflict between shareholders.

¹⁶⁶ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [73]. See also *Gallagher Holdings Limited v Unison Resources Incorporated* 2018 NSSC 251, 2018 CarswellINS 779 (NSSC) [438].

corporation are also considered in some instances.¹⁶⁷ In smaller corporations a deviation from formalities may be more acceptable than in bigger corporations.¹⁶⁸

The nature of the relationship between the parties also needs to be carefully considered.¹⁶⁹ Different considerations apply to personal relationships in contrast with relationships at an arm's-length or strict commercial relationships.¹⁷⁰ The relationship between the parties is considered over and above their legal rights.

A complainant may rely upon past practices to establish that it had a particular reasonable expectation and that a deviation from past practices may entitle the complainant to relief in terms section 241.¹⁷¹ However, such practices and expectations may change over a period of time as long as a valid commercial reason exists and as long the rights of the complainant are not undermined.¹⁷² To determine whether a breach of an expectation of a stakeholder is unfairly prejudicial, a court will take into account the steps that the stakeholder could have taken to protect him- or

¹⁶⁷ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [74]. See also *Gallagher Holdings Limited v Unison Resources Incorporated* 2018 NSSC 251, 2018 CarswellNS 779 (NSSC) [438]; *Noble v North Halton Golf and Country Club Limited* 2018 ONSC 3565, 2018 297 ACWS (3d) 314, 2018 CarswellOnt 12170 (ONSC) [129].

¹⁶⁸ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [74].

¹⁶⁹ *Dubois v Lucid Distributors Inc* 2018 BCSC 1582, 2018 298 ACWS (3d) 754, 2018 CarswellBC 2456 (BCSC) [59].

¹⁷⁰ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [75].

¹⁷¹ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [76]. See also *Banque Nationale du Canada c Titley* 2004 CarswellQue 10132 (QCCS) [44].

¹⁷² *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [77]. See also *Noble v North Halton Golf and Country Club Limited* 2018 ONSC 3565, 2018 297 ACWS (3d) 314, 2018 CarswellOnt 12170 (ONSC) [130].

herself against the prejudice that forms the subject of the complaint.¹⁷³

The protection of reasonable expectations is recognised as the theoretical basis for the remedy.¹⁷⁴ Reasonable expectations are determined objectively and with reference to the context and facts of each case.¹⁷⁵ This entails that the actual expectation of the stakeholder is not decisive, and would be considered only as a factor together with the relationship between the parties and any contradictory claims and expectations.¹⁷⁶

Contradictory expectations amongst stakeholders create the problem that directors or officers of a corporation may, in some circumstances, attempt to resolve this conflict by abuse whereby the interests of a group are promoted unfairly at the expense of another.¹⁷⁷ The directors should resolve the conflict of interests between stakeholders in a fair manner to serve the best interests of the company.¹⁷⁸ It is a reasonable expectation of a stakeholder to be treated fairly. In the context of a corporation stakeholders form relationships and in specific circumstances these

¹⁷³ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [78]. See also *First Edmonton Place Ltd v 315888 Alberta Ltd* [1988] AWLD 1140, 1988 40 BLR 28, 1988 CarswellAlta 103 (ABCQB) [57]-[58] regarding the position of a creditor.

¹⁷⁴ See *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [89].

¹⁷⁵ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [62]. See also *Rees v Fond* 2018 NLCA 60, 2018 299 ACWS (3d) 89, 2018 CarswellNfld 400 (NLCA); *Surry Knight Junior Hockey League* 2018 BCSC 1748, 2018 299 ACWS (3d) 19, 2018 CarswellBC 2703 (BCSC) [108]; *Dubois v Lucid Distributors Inc* 2018 BCSC 1582, 2018 298 ACWS (3d) 754, 2018 CarswellBC 2456 (BCSC) [251]; *Vancouver Island Junior Hockey League Society v British Columbia Amateur Hockey Association* 2018 BCSC 2289; 2018 CarswellBC 3471 [116].

¹⁷⁶ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [62].

¹⁷⁷ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [62]. In *Basha v Singh* 2016 QCCS 1564, 2016 CarswellQue 2981 (QCCS) [74] the court took in consideration that the defendants in the case did not do anything to obtain an advantage to the detriment of the complainant.

¹⁷⁸ *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [111].

relationships may create certain expectations. The reasonableness of the expectations of the complainant must be established with reference to the nature of the corporation, the various parties, representations and agreements.¹⁷⁹

4.9 Alternative relief

4.9.1 Introduction

An interesting feature of the Canadian Business Corporations Act¹⁸⁰ is section 214. Section 214(1) specifically provides for relief in the form of an order for the liquidation and dissolution of a corporation or any of its affiliates. A court may grant such an order based on the grounds set out in section 214(1)(a) and (b).

4.9.2 Section 214(1)(a)

Section 214(1)(a) provides that a court may grant an order for the liquidation and dissolution of a corporation or any of its affiliated on application of a shareholder:

- ‘(a) if the court is satisfied that in respect of a corporation or any of its affiliates
 - (i) any act or omission of the corporation or any of its affiliates effects a result,
 - (ii) the business or affiliates of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
 - (iii) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer.’

¹⁷⁹ *Levenzon v Korres* 2014 QCCS 258, 2014 CarswellQue 592 (QCCS) [71]. In *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [79] the court explained that shareholder agreements and certain representations in marketing material, prospectuses, offering circulars and other communications can be regarded as sources of reasonable expectations. See also *10443325 Ontario Ltd v CSA Building Sciences Western Ltd* 2016 BCCA 258, [2016] BCWLD 4927, 2016 CarswellBC 1607 (BCCA) [55] where it was held that the source of reasonable expectations may be a combination of statutory provisions, articles or bylaws, contracts and family and personal relationships.

¹⁸⁰ RSC 1985 c C-44.

It is important to note that section 214(1)(a) empowers a court to grant an order for the liquidation and dissolution of a corporation or any of its affiliates on the same grounds that a complainant may apply for relief in terms of section 241.¹⁸¹ The main form of relief in terms of section 214 is an order for the liquidation and dissolution of a corporation or its affiliates. However, section 214(2) provides for the power of a court grant alternative relief in the form of an order in terms of section 241.¹⁸² It is interesting to note that section 241(3)(l) also makes specific provision for relief in the form of an order for the liquidation and dissolution of a corporation.

Section 214 is a duplication of the wording of section 241.¹⁸³ The main difference between these two sections is that section 214 specifically prescribes an order for liquidation and dissolution of a corporation as a form of relief. Such order may be made on grounds similar to those found in section 241.¹⁸⁴

¹⁸¹ Compare section 214(1)(a) with section 241(2) of the Canada Business Corporations Act (RSC 1985 c C-44).

¹⁸² The court may make such an order or orders irrespective of whether the application is brought in terms of section 214(1)(a) or (b) of the Canada Business Corporations Act (RSC 1985 c C-44).

¹⁸³ Section 214(1) provides that:

‘A court may order the liquidation and dissolution of a corporation or any of its affiliated corporations on the application of a shareholder,

- (a) If the court is satisfied that in respect of a corporation or any of its affiliates
 - (i) any act or omission of the corporation or any of its affiliates effect a result,
 - (ii) the business or affairs of the corporation or any of its affiliate are or have been carried on or conducted in a manner, or
 - (iii) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer’.

¹⁸⁴ Section 241(2) provides:

‘On an application under this section, a court may make such order under this section or section 241 as it thinks fit.’

4.9.3 Section 214(1)(b)

A court may also grant an order for the liquidation and dissolution of a corporation or any of its affiliates in terms of section 214(1)(b):

‘if the court is satisfied that

- (i) a unanimous shareholder agreement entitles a complaining shareholder to demand dissolution of the corporation after the occurrence of a specified event and that event has occurred, or
- (ii) it is just and equitable that the corporation should be liquidated and dissolved.’

As a further alternative ground a court should be convinced that it is just and equitable that the corporation be liquidated and dissolved.¹⁸⁵ The power of a court to order the winding-up of the company on just and equitable grounds is regarded as an equitable remedy that cloaks the court with a wide discretion.¹⁸⁶ Such discretion should be exercised judicially by considering and balancing the rights between the petitioner, the remaining shareholders and any other interested party that may be affected by such an order.¹⁸⁷ The courts have historically been tasked to order the liquidation of companies on just and equitable grounds when situations such as a deadlock exists between shareholders, when confidence in the management of the corporation is lost, based on grounds similar to that of partnerships, and when a company lost its substratum.¹⁸⁸ This remedy is not only available when there is no other appropriate remedy available.¹⁸⁹ The remedy

¹⁸⁵ Canada Business Corporations Act (RSC 1985 c C-44), s 241(1)(b)(ii).

¹⁸⁶ *Lutfy v Lutfy* 1996 CarswellQue 510 (QCSC) [36].

¹⁸⁷ *Lutfy v Lutfy* 1996 CarswellQue 510 (QCSC) [37].

¹⁸⁸ *Lutfy v Lutfy* 1996 CarswellQue 510 (QCSC) [38].

¹⁸⁹ See *Lutfy v Lutfy* 1996 CarswellQue 510 (QCSC) [36] where the court held that ‘[t]he judicial remedy of winding-up is an equitable remedy and confers upon this Court a wide discretion in

should not be used by minority shareholders to oppress majority shareholders.¹⁹⁰

Alternatively, it should be proven that the shareholder relies upon a unanimous shareholder agreement in terms of which a specific event occurred that entitled the shareholder to an order for liquidation and dissolution of the corporation.¹⁹¹

4.9.4 Alternative orders

Section 214(2) specifically provides that a court is not limited to grant relief in the form of a liquidation order, but may grant relief in terms of section 241 as it thinks fit.¹⁹² Section 214(3) specifically provides that section 242 applies to applications in terms of section 214.¹⁹³ It is submitted that an order for the liquidation and winding-up of a company is a measure of last resort and that the objective of the legislature with the incorporation of section 241 was as far as possible to provide an alternative remedy to a liquidation order.¹⁹⁴

deciding whether a wind-up is just and equitable in the circumstances. It is essentially a question of fact and is not subordinate to the absence of another or more appropriate remedy'.

¹⁹⁰ *Mason v Intercity Properties* (1987) 59 OR (2d) 631, 697-98.

¹⁹¹ Section 241(1)(a) read with (b)(i). Historically the courts have been tasked to order the liquidation of companies on just and equitable grounds when situations such as a deadlock existed between shareholders, the confidence in the management of the corporation was lost, based on grounds similar to that of partnerships, and when a company lost its substratum. See *Lutfy v Lutfy* 1996 CarswellQue 510 (QCSC) [38] where the court pointed out that these grounds are not an exhaustive list.

¹⁹² It is interesting to note that section 241(7) provides that an applicant may seek relief in terms of section 214 as alternative to the relief available in terms of section 241.

¹⁹³ See 4.9.2 above.

¹⁹⁴ Robert WV Dickerson *Proposals for a New Business Corporations Law for Canada* (1971) 164. See further *Anor Management Ltd c Brooklo Industries Ltd* [1978] CS 731, 1978 CarswellQue 984 (QCCS) [21] with reference to section 234 of the Canada Business Corporations Act, where the court explained that the common object of the oppression remedy is to provide relief that is fair in the circumstances of

4.10 Groups of Companies

The application of the oppression or unfair prejudice remedy within a group of corporations is a topic with which many jurisdictions have grappled or are grappling with. This problematic issue arises because in many instances the relevant jurisdiction's statutory unfair prejudice remedy does not specifically speak to corporations operating in a group context. This creates uncertainty as to whether the statutory unfair prejudice remedy can apply to company groups.

As section 241 specifically provides for the application of the remedy to a corporation and its affiliates this problem does not arise as acutely in Canada. An affiliate refers to a body corporate¹⁹⁵ as defined in section 2(2). A body corporate is an affiliate of another body corporate, when such a body corporate is a subsidiary of the other or when both body corporates are the subsidiaries of the same body corporate.¹⁹⁶ Body corporates are also affiliates when each of them is controlled by the same person.¹⁹⁷ Body corporates are also affiliates of each other when they are affiliates of the same body corporate at the same time.¹⁹⁸

the particular case without issuing an order for the liquidation of the corporation. See also *Vedova v Garden House Inn Ltd* 1985 29 BLR 236, 1985 31 ACWS (2d) 102, 1985 CarswellOnt 140 (Ont HC) [8] where the court stated that '[t]he relief available is to be determined by tests less stringent than those which traditionally had to be met in order to procure an order for winding-up'. See also *Marot v Marot* 2019 ONSC 866, 2019 CarswellOnt 1531 [50] where the court stated that an order for the winding-up of a company is not appropriate when a company can continue to be operate profitably and that a court in such circumstances has a duty to consider less restrictive alternative remedies when available. See 5.8 below for a discussion of the South African oppression or unfair prejudice remedy as a form of alternative relief to the winding-up and liquidation of companies.

¹⁹⁵ A 'body corporate' is defined in section 2(1) of the Canada Business Corporations Act (RSC 1985 c C-44) as 'a company or other body corporate wherever or however incorporated'.

¹⁹⁶ Canada Business Corporations Act (RSC 1985 c C-44), s 2(2)(a).

¹⁹⁷ Canada Business Corporations Act (RSC 1985 c C-44), s 2(2)(a).

¹⁹⁸ Canada Business Corporations Act (RSC 1985 c C-44), s 2(2)(b).

A reading of section 241(2)(a)-(c) reveals that the relief in terms of the section can be directed at the conduct or the effect of the conduct of a corporation or its affiliates. This confirms that the remedy in section 241 finds application in the context of a groups of companies or corporations.¹⁹⁹

4.11 The relief

4.11.1 Introduction

The strength of section 241 is that it provides the court with the power and discretion to grant a wide variety of relief.²⁰⁰ Most importantly, section 241 provides an alternative to the liquidation and dissolution of corporations.²⁰¹ The relief a court may grant is contained in section 241(3). This provision stipulates that:

- (3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
 - (a) an order restraining the conduct complained of;
 - (b) an order appointing a receiver or receiver-manager;
 - (c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
 - (d) an order directing an issue or exchange of securities;
 - (e) an order appointing directors in place of or in addition to all or any of the directors then in office;
 - (f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
 - (g) an order directing the corporation, subject to subsection (6),

¹⁹⁹ See 5.7.7 below for a discussion of the South African position relating the application of the oppression remedy within company groups.

²⁰⁰ *Black c Alharayeri* 2015 QCCA 1350, 2015 53 BLR (5th) 43, 2015 CarswellQue 13380 (QCCA) [68]. For a similar approach see 6725392 *Canada Inc c Summit-Tech Multimedia Communications Inc* 2019 QCCS 512, 2019 CarswellQue 1213 [43].

²⁰¹ See 4.9 above.

- or any other person to pay a security holder any part of the monies that the security holders paid for securities;
- (h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
 - (i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;
 - (j) an order compensating an aggrieved person;
 - (k) an order directing rectification of the registers or other records of a corporation under section 243;
 - (l) an order liquidating and dissolving the corporation;
 - (m) an order directing an investigation under Part XIX to be made; and
 - (n) an order requiring the trial of any issue’.

4.11.2 The purpose of relief

The purpose of relief in terms of section 241 is to ‘rectify the matters complained of’.²⁰² In terms of section 241(3) a court clearly has a wide discretion in relation to the relief it may grant.²⁰³ The section provides that a court may make an order that

²⁰² Canada Business Corporations Act (RSC 1985 c C-44), s 241(2). See also *Basha v Singh* 2016 QCCS 1564, 2016 CarswellQue 2981 (QCCS) [42]. See also *Caughlin v Canadian Payroll Systems Inc* 2019 MBQB 6; 2019 CarswellMan 14 [69] and [70]-[71]; *Pohl v Palisca* 2019 ONSC 16, 2019 CarswellOnt 3 [140]. According to *Wilson v Alharayeri* 2017 SCC 39, [2017] 1 SCR 1037, 2017 CarswellQue 5230 (SCC) [27] the purpose of relief granted in terms of section 241(3) is corrective to address ‘inequities between private parties and “solely” to rectify the matters complained of’. In *Menlin v Menlin* 2018 ABQB 1056; 2018 CarswellAlta 3186 [69] it was held that court intervention must be more than what is necessary in the circumstances ‘to address the imbalance or the conduct subject of complaint’. See also *Kulhawy v Commerx Holdings LLC* 2018 ABQB 986; 2018 CarswellAlta 2902 [26]. See also JG MacIntosh ‘The Retrospectivity of the Oppression Remedy’ (1987) 13 *Can Bus LJ* 219, 225 who states that the function of the unfair prejudice remedy is to restore balance between private parties and that it does not have a punitive function.

²⁰³ *Alharayeri v Black* 2014 QCCS 180, 2014 CarswellQue 419 (QCCS) [154]. In *152581 Canada Ltd v Matol World Corporation* [1996] QJ No 4017, [1997] RJQ 161, 1996 CarswellQue 1211 (QCCS) [79] the court held that relief can only be granted once the jurisdictional requirements of section 241

it 'thinks fit'.²⁰⁴ A court is not restricted to the relief listed in the provision.²⁰⁵ Section 241(3) only provides examples of the type of relief a court may grant but a court is not limited to the relief listed in this particular subsection.

4.11.3 Interim orders

Relief may also take the form of interim orders. It is interesting to note that an application for an interim order in terms of section 241(3) does not necessarily have to be made by the complainant(s) in the main application or a complainant as

have been met and not because the relief would be in the best interest of the corporation. In *Banque Nationale du Canada c Titley* 2004 CarswellQue 10132 (QCCS) [46] the court held that the appropriateness of the relief depends on the facts and circumstances of the case and is not subject to the availability of alternative remedies. In *Wilson v Alharayeri* 2017 SCC 39, [2017] 1 SCR 1037, 2017 CarswellQue 5230 (SCC) [27] the court held that relief granted in terms of section 241(3) 'should go no further than necessary to correct the injustice or unfairness between the parties'. See also *Jeffrie v Hendriksen* 2013 NSSC 153, 2013 228 ACWS (3d) 652, 2013 CarswellINS 315 (NSSC) [137] where the court held that an appropriate remedy is aimed at redressing the conduct complained of without unnecessarily interfering in the company's affairs. See further 63833 *Manitoba Corporation v Cosman's Furniture (1972) Ltd et al* 2018 MBCA 72, [2018] 11 WWR 232, 2018 CarswellMan 273 (MBCA) [43]-[44].

²⁰⁴ The court in *Nanef v Con-Crete Holdings Ltd* (1995) 23 BLR (2d) 286, 1995 23 OR (3d) 481, 1995 CarswellOnt 1207 (Ont CA) [19] held that the nature of the reasonable expectations to be protected has an important bearing on the relief that a court may grant. The nature of the reasonable expectations refers to whether the relationship between the shareholders is purely commercial or whether the corporation is a family business. See also *Bloom v Grynwald* 2002 CarswellQue 1257 (QCCS) [112] and [130] where the court pointed out that a court's discretion when granting relief should be guided by what is appropriate in the circumstances of each case. The relief that a complainant may obtain in terms of section 241 has on an occasion been described as *sui generis*. See also *Gruber v Greenberg* [2003] QJ No 21414, 2003 CarswellQue 3328 (QCCS) [22] where the court described the relief a court may grant in terms of section 241 as *sui generis*.

²⁰⁵ *Alharayeri v Black* 2014 QCCS 180, 2014 CarswellQue 419 (QCCS) [154]; *Desjardines Ducharme Stein Monast v Empress Jewellery (Canada) Inc* [2004] RJQ 1243, 2004 CarswellQue 939 (QCCS) [24]; *Burnett v Axxa Realities* [2004] QJ No 10701, 2004 CarswellQue 2927 (QCCS) [17].

defined in section 238.²⁰⁶ A person will have standing to apply for an interim order as long as such an application is 'in connection with' the main application.²⁰⁷

When considering the issue of an interim order a court must first establish whether the applicant or petitioner has a quality right and that such an order is necessary to prevent serious or irreparable harm or injury.²⁰⁸ The quality of the right of the petitioner refers to the likelihood that the petitioner will succeed with his or her legal action on the merits.²⁰⁹ A court must further weigh the inconvenience that such an interim order may have on the defendant against the harm that the petitioner will suffer if such an order is not made.²¹⁰

4.11.4 Restraining order²¹¹

The court may grant relief in the form of a restraining order.²¹² The order is often granted in the form of interim relief to preserve the rights of a party pending the resolving of a dispute.²¹³ To grant such an interim order a court must be satisfied that it is necessary and that there are *prima facie* grounds of oppressive or unfairly

²⁰⁶ *Adams v Smerchanski* 2014 QCCS 5578, 2014 ACWS (3d) 78, 2014 CarsewellQue 12043 (QCCS) [32].

²⁰⁷ *Adams v Smerchanski* 2014 QCCS 5578, 2014 ACWS (3d) 78, 2014 CarsewellQue 12043 (QCCS) [32].

²⁰⁸ *Adams v Smerchanski* 2014 QCCS 5578, 2014 ACWS (3d) 78, 2014 CarsewellQue 12043 (QCCS) [42].

²⁰⁹ *Adams v Smerchanski* 2014 QCCS 5578, 2014 ACWS (3d) 78, 2014 CarsewellQue 12043 (QCCS) [42].

²¹⁰ *Adams v Smerchanski* 2014 QCCS 5578, 2014 ACWS (3d) 78, 2014 CarsewellQue 12043 (QCCS) [42]. See 5.9.2 below for the South African equivalent of this form of relief.

²¹¹ Canada Business Corporations Act (RSC 1985 c C-44), s 241(3)(a).

²¹² DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 6-18 to 6-20.

²¹³ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 6-18 to 6-20.

prejudicial conduct present.²¹⁴ Further such an order would only be made when the harm or potential harm that a complainant may suffer cannot be rectified by an order for compensatory damages.²¹⁵

A restraining order is of specific relevance in the event of conduct that is in breach of the articles or objects a corporation.²¹⁶ Restraining orders play an important role in the provision of alternative relief. Usually it would be inappropriate to seek the dissolution of a corporation based on the fact that a corporation acted beyond the objects and restrictions stated in its articles.²¹⁷

4.11.5 Appointment of a receiver or receiver manager²¹⁸

The appointment of a receiver is justified in circumstances where the complainant can prove that his or her rights are placed at risk due to the poor administration or insolvency of the corporation.²¹⁹ The complainant must demonstrate the necessity for such an appointment and that the board is unable to manage the corporation

²¹⁴ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 6-18 to 6-20. See also 4.11.3 above.

²¹⁵ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 6-18 to 6-20. See also 4.11.3 above.

²¹⁶ Robert WV Dickerson *Proposals for a New Business Corporations Law for Canada* (1971) 151.

²¹⁷ Robert WV Dickerson *Proposals for a New Business Corporations Law for Canada* (1971) 151. See 4.9 above.

²¹⁸ See Canada Business Corporations Act (RSC 1985 c C-44), s 241(3)(b). See also *Distribution Fomazz inc c Farias* 2014 QCCS 150, 2014 238 ACWS (3d) 627, 2014 CarswellQue 364 (QCCS). See further *Standal's Patents Ltd c 160088 Canada inc* [1991] RJQ 1996, 1991 Carswell 1837 (QCCS).

²¹⁹ *Distribution Fomazz inc c Farias* 2014 QCCS 150, 2014 238 ACWS (3d) 627, 2014 CarswellQue 364 (QCCS) [47]. The complainant should prove prejudice and that such an appointment is an 'urgent necessity'. See also *Chagnon v Sayegh* 2011 QCCS 2172, 2011 202 ACWS (3d) 568, 2011 CarswellQue 4773 (QCCS) [21].

properly.²²⁰ A court will only make an order for the appointment of a receiver in exceptional circumstances.²²¹

Before a court will order the appointment of a receiver, factors that need to be considered include the ability of the directors to manage the company properly; the impact such an appointment will have on the goodwill and value of the corporation; and the interests of and motivation for the parties seeking such an appointment.²²² The appointment of a receiver as an interim measure will not lightly be considered by a court. Such form of relief is regarded as an exceptional measure that will only be granted when no other remedy is available to address the oppression suffered by the complainant.²²³ A receiver will not be appointed to determine whether the conduct complained of took place.²²⁴ The order will only be made if oppressive or unfair prejudicial conduct is proven.²²⁵

4.11.6 Regulation of a corporation's affairs

The directors conduct the business and affairs of a corporation.²²⁶ The shareholders of a corporation are only allowed to intervene in the management of the affairs of

²²⁰ *Distribution Fomazz inc c Farias* 2014 QCCS 150, 2014 238 ACWS (3d) 627, 2014 CarswellQue 364 (QCCS) [47].

²²¹ *Distribution Fomazz inc c Farias* 2014 QCCS 150, 2014 238 ACWS (3d) 627, 2014 CarswellQue 364 (QCCS) [49].

²²² *Distribution Fomazz inc c Farias* 2014 QCCS 150, 2014 238 ACWS (3d) 627, 2014 CarswellQue 364 (QCCS) [49].

²²³ *Distribution Fomazz inc c Farias* 2014 QCCS 150, 2014 238 ACWS (3d) 627, 2014 CarswellQue 364 (QCCS) [50].

²²⁴ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 6-20 and 6-21.

²²⁵ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 6-20 and 6-21.

²²⁶ Section 102(1) provides that '[s]ubject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation'. See 5.9.5 below for the South African equivalent of this form of relief.

the corporation as far as the constitution allows.²²⁷ Courts are often reluctant to interfere with the affairs of a corporation. The reason for this reluctance are that the directors are regarded as experts and is in a much better position to manage the affairs of the corporation and to consider the best interests of a corporation.²²⁸ Often aspects of the affairs of a corporation are regulated in the articles of incorporation²²⁹ and unanimous shareholder agreements.²³⁰ Relief in terms of the statutory unfair prejudice remedy may take the form of an order for the amendment of a corporation's articles of incorporation and unanimous shareholder agreements.

4.11.6.1 Creation or amendment of articles of incorporation

Section 241(3)(c) states that the regulation of a company's affairs may take the form of an amendment to the articles of incorporation or its bylaws.²³¹ Further, the order may include the creation or amendment of a unanimous shareholder agreement.²³² When a court makes an order for the amendment to the articles or by-laws of a corporation, a shareholder would not be entitled to exercise his or her rights of dissent in terms of section 190. However, a court will also be cautious to exercise the power to amend the constitution and/or by-law of a corporation based on the

²²⁷ See 4.3 above.

²²⁸ *Banque Nationale du Canada c Titley* 2004 CarswellQue 10132 (QCCS) [40].

²²⁹ See 4.11.6.1 below.

²³⁰ See 4.11.6.2 below.

²³¹ Section 241(5) specifically provides that a shareholder cannot exercise his or her rights in terms of section 190 when an amendment is affected in terms of a court order. See further section 241(4) that places a duty on the directors of a company to comply with section 191(4) of the Act in the event of a court order amending order varying the articles of a corporation or its bylaws. Subsequent to an order varying or amending the articles of a corporation no further amendment may be made unless the consent of the court has been obtained or it has ordered otherwise.

²³² See 5.9.5.3 below for the South African equivalent of this form of relief.

principle that parties should be kept to agreements voluntary made.²³³

4.11.6.2 Unanimous shareholder agreement

A 'unanimous shareholder agreement' is defined as an agreement as described in subsection 146(1) or a declaration of a shareholder described in subsection 146(2).²³⁴

(a) Section 146(1)

Section 146(1) describes a 'unanimous shareholder agreement' as a lawful agreement between all the shareholders of a corporation. It may also include an agreement between all the shareholders and one or more persons who are not shareholders of a corporation.²³⁵ Such unanimous shareholder agreement has the characteristic of placing a restriction on the powers and/or supervision of the directors to manage the business and affairs of the corporation.²³⁶

(b) Section 146(2)

For purposes of section 146(2) a 'unanimous shareholder agreement' is a written declaration whereby the power or supervision of directors to manage the business and affairs of a corporation is restricted. Such a declaration is made by a person who is the beneficial owner of all the issued shares of a corporation.²³⁷

A unanimous shareholder agreement that restricts the supervision or power of the directors to manage the business and affairs of a corporation has important

²³³ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 6-21 and 6-22.

²³⁴ Canada Business Corporations Act (RSC 1985 c C-44), s 2(1).

²³⁵ Canada Business Corporations Act (RSC 1985 c C-44), s 146(1).

²³⁶ Canada Business Corporations Act (RSC 1985 c C-44), s 146(1).

²³⁷ Canada Business Corporations Act (RSC 1985 c C-44), s 146(2).

legal implications for the parties thereto. A party to a unanimous shareholder agreement in terms of which the party is given the power to manage or supervise the business and/or affairs of a company carries all the rights, powers, duties and liabilities as in the case of a director.²³⁸ The section makes it clear that the rights, powers, duties and liabilities which such a party may attract may found its origins in the Act or otherwise.²³⁹ The party may rely upon all defences that are available to a director of the corporation.²⁴⁰

(c) Section 146(3)

Section 146(3) deems the purchaser or transferee of shares to be a party to a unanimous shareholder agreement if the shares are subject to such an agreement.²⁴¹ A unanimous shareholder agreement will not be enforceable against a transferee of a security unless the transferee had actual knowledge of the unanimous shareholder agreement or alternatively reference is made to the unanimous shareholder agreement on the security certificate.²⁴²

4.11.7 Issue or exchange of securities²⁴³

The court may order an issue or exchange of securities to remedy the conduct complained of.²⁴⁴ This form of relief is described as a very intrusive form of relief

²³⁸ Canada Business Corporations Act (RSC 1985 c C-44), s 146(5).

²³⁹ Canada Business Corporations Act (RSC 1985 c C-44), s 146(5).

²⁴⁰ Canada Business Corporations Act (RSC 1985 c C-44), s 146(5).

²⁴¹ Canada Business Corporations Act (RSC 1985 c C-44), s 49(8)(c).

²⁴² Canada Business Corporations Act (RSC 1985 c C-44), s 146(4) read with s 49(8)(c).

²⁴³ Canada Business Corporations Act (RSC 1985 c C-44), s 241(3)(d).

²⁴⁴ Canada Business Corporations Act (RSC 1985 c C-44), s 241(3)(d). See 5.9.6 below for the South African equivalent of this form of relief.

that is rarely used.²⁴⁵ It suggested that a court should rather order the board of the corporation to consider or reconsider resolutions for the issue of shares in the corporation as an alternative.²⁴⁶

4.11.8 Appointment of directors²⁴⁷

As explained above, the power and duty to manage the business and affairs of a corporation rest with the directors.²⁴⁸ The shareholders elect the directors.²⁴⁹ The directors exercise their powers subject to their legal duties.²⁵⁰ Section 241(3)(e) entrusts a court with the power to appoint directors to the corporation in the place of existing directors and/or in addition to the existing shareholders.²⁵¹

As can be seen from the reading of this particular subsection, the power of a court to order the replacement of directors or the appointment of additional directors has far-reaching consequences for a corporation. In principle directors can only be removed by those who have appointed them and the removal should take place in accordance within the ambit of the provisions of the Act.²⁵² To make this order less intrusive consideration should be given to the possibility to order the convening a

²⁴⁵ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 6-22.

²⁴⁶ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 6-22.

²⁴⁷ Canada Business Corporations Act (RSC 1985 c C-44), s 241(3)(e).

²⁴⁸ Canada Business Corporations Act (RSC 1985 c C-44), s 102(1).

²⁴⁹ Canada Business Corporations Act (RSC 1985 c C-44), s 106(3).

²⁵⁰ See Canada Business Corporations Act (RSC 1985 c C-44), s 122. This section provides:

‘122(1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

- (a) act honestly and in good faith with a view to the best interests of the corporation; and
- (b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.’

²⁵¹ See 5.9.7.1 below for the South African equivalent of this form of relief.

²⁵² In terms of section 109(1) of the Canada Business Corporations Act (RSC 1985 c C-44) a director can be removed at a special meeting by way of an ordinary resolution of shareholders.

shareholder meeting for the purpose of appointing directors as alternative to the court making direct appointments of directors.²⁵³

4.11.9 Purchase (buy-out) orders²⁵⁴

4.11.9.1 Introduction

In terms of section 241(3)(f) a court may order the corporation or any other person to purchase the securities held by a security holder.²⁵⁵ The Canada Business Corporations Act²⁵⁶ expressly provides that no payment may be made to a *shareholder* by a corporation when reasonable grounds exist for believing that the corporation is or would be after such payment be unable to pay its liabilities as they become due or that such payment would cause the aggregate of the liabilities of the corporation to be more than the realisable value of the corporation's assets.²⁵⁷

It is interesting to note that the prohibition in section 241(6) is only applicable to payments to a *shareholder*. Throughout section 241 reference is made to the holders of securities and no distinction is drawn between the holder of a share and the holder of a debt instrument. This distinction manifests for the first time in subsection (6). The distinction can simply be explained in that it aims to protect the creditors of a corporation. A payment in contravention of section 241(6) may benefit

²⁵³ See *Menlin v Menlin* 2018 ABQB 1056; 2018 CarswellAlta 3186 [62] where the court stated that the removal of a director in terms of the unfair prejudice remedy is an exceptional form of relief that must be used sparingly.

²⁵⁴ See 5.9.14 below for the South African equivalent of this form of relief.

²⁵⁵ Such an order may also be made regarding shares or a debt instrument. See the definition of a 'security'.

²⁵⁶ RSC, 1985, c C-44.

²⁵⁷ Canada Business Corporations Act (RSC 1985 c C-44), s 241(3)(f) read with subsections (6)(a) and (b).

shareholders to the expense of the creditors of the corporation. A payment directed to a holder of a debt instrument will simply decrease the liabilities of a corporation and the potential prejudice of creditors do not come into play.

A purchase order is usually made when it is found that there is no longer a relationship of trust and confidence between the complainant on the one hand and the majority shareholders or management of the company on the other.²⁵⁸ This is often the case when the complainant had an expectation to participate in the management of the corporation and is then excluded from participation in the management of the company.²⁵⁹ In the absence of oppressive or unfair prejudicial conduct a shareholder has no right to withdraw his or her investment in a company.²⁶⁰

Section 241(3)(f) provides that a court can make an order directing the corporation or any other person to purchase the securities of a security holder when such a security holder has succeeded in establishing the jurisdictional requirements of section 241(1). The section does not stipulate how the value of the relevant shares to be purchased should be determined. Therefore the principles relating to the valuation of shares subject to a purchase order must be distilled from case law.²⁶¹

²⁵⁸ *1043325 Ontario Ltd v CSA Building Sciences Western Ltd* 2014 CarswellBC 1906, 2014 244 ACWS (3d), 2014 CarswellBC 1906 (BCCA) [287].

²⁵⁹ *1043325 Ontario Ltd v CSA Building Sciences Western Ltd* 2014 CarswellBC 1906, 2014 244 ACWS (3d), 2014 CarswellBC 1906 (BCCA) [287].

²⁶⁰ *Basha v Singh* 2016 QCCS 1564, 2016 CarswellQue 2981 (QCCS) [91] and [93]-[95]. See *Miklos v Thomasfield Holdings Ltd* 2001 82 CRR (2d) 126, 2001 105 ACWS (3d) 857, 2001 CarswellOnt 1303 (ONSC) [110] and [113] where it was held that a shareholder does not have an inherent right to force a company to buy or purchase his or her shares. See also *Zanardo v Di Battista Gambin Developments Limited* 2019 ONSC 2115, 2019 Carswell 5222 [43].

²⁶¹ *Diligenti v RWMD Operations Kelowa Ltd (No 2)* [1977] 2 ACWS 951, 1977 4 BCLR 134, 1977 CarswellBC 139 (BCSC) [84].

4.11.9.2 Valuation of securities

(a) *Introduction*

The most important principles relating to the valuation of shares were developed in the province of British Columbia.²⁶² Although the statutory form of the oppression remedy in British Columbia is not identical to the provision in the Canada Business Corporations Act²⁶³ the differences are of a minor nature.²⁶⁴ A few important factors and principles need to be considered that may directly affect the valuation of the shares.

(b) *Fair value*

A principle that is clear from case law is that the shares which are subject to a purchase order should be valued at a fair value or price.²⁶⁵ The fair value of the shares is dependent on the facts and circumstances of a particular case.²⁶⁶ Fair value does not necessarily mean that the shares should be valued at the fair market

²⁶² The equivalent of section 241 of the Canada Business Corporations Act can be found in section 227(2)-(4) of the Business Corporations Act, SBC 2002, c 57.

²⁶³ RSC, 1985, c C-44.

²⁶⁴ *1043325 Ontario Ltd v CSA Building Sciences Western Ltd* 2014 CarswellBC 1906, 2014 244 ACWS (3d), 2014 CarswellBC 1906 (BCCA) [58].

²⁶⁵ *1043325 Ontario Ltd v CSA Building Sciences Western Ltd* 2015 BCSC 1160, 2015 46 BLR (5th) 212, 2015 CarswellBC 1866 (BCSC) [14]. A fair price is the price that would have emerged from the negotiations between a willing seller and a willing purchaser at the relevant point in time. See also *Diligenti v RWMD Operations Kelowa Ltd (No 2)* [1977] 2 ACWS 951, 1977 4 BCLR 134, 1977 CarswellBC 139 (BCSC) [20]; *Discovery Enterprises Inc v Ebco Industries Ltd* 2002 BCSC 1236, 2002 116 ACWS (3d) 194, 2002 CarswellBC 1973 (BCSC) [257].

²⁶⁶ *1043325 Ontario Ltd v CSA Building Sciences Western Ltd* 2015 BCSC 1160, 2015 46 BLR (5th) 212, 2015 CarswellBC 1866 (BCSC) [14]; *Discovery Enterprises Inc v Ebco Industries Ltd* 2002 BCSC 1236, 2002 116 ACWS (3d) 194, 2002 CarswellBC 1973 (BCSC) [255].

price of the shares.²⁶⁷ The fair market value of shares at a specific point in time may be taken into account as a factor to determine the fair value of the shares. The overriding principle remains that the valuation arrived at must be fair to all the parties that are affected by the dispute.²⁶⁸

The valuation of shares is usually done by appropriate experts who must base their opinions of their valuations on the correct assumptions and legal principles to be relevant and accurate. The shares must also be valued on the basis that no oppression has occurred.²⁶⁹

Considerations such as whether the valuation of the shares should be done in isolation or *en bloc*;²⁷⁰ the specific date on which the valuation of the shares should be based;²⁷¹ whether provision should be made for a minority discount;²⁷² and whether any adjustments should be made to provide for possible compensation²⁷³ must be established to provide an accurate basis on which the value of such shares should be determined or calculated.²⁷⁴

²⁶⁷ *1043325 Ontario Ltd v CSA Building Sciences Western Ltd* 2015 BCSC 1160, 2015 46 BLR (5th) 212, 2015 CarswellBC 1866 (BCSC) [14]; *Diligenti v RWMD Operations Kelowa Ltd (No 2)* [1977] 2 ACWS 951, 1977 4 BCLR 134, 1977 CarswellBC 139 (BCSC) [81]-[82], [85].

²⁶⁸ *1043325 Ontario Ltd v CSA Building Sciences Western Ltd* 2015 BCSC 1160, 2015 46 BLR (5th) 212, 2015 CarswellBC 1866 (BCSC) [16]; *Diligenti v RWMD Operations Kelowa Ltd (No 2)* [1977] 2 ACWS 951, 1977 4 BCLR 134, 1977 CarswellBC 139 (BCSC) [11].

²⁶⁹ *Diligenti v RWMD Operations Kelowa Ltd (No 2)* [1977] 2 ACWS 951, 1977 4 BCLR 134, 1977 CarswellBC 139 (BCSC) [11].

²⁷⁰ See 4.11.9.2 (c) below.

²⁷¹ See 4.11.9.2 (d) below.

²⁷² See 4.11.9.2 (e) below.

²⁷³ See also 4.11.13 below for a discussion of the award of compensation in terms of the oppression or unfair prejudice remedy.

²⁷⁴ See 4.11.9.2 (g) below.

(c) *The corporation as going concern (en bloc)*

The type of corporation that issued the shares in question may have a bearing on the approach to be taken when valuing the shares of a corporation. The type of corporation refers to whether or not the shares of the corporation are freely traded. Should the shares of the corporation not be freely traded, the best approach is to value the shares of the company as a going concern.²⁷⁵

(d) *Date*

As regards the date on which the valuation of shares that is subject to a purchase order must be based, the point of departure is the date on which the petition for relief was filed.²⁷⁶ An alternative date may be used in circumstances where the use of the date on which the petition was filed may be unfair in the circumstances of the particular case.²⁷⁷ This will protect the petitioner against a decrease in the value of his or her shares while the dispute between him- or herself and the corporation or

²⁷⁵ *Diligenti v RWMD Operations Kelowa Ltd (No 2)* [1977] 2 ACWS 951, 1977 4 BCLR 134, 1977 CarswellBC 139 (BCSC) [6]-[7] and [89] and [91]. The court [6] in *Diligenti* valued the share subject to a purchase order on the basis of what a prudent investor ('knowledgeable as to the facts of the particular business'), who is under no obligation to buy, will be willing to pay for the acquisition of the ownership and control of the business ('with all its assets, liabilities, records and prospects'). The seller is to be regarded to be under an obligation to sell. When a purchase order is made, the complainant is entitled to be paid out the fair value of his proportional interest in the corporation as a going concern.

²⁷⁶ *Discovery Enterprises Inc v Ebco Industries Ltd* 2002 BCSC 1236, 2002 116 ACWS (3d) 194, 2002 CarswellBC 1973 (BCSC) [228] and [230]; *1043325 Ontario Ltd v CSA Building Sciences Western Ltd* 2015 BCSC 1160, 2015 46 BLR (5th) 212, 2015 CarswellBC 1866 (BCSC) [23] and [28]; *Diligenti v RWMD Operations Kelowa Ltd (No 2)* [1977] 2 ACWS 951, 1977 4 BCLR 134, 1977 CarswellBC 139 (BCSC) [12].

²⁷⁷ *Discovery Enterprises Inc v Ebco Industries Ltd* 2002 BCSC 1236, 2002 116 ACWS (3d) 194, 2002 CarswellBC 1973 (BCSC) [228].

other shareholders is being resolved.²⁷⁸ However, based on the same principle the petitioner cannot rely on an increase in the value of the shares after the date on which the petition for relief was filed.²⁷⁹

(e) *Minority discount*

The valuation of the shares of a minority shareholder must be done without making provision for a minority discount.²⁸⁰ The underlying philosophy of the courts is that the majority shareholders (or directors) should not benefit from conduct which has made it unbearable for the complainant to remain in the corporation.²⁸¹

The application of the minority discount also lacks a rational basis as a purchase order is usually enforced against the corporation or the majority shareholders of the corporation. A purchase order enables the majority shareholder to increase his or her control of the corporation and therefore there is no reason why the shares of a minority shareholder should be bought at a discount.²⁸² The sale of shares to existing shareholders who are already minority shareholders also does not change their position and therefore no basis exists for the application of a minority discount.²⁸³ The situation differs substantially from the situation where the

²⁷⁸ *1043325 Ontario Ltd v CSA Building Sciences Western Ltd* 2015 BCSC 1160, 2015 46 BLR (5th) 212, 2015 CarswellBC 1866 (BCSC) [24].

²⁷⁹ *1043325 Ontario Ltd v CSA Building Sciences Western Ltd* 2015 BCSC 1160, 2015 46 BLR (5th) 212, 2015 CarswellBC 1866 (BCSC) [24].

²⁸⁰ *Mason v Intercity Properties Ltd* 1987 CarswellQnt 134 [30].

²⁸¹ *1043325 Ontario Ltd v CSA Building Sciences Western Ltd* 2015 BCSC 1160, 2015 46 BLR (5th) 212, 2015 CarswellBC 1866 (BCSC) [29].

²⁸² *1043325 Ontario Ltd v CSA Building Sciences Western Ltd* 2015 BCSC 1160, 2015 46 BLR (5th) 212, 2015 CarswellBC 1866 (BCSC) [18].

²⁸³ *Diligenti v RWMD Operations Kelowa Ltd (No 2)* [1977] 2 ACWS 951, 1977 4 BCLR 134, 1977 CarswellBC 139 (BCSC) [80]. See *Mason v Intercity Properties Ltd* 1987 CarswellQnt 134 [17] and [28] for the explanation of the disposal of a non-controlling stake in a corporation to an outside party.

shares are bought by a third party.²⁸⁴

(f) Adjustments

The valuation of shares that is subject to a purchase order may be adjusted to provide for any losses that the complainant suffered, provided that there is a causal link between the conduct complained of and the decrease in the value of the shares.

(g) The corporation or other party

The court has a discretion to determine who will be obliged to buy the shares in terms of a purchase order. The Canada Business Corporations Act²⁸⁵ is not prescriptive in this regard. When considering who should purchase the shares of the complainant the court should be guided by what is equitable in the circumstances of each case.²⁸⁶ Usually, an order will be made that the corporation, alternatively the majority shareholders, should purchase the shares of the complainant.

Before a court will order that the corporation must purchase the shares of the complainant, it will take into consideration the solvency of the corporation and the benefit derived by the majority shareholder if such an order is made.²⁸⁷ The court will be reluctant to make a purchase order against the corporation in circumstances where the order will be rendered unenforceable as a result of the insolvency or

²⁸⁴ *1043325 Ontario Ltd v CSA Building Sciences Western Ltd* 2015 BCSC 1160, 2015 46 BLR (5th) 212, 2015 CarswellBC 1866 (BCSC) [18] and [29].

²⁸⁵ RSC, 1985, c C-44.

²⁸⁶ *Diligenti v RWMD Operations Kelowa Ltd (No 2)* [1977] 2 ACWS 951, 1977 4 BCLR 134, 1977 CarswellBC 139 (BCSC) [94].

²⁸⁷ *1043325 Ontario Ltd v CSA Building Sciences Western Ltd* 2015 BCSC 1160, 2015 46 BLR (5th) 212, 2015 CarswellBC 1866 (BCSC) [31].

potential insolvency of the corporation.²⁸⁸ It is not a function of the courts to design a structure to lessen the consequential effects of a purchase order against a party.²⁸⁹

4.11.10 Payment to security holders

Section 241(3)(g) empowers a court to make an order directing the corporation or any other person to repay any part of the monies that a security holder or holders paid for securities to the security holders.²⁹⁰ Such payment is also subject to section 241(6).

4.11.11 Setting aside of transactions or contracts²⁹¹

A novel form of relief can be found in section 241(3)(h). This provision enables a court to vary or set aside the transaction or contract.²⁹² In the past courts were hesitant to interfere with the contractual agreements between parties where such contractual agreements had been concluded freely and voluntarily. What is interesting to note from the wording of the provision is that it appears that such a variation or setting aside of a contract will subsequently be followed by an order compensating the corporation or any other party to the contract or transaction.²⁹³

²⁸⁸ *1043325 Ontario Ltd v CSA Building Sciences Western Ltd* 2015 BCSC 1160, 2015 46 BLR (5th) 212, 2015 CarswellBC 1866 (BCSC) [31]. See in this regard section 241(6) of the Canada Business Corporations Act (RSC 1985 c C-44).

²⁸⁹ *Diligenti v RWMD Operations Kelowa Ltd (No 2)* [1977] 2 ACWS 951, 1977 4 BCLR 134, 1977 CarswellBC 139 (BCSC) [94] where the court responded to an argument that a purchase order against certain individual respondents would result in detrimental tax consequences for the respondents.

²⁹⁰ See 5.9.8 below for a similar form of relief under the South African Companies Act 71 of 2008.

²⁹¹ See, for example, *Adams v Smerchanski* 2014 QCCS 5578, 2014 ACWS (3d) 78, 2014 CarswellQue 12043 (QCCS).

²⁹² See 5.9.9 below for a similar form of relief under the South African Companies Act 71 of 2008.

²⁹³ Canada Business Corporations Act (RSC 1985 c C-44), s 241(3)(h).

This provision does not expressly include the power of a court to vary a contract between the corporation and its shareholders, but the power of the court is not necessarily limited by this provision.²⁹⁴

Courts are reluctant to issue interim orders that modify a contract. This is due to the fact that the purpose of these orders are to protect the rights of parties pending litigation.²⁹⁵ The modification of such a contract has an effect that goes behind this purpose.²⁹⁶ A court will look more favourably on the suspension of the rights of a party on a temporary basis instead of the modification or variation of a contract.²⁹⁷

4.11.12 Access to financial statements

The remedy in section 241 also provides for an order compelling the corporation to provide the court or any other interested person with financial statements in the form required by the Canada Business Corporations Act²⁹⁸ or any other form as instructed by the court.²⁹⁹

²⁹⁴ *Adams v Smerchanski* 2014 QCCS 5578, 2014 ACWS (3d) 78, 2014 CarsewellQue 12043 (QCCS) [39]. See also 4.11.6 above.

²⁹⁵ *Adams v Smerchanski* 2014 QCCS 5578, 2014 ACWS (3d) 78, 2014 CarsewellQue 12043 (QCCS) [35]. See also *Standal's Patents Ltd c 160088 Canada inc* [1991] RJQ 1996, 1991 Carswell 1837 (QCCS) [18] where the court held that it does have the power to make such an order on either an interim or final basis. See 4.11.3 above.

²⁹⁶ *Adams v Smerchanski* 2014 QCCS 5578, 2014 ACWS (3d) 78, 2014 CarsewellQue 12043 (QCCS) [35].

²⁹⁷ *Adams v Smerchanski* 2014 QCCS 5578, 2014 ACWS (3d) 78, 2014 CarsewellQue 12043 (QCCS) [35].

²⁹⁸ RSC, 1985, c C-44.

²⁹⁹ Canada Business Corporations Act (RSC 1985 c C-44), s 241(3)(i).

4.11.13 Compensation³⁰⁰

A court may order the payment of compensation.³⁰¹ Such compensation may be granted to any aggrieved person.³⁰² Such an order will be made if it will rectify the oppression suffered by the complainant.³⁰³

An order for compensation may include an order that the directors and officers of the corporation be held personally liable for the payment of compensation.³⁰⁴ A court will hold the directors and officers of a corporation personally liable in circumstances where it can be demonstrated that the directors or officers benefited from their oppressive conduct towards the complainant or where the director or directors had total control over the corporation.³⁰⁵ To succeed the complainant must disclose a cause of action or make allegations in the relevant pleadings that clearly identify the conduct complained of and which will render the various individual directors liable.³⁰⁶

The termination of an employment relationship does not automatically entitle a complainant to relief in terms of section 241, although relief is not necessarily

³⁰⁰ See *Black c Alharayeri* 2015 CarswellQue 13380 (QCCA) for example.

³⁰¹ Canada Business Corporations Act (RSC 1985 c C-44), s 241(3)(j). See 5.9.11 below for a similar form of relief under the South African Companies Act 71 of 2008.

³⁰² Canada Business Corporations Act (RSC 1985 c C-44), s 241(3)(j).

³⁰³ *Budd v Gentra* 1998 111 OAC 288, 1991 43 BLR (2d) 27, 1998 CarswellOnt 3069 (ONCA).

³⁰⁴ In *Budd v Gentra* 1998 111 OAC 288, 1991 43 BLR (2d) 27, 1998 CarswellOnt 3069 (ONCA) [52] the court held that a plaintiff should complete all the necessary facts that justify holding the directors and officers of a corporation personally liable and that such an order rectifies the conduct complained of.

³⁰⁵ *Budd v Gentra* 1998 111 OAC 288, 1991 43 BLR (2d) 27, 1998 CarswellOnt 3069 (ONCA) [52].

³⁰⁶ In *Budd v Gentra* 1998 111 OAC 288, 1991 43 BLR (2d) 27, 1998 CarswellOnt 3069 (ONCA) [48] it was held that it is crucial that the oppressive conduct should be linked to the specific individual directors whom the plaintiff attempts to hold personally liable for the conduct complained of.

excluded in appropriate circumstances.³⁰⁷ The function of awarding damages or compensation for the unlawful dismissal of employee falls within the jurisdictions of civil courts that will apply the law pertaining to employment contracts.³⁰⁸

4.11.14 Rectification of registers and records

An order may be made to direct the rectification of registers of the corporation or any other records of the corporation under section 243.³⁰⁹

4.11.15 Liquidation

Although section 241 and more in particular section 241(3) provides for alternative remedies, the legislature preserved the relief that a court may grant in the form of an order liquidating and dissolving the corporation.³¹⁰

³⁰⁷ See *Léger c Garage Technology Ventures Canada Lp (Capital st-Laurent, lp)* 2012 QCCA 1901, [2012] RJQ 2030, 2012 CarswellQue 15066 (QCCA) [89] and [91] where the court explained that an overlap may exist between the remedy for unlawful dismissal and the remedy in terms of section 241 which may entitle the complainant to relief in both instances provided that the requirements of each of the remedies are independently met. See also *Heeg v Hightech Piping (HTP) Ltd* 2009 QCCS 4043, 2009 186 ACWS (3d) 393, 2009 CarswellQue 9193 (QCCS) [120] for an example where the termination of employment may also be oppressive for purposes of section 241. See further *Dubois v Lucid Distributors Inc* 2018 BCSC 1582, 2018 298 ACWS (3d) 754, 2018 CarswellBC 2456 (BCSC) [270] where the court stated that '[w]rongful dismissal by itself will not justify a finding of oppression. It is only where the interests of the employee are closely intertwined with his interest as a shareholder, and where the dismissal is part of a pattern of conduct to exclude the complainant from participation in the corporation, that the dismissal can be found to be an act of oppression'. See 4.6.4.3 above regarding the standing of an employee for purposes of section 241 of the Canada Business Corporations Act (RSC 1985 c C-44).

³⁰⁸ *Léger c Garage Technology Ventures Canada Lp (Capital st-Laurent, lp)* 2012 QCCA 1901, [2012] RJQ 2030, 2012 CarswellQue 15066 (QCCA) [90].

³⁰⁹ Canada Business Corporations Act (RSC 1985 c C-44), s 241(3)(k). See 5.9.12 below for a similar form of relief under the South African Companies Act 71 of 2008.

³¹⁰ Canada Business Corporations Act (RSC 1985 c C-44), s 241(3)(l). See also 4.9 above.

4.11.16 Investigation

A court may also in appropriate circumstances relief in the form of an investigation under Part XIX.³¹¹

4.11.17 Trial

A standard order that a court may make is to direct that any issue relating to the application or petition be referred to trial.³¹²

4.12 The interplay between the statutory unfair prejudice remedy and the statutory derivative action³¹³

4.12.1 The proper plaintiff and the indirect prejudice suffered by shareholders

The proper plaintiff rule found in *Foss v Harbottle*³¹⁴ gives effect to the principle of separate legal personality.³¹⁵ Because of the rule in *Foss v Harbottle*³¹⁶ and the principle of majority rule, courts traditionally were reluctant to interfere with the

³¹¹ Canada Business Corporations Act (RSC 1985 c C-44), s 241(3)(m).

³¹² Canada Business Corporations Act (RSC 1985 c C-44), s 241(3)(n). See 5.9.13 below for a similar form of relief under the South African Companies Act 71 of 2008.

³¹³ See 5.9.15 below for a discussion of the position in South Africa.

³¹⁴ *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189.

³¹⁵ The court in *Pasnak v Chura* 2004 BCCA 221, [2004] 7 WWR 459, 2004 CarswellBC 874 (BCCA) [5] and [26] found that the remedial powers of a court under the unfair prejudice remedy do not include the power to ignore the separate corporate personality of a corporation. One of the consequences of the separate legal personality of a company is that, as a general rule, a shareholder cannot institute legal proceedings for a wrong committed against a corporation. This legal position was confirmed in *Hercules Management Ltd v Ernest & Young* [1997] 2 SCR 165, [1997] 8 WWR 80, 1997 CarswellMan 198 (SCC) [59] where the court further held that the legal position as set out in the English Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 applies equally in Canada. See also 2.10.6 for a discussion of the principles relating to the recovery of reflective losses in England.

³¹⁶ *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189.

internal affairs of a company or corporation. In terms of this rule, the majority of shareholders could ratify wrongs committed against the company.³¹⁷ Although the proper plaintiff rule served an important purpose, the strict application thereof often exposed minority shareholders to abuse.³¹⁸ The shortcomings of the proper plaintiff rule are especially apparent in circumstances where a wrong is committed against a company or corporation by the directors or majority shareholders of the corporation or company.³¹⁹ This leaves the minority shareholders in an untenable position, because minority shareholders or non-controlling shareholders cannot institute legal proceedings on behalf of the corporation against wrongdoers. Further, shareholders cannot institute legal proceedings in their personal capacity to seek relief for harm they have suffered because of a wrong committed against the company.³²⁰ This is because the harm suffered or loss incurred by the shareholders is only a reflection of the prejudice suffered by the corporation.

³¹⁷ In *Rea v Wildeboer* 2015 ONCA 373, 2015 126 OR (3d) 178, 2015 CarswellOnt 7602 (ONCA) [16] the court explained that the common law interpretation of the internal management rule included the ratification by majority shareholders of wrongful conduct. In such circumstances, neither an individual shareholder nor the corporation could seek redress. It is on this basis that courts were reluctant to interfere with the internal affairs of a corporation.

³¹⁸ 10443325 *Ontario Ltd v CSA Building Sciences Western Ltd* 2016 BCCA 258, [2016] BCWLD 4927, 2016 CarswellBC 1607 (BCCA) [47]. See also *Rea v Wildeboer* 2015 ONCA 373, 2015 126 OR (3d) 178, 2015 CarswellOnt 7602 (ONCA) [18]-[19]. See further DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 7-2. See also 2.3.1.5 above for a discussion of the problems associated with the strict application of the principles in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189.

³¹⁹ See also 2.3.1.5 above.

³²⁰ In *Pasnak v Chura* 2004 BCCA 221, [2004] 7 WWR 459, 2004 CarswellBC 874 (BCCA) [5] the court specifically emphasised that 'a shareholder must show direct and personal harm in order to maintain a personal action for oppression, otherwise he must seek leave to bring a derivative action in the name of the company'.

4.12.2 Statutory reform of the personal action and the derivative remedy

Because of the problems that resulted from the strict application of the proper plaintiff rule in *Foss v Harbottle*,³²¹ statutory interventions were required to address the issues broadly sketched above.³²² The statutory interventions took the form of a statutory derivative action and the statutory personal remedy (also known as the statutory unfair prejudice or oppression remedy).

On reading the provisions relating to the statutory derivative action and the statutory personal remedy, consideration should be given to the purposes of these remedies and specifically the purpose of the statutory derivative action.³²³ The purpose of the latter is to create a statutory procedure in terms of which legal proceedings can be instituted for relief on behalf of the corporation for a wrong or wrongs that was or were committed against the corporation. In short, the relief sought in terms of the statutory derivative action is for the benefit of the corporation. On the other hand, the purpose of the statutory personal remedy is to provide relief for the direct benefit of shareholders who have been harmed or prejudiced due to unfairly prejudicial conduct.³²⁴ To successfully claim relief in terms of the statutory personal remedy, unlawful or wrongful conduct does not have to be proven, while a breach of a legal duty towards the corporation is required for the institution of legal

³²¹ *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189.

³²² *Rea v Wildeboer* 2015 ONCA 373, 2015 126 OR (3d) 178, 2015 CarswellOnt 7602 (ONCA) [16]-[17]. See also *10443325 Ontario Ltd v CSA Building Sciences Western Ltd* 2016 BCCA 258, [2016] BCWLD 4927, 2016 CarswellBC 1607 (BCCA) [47] where the court viewed the introduction of the statutory oppression remedy as a reaction to the inadequate protection provided to shareholders by the common law.

³²³ See 4.4 above for a discussion of the objective and purpose of the statutory unfair prejudice remedy.

³²⁴ See 4.4 above.

proceedings on behalf of the corporation.³²⁵

4.12.3 The corporation as beneficiary of the oppression remedy

Case law is clear that the oppression remedy should be interpreted broadly in order to give effect to the purpose thereof. However, it is important to determine and establish the boundaries of the scope of application of the oppression remedy. A broad interpretation or application of the oppression remedy creates an overlap with the derivative action in some circumstances.³²⁶ This may also raise the question on whether the oppression remedy can be utilised to obtain relief for the benefit of the corporation or whether the oppression remedy can solely be used to obtain relief for shareholders and other stakeholders, in circumstances where a wrong is committed against the corporation.³²⁷

The question on whether the rights and interests of a corporation can be protected by way of the institution of an oppression remedy or personal action is important. The institution of an oppression remedy holds an important advantage in that it prevents the institution of multiple actions in circumstances where the conduct complained of has prejudiced both the corporation and the interests of individual shareholders or other stakeholders.³²⁸

³²⁵ See 4.7.6 above. See also 4.12.3 below.

³²⁶ In *Rea v Wildeboer* 2015 ONCA 373, 2015 126 OR (3d) 178, 2015 CarswellOnt 7602 (ONCA) [17] the court noted that although the oppression remedy (or personal action) and the derivative action could potentially overlap, the remedies approach the protection of shareholder rights in two different manners or ways. See also M Koehnen *Oppression and Related Remedies* (2004) 443.

³²⁷ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 7-19 point out that the test for relief in terms of the personal remedy is not whether there had been a breach of duty owed to the shareholders of a corporation but rather whether the minority shareholders were treated unfairly.

³²⁸ *Sparling c Javelin International Ltd* [1986] RJQ 1073, [1986] QJ No 2453, 1986 CarswellQue 406 (QCSC) [333].

The statutory incorporation of the derivative action and the personal remedy should further be viewed against the backdrop of the problems associated with the proper plaintiff rule in *Foss v Harbottle*.³²⁹ From this point of view, the formulation of the statutory derivative action and statutory unfair remedy should be with the purpose or object to overcome the obstacles created by the strict application of the principles in *Foss v Harbottle*.³³⁰

The fact that a court may make orders in terms of the statutory unfair remedy to compensate the corporation or any aggrieved person is considered by some to support the argument that the statutory unfair remedy may be used to pursue derivative relief.³³¹

4.12.4 The statutory derivative action

Section 239 contains the statutory derivative action. This section covers the defending, discontinuation and the intervention of an action on behalf of the corporation or its subsidiaries or against the corporation or its subsidiaries. In terms of this provision, a complainant may bring an action for and on behalf of a corporation or any of its subsidiaries if the leave of a court is obtained.³³²

³²⁹ (1843) 67 ER 189, 2 Hare 461.

³³⁰ *Sparling c Javelin International Ltd* [1986] RJQ 1073, [1986] QJ No 2453, 1986 CarswellQue 406 (QCSC) [333].

³³¹ *Sparling c Javelin International Ltd* [1986] RJQ 1073, [1986] QJ No 2453, 1986 CarswellQue 406 (QCSC) [333]. See also *Ontario (Securities Commission) v McLaughlin* [1987] OJ No 1247, 1987 10 ACWS (3d) 270, 1987 CarswellOnt 2568 (OntHCJ) [22] where the court held that the oppression remedy or statutory personal action could include the enforcement of derivative claims.

³³² A party may not pursue a derivative action unless the prerequisites in section 239(2) are met. See also *Rea v Wildeboer* 2015 ONCA 373, 2015 126 OR (3d) 178, 2015 CarswellOnt 7602 (ONCA) [18]-[19]. A complainant needs to obtain the leave of a court to pursue a derivative action in order to protect the corporation against 'a multiplicity of frivolous actions instituted by disgruntled

In terms of section 240, a court may make any order it thinks fit, which may include an order authorising the complainant to control the action on behalf of the corporation or its subsidiaries.³³³ The court order may further contain instructions in accordance with which the action must be conducted.³³⁴

What is of particular importance is that a court is empowered to order that any amount payable by a defendant in action to be paid directly to former or present security holders of the corporation or its subsidiary instead of to the corporation or its subsidiary.³³⁵ Relief in this form resemble relief that is usually associated with the oppression remedy. Section 240(d) provides for the making of an order by a court directing the corporation or its subsidiary to pay the reasonable legal fees incurred by complainant in connection with an action authorised in terms of section 239.

4.12.5 The derivative action in section 239 and the unfair prejudice remedy in section 241: The main differences

Section 241 differs from section 239 as the first mentioned remedy is of a personal nature.³³⁶ Although the derivative actions and the personal remedy are distinct of each other, factual circumstances may arise where, both the personal remedy and the derivative action can find application.³³⁷ Despite the potential overlap that may exist between these two remedies or actions, there are fundamental differences. These two

stakeholders pursuing private vendettas and frivolous claims'. See DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 7-8.

³³³ Canada Business Corporations Act (RSC 1985 c C-44), s 240(a).

³³⁴ Canada Business Corporations Act (RSC 1985 c C-44), s 240(b).

³³⁵ Canada Business Corporations Act (RSC 1985 c C-44), s 240(c)

³³⁶ *GTI societe en commandite c Diablo Technologies inc.* 2013 QCCS 2987, 2013 238 ACWS (3d) 92, 2013 CarswellQue 6464 (QCCS) [22].

³³⁷ *Tobin v De Lanauze* [2000] RJQ 2596, [2000] QJ No 3137, 2000 CarswellQue 2393 (QCCS) [22].

remedies have different rationales and have separate statutory foundations.³³⁸

One of the differences between the statutory personal action and the statutory derivative action is that a complainant will need to obtain leave from a court to institute a derivative action on behalf of the company, while such leave is not required when instituting a personal action.³³⁹ Secondly, the purpose of a derivative action is to provide relief for wrongs committed against the corporation while the personal action provides a remedy to a complainant who has suffered harm due to the oppressive or unfairly prejudicial conduct to or the unfair disregard of the complainant's interests.³⁴⁰

A shareholder cannot rely upon section 241 by merely proving that the corporation has suffered damages or harm and therefore he or she as the shareholder suffered harm due to the consequential result of the loss suffered by

³³⁸ *Rea v Wildeboer* 2015 ONCA 373, 2015 126 OR (3d) 178, 2015 CarswellOnt 7602 (ONCA) [35].

³³⁹ *Rea v Wildeboer* 2015 ONCA 373, 2015 126 OR (3d) 178, 2015 CarswellOnt 7602 (ONCA) [18]-[19]. A complainant needs to obtain the leave of a court to pursue a derivative action in order to protect the corporation against 'a multiplicity of frivolous actions instituted by disgruntled stakeholders pursuing private vendettas and frivolous claims'. See DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 7-8. See also 4.12.4 above.

³⁴⁰ See *Rea v Wildeboer* 2015 ONCA 373, 2015 126 OR (3d) 178, 2015 CarswellOnt 7602 (ONCA) (ONCA) [18]-[19]. The court [27] stressed the distinction between the oppression remedy and the derivative action must be maintained. When a derivative claim is instituted, the individual personal interests of the complainant do not come into play [27]. In *BCE Inc, Re* 2008 SCC 69, [2008] 3 SCR 560, 2008 CarswellQue 12596 (SCC) [42] the court emphasised that rights and obligations are enforced by specific legal remedies. Such remedies may be enforced for and on behalf of the company in terms of section 239 of the Canada Business Corporations Act while on the other hand the oppression remedy deals with expectations of various stakeholders in the company. According to the court such expectations form the cornerstone of the oppression remedy. See *Ford Motor Co of Canada v Ontario (Municipal Employees Retirement Board)* [2006] OJ No 990, 2006 208 OAC 125, 2006 CarswellOnt 1526 (ONCA) [112] (leave to appeal refused) [2006] SCCA No 77 (SCC); *Hoet v Vogel* [1995] BCWLD 987, 1995 54 ACWS (3d) 61, 1995 CarswellBC 2187 (BCSC) [18]-[19] for authority that the oppression remedy is a personal claim.

the corporation.³⁴¹ A shareholder is required to establish oppression independent from the harm suffered by the corporation.³⁴²

The application of the statutory personal action and the statutory derivative action may overlap in certain circumstances depending on the facts.³⁴³ Due to its broad discretion, a court has in terms of the unfairly prejudicial remedy and the fact that it is not always possible to make a clear distinction of whether the unfair prejudicial remedy or the derivative action should apply to a particular set of facts, other factors and considerations may apply.³⁴⁴

³⁴¹ In *Robak Industries Ltd v Gardner* 2007 BCCA 61, 2007 28 BLR (4th) 1, 2007 CarswellBC 205 (BCCA) [35] the court held that '[t]here is no logic that would allow only one shareholder to claim that loss, where the claim relates to wrongs done to the company, and all of the shareholders have suffered the loss in value. A single shareholder cannot claim that loss in value of the shares, *per se*, is a personal loss, direct loss'. See also *10443325 Ontario Ltd v CSA Building Sciences Western Ltd* 2016 BCCA 258, [2016] BCWLD 4927, 2016 CarswellBC 1607 (BCCA) [72]-[73] and [78]. See further 4.11.13 above.

³⁴² *10443325 Ontario Ltd v CSA Building Sciences Western Ltd* 2016 BCCA 258, [2016] BCWLD 4927, 2016 CarswellBC 1607 (BCCA) [72] and [74]; *Tobin v De Lanauze* [2000] RJQ 2596, [2000] QJ No 3137, 2000 CarswellQue 2393 (QCCS) [66]. See *Rea v Wildeboer* 2015 ONCA 373, 2015 126 OR (3d) 178, 2015 CarswellOnt 7602 (ONCA) [33]-[35] and [41] where the court stressed that that the harm suffered by the complainant should be harm that is separate and distinct from harm suffered by the corporation. The court [33] explained that a complainant must prove that the harm he or she suffers or suffered affected the personal interests of the complainant. See also *10443325 Ontario Ltd v CSA Building Sciences Western Ltd* 2016 BCCA 258, [2016] BCWLD 4927, 2016 CarswellBC 1607 (BCCA) [78] and *Furry Creek Timber Corp v Laad Ventures Ltd* [1992] BCWLD 2546, 1992 75 BCLR (2d) 246, 1992 CarswellBC 389 (BCSC) [16] where the court held that a shareholder must prove that he or she has been offended in a manner that is in 'addition to the indirect effect on the value of all shareholders' shares generally'. See further *Hercules Management Ltd v Ernst & Young* [1997] 2 SCR 165, [1997] 8 WWR 80, 1997 CarswellMan 198 (SCC) [62].

³⁴³ See *10443325 Ontario Ltd v CSA Building Sciences Western Ltd* 2016 BCCA 258, [2016] BCWLD 4927, 2016 CarswellBC 1607 (BCCA) [71] in the context of the payment of excessive management fees.

³⁴⁴ In *Malata Group (HK) Ltd v Jung* 2008 ONCA 111, 2008 290 DLR (4th) 343, 2008 CarswellOnt 699 (ONCA) [39]-[40] the court emphasised that the use of the oppression remedy may be justified

4.12.6 Concluding remarks

Case law that deals with the potential overlap between the statutory oppression remedy and the statutory derivative action are divided. It may be argued by some that, in circumstances where the derivative action applies, the application of the personal remedy or oppression remedy is excluded. However, the oppression remedy may find application should the complainant be able to prove that the prejudice suffered by the complainant is distinct from the collective prejudice suffered by all the shareholders of the corporation.³⁴⁵ Others may argue, that the

to provide relief to a complainant in circumstances where the derivative action could just as easily be applied. This is especially the case when such relief is sought in the context of a closely held corporation with relatively a few shareholders. The danger of exposing the corporation to a range of frivolous lawsuits is much less and therefore such an action does not have to be brought in terms of the derivative action. In *Rea v Wildeboer* 2015 ONCA 373, 2015 126 OR (3d) 178, 2015 CarswellOnt 7602 (ONCA) [31] the court qualified the approach taken in *Malata* by emphasising that the misappropriation of funds not only infringed on the interests of the corporation but that the interests of a minority shareholder have also been affected as the relevant shareholder was a creditor of the company. The court further explained that conflating the two remedies will be ignoring the separate statutory basis and rationale of the remedies. The court in *Rea v Wildeboer* 2015 ONCA 373, 2015 126 OR (3d) 178, 2015 CarswellOnt 7602 (ONCA) [49] further remarked that '[w]here the facts may give rise to both a "corporate claim" and a "personal" oppression remedy claim – as *Malata* and the other cases referred to above illustrate – the question of whether an oppression remedy proceeding is available will have to be sorted out on a case by case basis'.

³⁴⁵ See *Rea v Wildeboer* 2015 ONCA 373, 2015 126 OR (3d) 178, 2015 CarswellOnt 7602 (ONCA) [33]-[35] and [41] where the court stressed that the harm suffered by the complainant should be harm that is separate and distinct from harm suffered by stakeholders as a whole. The court [33] explained that a complainant should prove that harm he or she suffers or suffered affected the personal interests of the complainant and must only affect the interests of 'the collectivity of shareholders as a whole'. See also *10443325 Ontario Ltd v CSA Building Sciences Western Ltd* 2016 BCCA 258, [2016] BCWLD 4927, 2016 CarswellBC 1607 (BCCA) [78]; *Robak Industries Ltd v Gardner* 2007 BCCA 61, 2007 28 BLR (4th) 1, 2007 CarswellBC 205 (BCCA) [38]. See further *Furry Creek Timber Corp v Laad Ventures Ltd* [1992] BCWLD 2546, 1992 75 BCLR (2d) 246, 1992 CarswellBC 389 (BCSC). According to DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 7-20 this approach does provide a rational basis for the oppression or personal remedy only being available when the shareholders of a corporation are treated unfairly.

provisions of the statutory derivative action and the statutory personal remedy is complementary and not mutually exclusive.³⁴⁶

As a general rule is the statutory derivative action apply when a director or directors have breached their duties owed to the corporation. The possibility to utilise the oppression remedy to seek relief on behalf of the corporation was considered above.³⁴⁷ The main criticism against such an approach is that the oppression remedy can then be used to circumvent the requirement in the statutory derivative action to obtain the leave of the court, prior to the institution of legal proceedings on behalf of the court. Case law dealing with the overlap between the statutory derivative action and the oppression remedy can be divided into two approaches. Firstly, the application of the appropriate remedy or action can be determined with reference to the nature of the legal duty breached.³⁴⁸ Secondly, the application of the appropriate remedy can be determined with reference to nature of the harm caused.³⁴⁹ Both these approaches still fail to provide theoretically sound guidelines on how to distinguish between the application of the statutory derivative

³⁴⁶ *Ontario (Securities Commission) v McLaughlin* [1987] OJ No 1247, 1987 10 ACWS (3d) 270, 1987 CarswellOnt 2568 (OntHCJ) [22]. See also *Tobin v De Lanauze* [2000] RJQ 2596, [2000] QJ No 3137, 2000 CarswellQue 2393 (QCCS) and *Ford Motor Co of Canada Ltd v Ontario (Municipal Employees Retirement Board)* [2004] OJ No 191, 2004 41 BLR (3d) 74, 2004 CarswellOnt 208 (ONSC) [241] where the court stated that '[c]onduct which may result in harm to a company and may therefore be the subject of a derivative claim may also result in oppression to minority shareholders. The presence of a derivative action remedy does not preclude minority shareholders from pursuing their personal remedy under s 241'. In *Deluce Holdings Inc v Air Canada* [1992] OJ No 2382, 1992 12 OR (3d) 131, 1992 CarswellOnt 154 (ONCJ.GD) [92] the court held that the fact that a wrong is committed against a company does not bar the application of the personal remedy.

³⁴⁷ See 4.12.3 above.

³⁴⁸ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 7-19.

³⁴⁹ DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 7-19.

action and the statutory oppression or personal remedy in some circumstances.

4.13 The interrelationship between the right to dissent and the unfair prejudice remedy

Section 190 provides for a shareholder's right to dissent.³⁵⁰ When a shareholder exercises his or her right of dissent, it has the right to be paid by the corporation a fair value for those shares in terms of which the right of dissent has been exercised.³⁵¹ To a substantial degree the consequences of the exercise of the right to dissent resembles relief in the form of a buy-out or purchase order³⁵² that can be granted in terms of the unfair prejudice remedy where the shares of a complainant is bought at a fair value by the corporation or other shareholders.³⁵³

The facts and circumstances of each case should be carefully considered to determine whether the unfair prejudice remedy or the right of dissent provisions apply to a particular case. It has to be established whether the unfair prejudice remedy can be applied to situations where the right to dissent applies.

One of the important aspects that a shareholder should consider when exercising his or her right to dissent is that the end result will be the exit of the shareholder from the corporate structure.³⁵⁴ This is not necessarily the result when

³⁵⁰ See 5.10 below for a discussion of the overlap between the oppression or unfair prejudice remedy and the appraisal remedy in section 164 of the Companies Act 71 of 2008.

³⁵¹ Canada Business Corporations Act (RSC 1985 c C-44), s 190(3).

³⁵² See 4.11.9 above.

³⁵³ Canada Business Corporations Act (RSC 1985 c C-44), s 241(3)(f).

³⁵⁴ *Brant Investments v KeepRite Inc* 1987 42 DLR (4th) 15, 1987 60 OR (2d) 737, 1987 CarswellOnt 135 (OntHCJ) [46].

reliance is placed on the statutory unfair prejudice remedy.³⁵⁵ In terms of the statutory unfair prejudice remedy a court has a wide variety of relief that can be granted in addition to or in place of an order that the complainant should be bought out at fair value.³⁵⁶ This creates the possibility that a court may grant relief to remedy the unfair prejudicial results or conduct complained of in a form that allows the complainant to remain a shareholder of the corporation.

In appropriate circumstances the exercise of the right of dissent does not prohibit a shareholder from relying on the provisions of the unfair prejudice for relief.³⁵⁷ Some argue that the failure of a complainant to have exercised his or her right of dissent can be viewed as to legitimise the conduct or actions of the majority. This approach has been subjected to criticism by some courts.³⁵⁸ Others argue that both these remedies are available to a shareholder provided that the requirements for each of the remedies can be proven.³⁵⁹

It is argued that the right to dissent and the unfair prejudice remedy co-exist

³⁵⁵ *Brant Investments v KeepRite Inc* 1987 42 DLR (4th) 15, 1987 60 OR (2d) 737, 1987 CarswellOnt 135 (OntHCJ) [46].

³⁵⁶ Canada Business Corporations Act (RSC 1985 c C-44), s 241(3)(f).

³⁵⁷ *Brant Investments v KeepRite Inc* 1987 42 DLR (4th) 15, 1987 60 OR (2d) 737, 1987 CarswellOnt 135 (OntHCJ) [46]-[47]; DS Morrit, SL Bjorkquist and AD Coleman *The Oppression Remedy* (2004) 7-30 and 7-31.

³⁵⁸ *Wind Ridge Farms Ltd v Quadra Group Investments Ltd* [1999] 12 WWR 203, 1999 178 DLR (4th) 603, 1999 CarswellSask 592 (SKCA) [22].

³⁵⁹ In *Wind Ridge Farms Ltd v Quadra Group Investments Ltd* [1999] 12 WWR 203, 1999 178 DLR (4th) 603, 1999 CarswellSask 592 (SKCA) [22] the court noted that the oppression or unfair prejudice remedy in section 234 of the Saskatchewan Business Corporations Act is wider than the right of dissent in section 184. Section 184 only provides a remedy to shareholders where section 234 provides a remedy to a complainant, which among others includes a shareholder. These remedies are not mutually exclusive and will find application when the requirements of each of the provisions is proven. According to the court [25] '[t]here is no reason to require a shareholder to dissent before it can bring an application for an oppression remedy pursuant to s 234'.

in the appropriate circumstances.³⁶⁰ This implies that a shareholder can still rely on the unfair prejudice remedy even after the complainant has exercised his or her right of dissent.³⁶¹

4.14 Alternative dispute resolution and offers of settlement

4.14.1 Introduction

Similar to the position in other jurisdictions, courts are often involved in protracted litigation in terms of the statutory unfair prejudice remedy involving extensive and complex factual disputes. These disputes usually play out in commercial or business contexts, which require them to be resolved expeditiously and in a cost effective manner. One of the ways in which this can be achieved is by making use of arbitration proceedings. This necessitates the consideration of the application of section 241 in the context of arbitration proceedings.

Another method that can be utilised in an attempt to avoid protracted litigation is negotiating offers of settlements. Parties are encouraged to settle their dispute(s)

³⁶⁰ In *Arthur v Signum Communications Ltd* [1991] OJ No 86, 1991 25 ACWS (3d) 58, 1991 CarswellOnt 3126 (ONCJ.GD) [128] the court held that the provisions containing the right to dissent expressly acknowledged that the right to dissent is additional to any other rights of the shareholder. See also *Alberta Treasury Branches v SevenWay Capital Corp* 2000 ABCA 194, [2000] 10 WWR 453, 2000 CarswellAlta 705 (ABCA) [40] where the court held that unfair prejudice or oppression remedy is available to a complainant despite the right to dissent and the language of the provisions of section 184 containing the right to dissent.

³⁶¹ See, for example, *Ford Motor Co of Canada v Ontario (Municipal Employees Retirement Board* [2004] OJ No 191, 2004 41 BLR (3d) 74, 2004 CarswellOnt 208 (ONSC) [468]-[474] where the court awarded additional value (compensation) to minority shareholders who exercised their right to dissent. This additional value was based on the oppression remedy to rectify prejudice suffered as a result of oppressive conduct that took place prior to the event that triggered the shareholders' right to dissent.

prior to the commencement of any court process. This will require parties to make acceptable offers in an attempt to settle the dispute. Aspects of offers of settlement and arbitration proceedings are now be considered in the context of disputes in terms of section 241.

4.14.2 Arbitration

4.14.2.1 Introduction

The position regarding the arbitrability of disputes in terms of section 241 is uncertain.³⁶² Case law dealing with the issue does not provide clarity on this question. According to some authorities only the court has the power to grant relief in terms of section 241 based on the wording of the Canada Business Corporations Act³⁶³ and on the grounds that the jurisdiction of the court cannot be ousted by an arbitration agreement.

The arbitration of certain disputes which by their nature affect values that are fundamental to the Canadian legal system will usually not be susceptible to arbitration. Such disputes usually impact on the legal status of a person. Further it was held that because issues of fraud and bad faith are raised in reliance on the oppression remedy, the remedy was once regarded as one which deals with matters of public order that cannot be subjected to arbitration.³⁶⁴ However, when reliance is

³⁶² See 5.11.2 below for the South African position on the reliance on the oppression remedy in arbitration proceedings.

³⁶³ RSC, 1985, c C-44.

³⁶⁴ *Tremblay c Acier Leroux inc* [2004] RJQ 839, 2004 133 ACWS (3d) 589, 2004 CarswellQue 449 (QCCA) [30]. See also [35]-[36] where the court explains that content should be given to public order that would not unjustifiably restrict the disputes to be submitted to arbitration which has the potential of being an effective dispute resolution mechanism. See also *Desputeaux v Editions Chouette Inc* 2003 SCC 17, [2003] 1 SCR 178, 2003 CarswellQue 342 (SCC) [52]. See further in this regard

placed on the oppression remedy based on allegations of fraud and bad faith the fundamental values of the legal system are not necessarily affected.³⁶⁵

4.14.2.2 The powers of a court and an arbitrator

Section 241 specifically provides that a complainant may approach a *court* for relief. Because specific reference is made to ‘a court’, the question can be raised whether relief in terms of section 241 may be granted by an arbitrator in arbitration proceedings. However, some courts are of the view that through case law, the law has developed enough to allow parties to an arbitration agreement to cover disputes in terms of the oppression remedy.³⁶⁶ No party will be prejudiced by having the dispute adjudicated by an arbitrator as the latter would be able to provide the same relief as a court.³⁶⁷ This argument is further supported by the notion that parties usually voluntarily and freely agree to subject the disputes to arbitration proceedings and that such an undertaking should be enforced.³⁶⁸ Arbitration must no longer be

Woolcock v Bushert 2004 192 OAC 16, 2004 246 DLR (4th) 139, 2004 CarswellOnt 4517 (Ont CA) [33] where the court held that the fact that a dispute between the parties relates to oppressive conduct does not disqualify it from being subjected to arbitration proceedings. See further *Kints v Kints* [1998] OJ No 3244, 1998 73 OTC 42, 1998 CarswellOnt 3188 (ONCJ.GD) [26].

³⁶⁵ *Tremblay c Acier Leroux inc* [2004] RJQ 839, 2004 133 ACWS (3d) 589, 2004 CarswellQue 449 (QCCA) [35].

³⁶⁶ *Tremblay c Acier Leroux inc* [2004] RJQ 839, 2004 133 ACWS (3d) 589, 2004 CarswellQue 449 (QCCA) [30]. See also *ABOP LLC v Qtrade Canada Inc* 2007 BCCA 290, (2007) 284 DLR (4th) 171, 2007 CarswellBC 1082 (BCCA) [28] where the court held that reliance on oppressive conduct does not oust the jurisdiction of an arbitrator.

³⁶⁷ *Kints v Kints* [1998] OJ No 3244, 1998 73 OTC 42, 1998 CarswellOnt 3188 (ONCJ.GD) [26].

³⁶⁸ See *Kints v Kints* [1998] OJ No 3244, 1998 73 OTC 42, 1998 CarswellOnt 3188 (ONCJ.GD) [26] for a judgment handed down in terms of section 7 of the Arbitration Act 1991. Section 7(1) provided that a court will enforce an arbitration agreement between the parties when such an agreement covers the dispute. Section 7(2) described the circumstances under which a court will not enforce an arbitration agreement. Such circumstances or grounds include the legal incapacity of one of the parties at the time of the execution of the arbitration agreement; the invalidity of the arbitration

seen as an exceptional mechanism for parties to use in order to have their disputes resolved.³⁶⁹

4.14.2.3 The enforcement of agreements

Unless, the arbitration agreement is null and void, inoperative or incapable of being performed, a court will refer parties to arbitration.³⁷⁰ This is the position provided that the wording of such arbitration clause and agreement covers the nature of the dispute.³⁷¹ The enforcement of arbitration agreements between parties recognises the autonomy and freedom of parties to elect to have their disputes subjected to arbitration.³⁷² This further enforces the principle that a party who has voluntarily agreed to arbitration proceedings should be kept to such an agreement.³⁷³

agreement; when the nature of the dispute is such that it cannot be arbitrated in terms Ontario law; the motion was moved after an undue delay; and/or the matter is susceptible to default or summary judgment.

³⁶⁹ *Bridgepoint International Canada Inc v Ericsson Canada Inc* [2001] QJ No 2470, 2001 CarswellQue 1519 (QCCS). In *Anor Management Ltd c Brooklo Industries Ltd* [1978] CS 731, 1978 CarswellQue 984 (QCCS) [19] the court recognised the expeditious resolution of disputes as one of the objectives of section 241.

³⁷⁰ Article 8 of the Commercial Arbitration Act RSC 1985, c 17 (2nd Supp).

³⁷¹ *Maher v Morelli Chertkow* 2003 BCSC 48, 2003 120 ACWS (3d) 358, 2003 CarswellBC 35 (BCSC) [14]; *ABOP LLC v Qtrade Canada Inc* 2007 BCCA 290, (2007) 284 DLR (4th) 171, 2007 CarswellBC 1082 (BCCA) [20].

³⁷² *Desputeaux v Editions Chouette Inc* 2003 SCC 17, [2003] 1 SCR 178, 2003 CarswellQue 342 (SCC) [22] and [52]. See also *Bridgepoint International (Canada) Inc v Ericsson Canada Inc* [2001] QJ No 2470, 2001 CarswellQue 1519 (QCCS) [8]-[10] where the court held that arbitration agreements must be interpreted in a liberal way to give effect to the autonomy of the parties to the agreement.

³⁷³ See *Kints v Kints* [1998] OJ No 3244, 1998 73 OTC 42, 1998 CarswellOnt 3188 (ONCJ.GD) [26]. See also *Maher v Morelli Chertkow* 2003 BCSC 48, 2003 120 ACWS (3d) 358, 2003 CarswellBC 35 (BCSC) [14] where the court held that it will keep parties to an agreement to have their disputes resolved by way arbitration unless proper reasons exists not to give effect to such agreement.

4.14.2.4 The hybrid model

Some courts endorse a hybrid model when adjudicating oppression disputes to which arbitration clauses apply.³⁷⁴ This may especially be the case where the relief sought is of the type that can only be granted by a court, such as an order for the appointment of a receiver or the liquidation of the corporation.³⁷⁵ This entails that the arbitrator will consider the merits of the facts regarding oppression of a shareholder. Once the arbitrator has found that oppression is present in a particular matter, the rest of the dispute is then referred to the court who will formulate and grant the appropriate relief to remedy the conduct complained of.³⁷⁶

4.14.3 Offers of settlement

The English case of *O'Neill v Phillips*³⁷⁷ is an influential case relating to the resolving of disputes in terms of the oppression remedy.³⁷⁸ The effect of the *obiter* remarks made by the court is that a claim based on oppressive or unfair prejudicial conduct may be dismissed if the petitioner or plaintiff rejected a reasonable offer for the purchase of his or her shares at a fair value.³⁷⁹

The effect of the rejection of an offer to purchase the shares of the complainant at a fair value is yet to be thoroughly considered by the Canadian

³⁷⁴ *ABOP LLC v Qtrade Canada Inc* 2007 BCCA 290, (2007) 284 DLR (4th) 171, 2007 CarswellBC 1082 (BCCA).

³⁷⁵ *ABOP LLC v Qtrade Canada Inc* 2007 BCCA 290, (2007) 284 DLR (4th) 171, 2007 CarswellBC 1082 (BCCA) [26].

³⁷⁶ *ABOP LLC v Qtrade Canada Inc* 2007 BCCA 290, (2007) 284 DLR (4th) 171, 2007 CarswellBC 1082 (BCCA) [23] and [24].

³⁷⁷ [1999] WLR 1092.

³⁷⁸ See 2.11.2 above for a discussion of this case and the position in England.

³⁷⁹ See 2.11.2 above. See 5.11.1 below for the position in South African relating to reasonable offers.

courts. It is doubtful whether the judgment in *O'Neill*³⁸⁰ will be applied in Canada as some of the guidelines in *O'Neill*³⁸¹ are not clear. Therefore, the *obiter* remarks of the court should be approached with caution.³⁸²

It is argued by some that the court in *O'Neill*³⁸³ approached the oppression remedy as a remedy in terms of which a shareholder (minority) may leave the company structure when the circumstances justifying such relief are present.³⁸⁴ The problem with this approach is that it fails to recognise that the buy-out or purchase order is not the only relief that a court can grant in terms of the remedy.³⁸⁵ The oppression remedy provides for a wide range of other possible orders a court can make.³⁸⁶

It would be difficult to determine what a reasonable offer would constitute if the relief sought by a complainant is in a form other than a buy-out of the complainant's shares.³⁸⁷ However, there are many practical justifications for providing a complainant with an offer in terms of which a complainant is offered cash as an alternative to any other remedies.³⁸⁸

³⁸⁰ *O'Neill v Phillips* [1999] WLR 1092.

³⁸¹ *O'Neill v Phillips* [1999] WLR 1092.

³⁸² A Duggan, JS Ziegel and J Girgis 'Is there an Oppression Remedy Showstopper? *O'Neill v Phillips*' (2000) 33 *Canadian Business Law Journal* 447.

³⁸³ *O'Neill v Phillips* [1999] WLR 1092.

³⁸⁴ A Duggan, JS Ziegel and J Girgis 'Is there an Oppression Remedy Showstopper? *O'Neill v Phillips*' (2000) 33 *Canadian Business Law Journal* 447.

³⁸⁵ See 4.11 above for a discussion of the various forms of relief a court may grant.

³⁸⁶ See 4.11 above.

³⁸⁷ A Duggan, JS Ziegel and J Girgis 'Is there an Oppression Remedy Showstopper? *O'Neill v Phillips*' (2000) 33 *Canadian Business Law Journal* 447.

³⁸⁸ A Duggan, JS Ziegel and J Girgis 'Is there an Oppression Remedy Showstopper? *O'Neill v Phillips*' (2000) 33 *Canadian Business Law Journal* 447.

From a theoretical perspective, the approach in *O'Neill v Phillips*³⁸⁹ may be problematic, especially in those situations where the complainant wants to remain part of the company and seek relief other than a buy-out order. Some authors are of the view that a reasonable buy-out offer can only neutralise a claim in terms of the oppression remedy when the relief sought by a complainant is a buy-out of the complainant's shares.³⁹⁰

The characteristics of a reasonable offer as described in *O'Neill v Phillips*³⁹¹ are also problematic.³⁹² The valuation of the shares of a complainant will depend on the context of the dispute before the court. As a general rule the shares will be valued on a *pro rata* basis, but there may be exceptions.³⁹³ The court's statement in *O'Neill*³⁹⁴ that the value of the shares should be fixed by an expert and that full arbitration proceedings do have not to be available for determining the value of the shares is questionable. The court acknowledged that a risk existed that the

³⁸⁹ [1999] WLR 1092.

³⁹⁰ A Duggan, JS Ziegel and J Girgis 'Is there an Oppression Remedy Showstopper? *O'Neill v Phillips*' (2000) 33 *Canadian Business Law Journal* 447. See also in this regard *Valrut Investments Ltd v Norstar Commercial Developments* 2008 171 ACWS (3d) 455, 2008 CarswellOnt 1910 (ONSC) [11] where the court dealt with interests in a partnership and distinguished the case from *O'Neill v Phillips* [1999] WLR 1092 on the basis that in the application relief was not sought in the form of a buy-out order.

³⁹¹ [1999] WLR 1092.

³⁹² A Duggan, JS Ziegel and J Girgis 'Is there an Oppression Remedy Showstopper? *O'Neill v Phillips*' (2000) 33 *Canadian Business Law Journal* 447.

³⁹³ See 4.11.9.2 below for a discussion of the valuation of shares for purposes of a purchase or buy-out order. See also 2.11.2 above for a discussion of the obiter remarks in *O'Neill v Phillips* [1999] WLR 1092. A Duggan, JS Ziegel and J Girgis 'Is there an Oppression Remedy Showstopper? *O'Neill v Phillips*' (2000) 33 *Canadian Business Law Journal* 447 provide examples of such exceptions, for example, where the complainant never had a legitimate expectation to share in the net assets of a company.

³⁹⁴ *O'Neill v Phillips* [1999] WLR 1092.

valuation of the shares subject to the dispute may not always be accurate, but that the approach is justified on the basis that all the parties to the dispute are exposed to this possibility. This is considered by some as unjust as there is no reason why the complainant should carry any risk when the wrongdoer acted in contravention of section 241.³⁹⁵ The judgment fails to provide guidance on the scale on which legal costs must be offered in the event of a party being under an obligation to offer the payment of legal costs at all.³⁹⁶ It is further not clear when a complainant becomes entitled to be offered the payment of legal costs relating to the dispute.³⁹⁷

4.15 Conclusion and recommendations

4.15.1 The development of the statutory unfair prejudice remedy

At first the introduction of the statutory unfair prejudice remedy in Canada was resisted on the grounds that it allowed unnecessary court intervention in the internal affairs of corporations.³⁹⁸ Later, forms of the oppression remedy were introduced in some of the Canadian provinces. Some of these early versions of the statutory oppression remedy were modelled on section 210 of the English Companies Act 1948.³⁹⁹ This approach of the legislature could also be observed in other

³⁹⁵ A Duggan, JS Ziegel and J Girgis 'Is there an Oppression Remedy Showstopper? *O'Neill v Phillips*' (2000) 33 *Canadian Business Law Journal* 447.

³⁹⁶ A Duggan, JS Ziegel and J Girgis 'Is there an Oppression Remedy Showstopper? *O'Neill v Phillips*' (2000) 33 *Canadian Business Law Journal* 447.

³⁹⁷ A Duggan, JS Ziegel and J Girgis 'Is there an Oppression Remedy Showstopper? *O'Neill v Phillips*' (2000) 33 *Canadian Business Law Journal* 447.

³⁹⁸ See 4.2 above.

³⁹⁹ See 4.2 above.

jurisdictions considered in this thesis.⁴⁰⁰ Although the legislature moved away from the English form of the oppression remedy, the influence of English law is still evident in certain respects of the Canadian remedy.⁴⁰¹

4.15.2 The statutory formulation of the remedy

The formulation of the Canadian statutory unfair prejudice remedy is important to the evaluation of the South African equivalent of the remedy as it almost follows the exact wording of section 241 of the Canada Business Corporations Act.⁴⁰² The Canadian statutory unfair prejudice remedy is characterised by its extensively wider and broader formulation of the remedy in some aspects, when compared with the formulation of the remedy in other jurisdictions investigated in this thesis.⁴⁰³ This approach of the legislature has significantly advanced the application of the statutory unfair prejudice remedy.

4.15.3 Standing

The Canadian statutory unfair prejudice remedy is not limited to shareholders. Section 238 makes it clear that this remedy is available the holders of securities. The remedy is not only available to registered holders but also to beneficial owners,

⁴⁰⁰ See 3.3, and more specifically 3.3.2, above regarding the development of the Australian unfair prejudice remedy. See Chapter 5 below for a discussion of the influence of English law on the development of South African company law.

⁴⁰¹ See, for example, the retention of the term oppressive in the Canadian remedy and the application of the no reflective loss principle.

⁴⁰² RSC, 1985, c C-44. See the wording of the South African remedy in section 163 of the Companies Act 71 of 2008 as set out in 5.3 below.

⁴⁰³ Especially in relation to the various stakeholders to whom the remedy is available and the various capacities in which a complainant may suffer unfair prejudice. See 4.6 above. For the position in England see 2.6.1 and 2.6.2 above. For the position in Australia and South Africa see 3.7 above and 5.7.1 below respectively.

former registered holders and beneficial owners.⁴⁰⁴ A current and former director or officer may also apply for relief in terms of the remedy.⁴⁰⁵ Section 238 also provides the court with a wide discretion to grant leave to any person that is proper to make an application in terms of the statutory unfair prejudice remedy.⁴⁰⁶ This provision is aligned with the interpretational approach that the remedy should not be interpreted in an unjustifiable restrictive manner in light of the fact that the unfair prejudice remedy should be flexible enough to provide for circumstances not foreseen by the legislature.

4.15.4 Capacity

Section 241 differentiates between the person who may rely on the provisions of the statutory unfair prejudice and the capacity in which a person may suffer prejudice. The provision expressly recognises that the interests of a security holder, creditor, director or officer may be unfairly prejudiced.⁴⁰⁷ This approach is commendable in light of the fact that similar provisions in other jurisdictions are criticised for restricting the unfair prejudice remedy to shareholders in their capacity as shareholders.⁴⁰⁸

4.15.5 Grounds and the concepts of oppression, unfair prejudice and unfair disregard of interests

The grounds on which a complainant can rely for purposes of the statutory unfair prejudice remedy are set out in section 241(2)(a)-(c). Canadian courts interpret the

⁴⁰⁴ See 4.6.1 above.

⁴⁰⁵ See 4.6.2 above.

⁴⁰⁶ See 4.6.4, and more specifically 4.6.4.1, above.

⁴⁰⁷ Canada Business Corporations Act (RSC 1985 c C-44), s 241(2).

⁴⁰⁸ See 5.7.1.4 below for criticism in the South African context on requiring that a shareholder should be unfairly prejudiced in his or her capacity as shareholder.

grounds in section 241(2)(a)-(c) as a whole and do not interpret each of the grounds separately.⁴⁰⁹ What is emphasised by the courts is that a complainant can rely on the effect or result of conduct or may complain of the manner in which powers are exercised or the business or affairs of the corporation are conducted.⁴¹⁰

Once it is established that the conduct complained of falls within the grounds stated in section 241(2)(a)-(c), it must further be determined whether the conduct can be described as oppressive, unfairly prejudicial or unfairly disregarding the interests of the complainant. According to Canadian courts the legislature deliberately drafted the provisions of the remedy in such a manner that it is not only triggered by oppressive conduct but also by conduct that can be described as unfairly prejudicial or can be regarded as an unfair disregard of the interests of the complainant. The use of the terms unfair prejudice and unfair disregard of interests is that there is a movement away from the restrictive connotation to the term oppressive which originates from the English law.⁴¹¹ An objective test is used to determine whether conduct is unfairly prejudicial. For this purpose, the subjective intention of the party that committed the conduct complained of does not play a role in the evaluation of the conduct complained of.⁴¹² Despite the fact that conduct that is oppressive, unfairly prejudicial or is an unfair disregard of interests entitles the complainant to the same forms of relief, the courts do create the impression that there are some semantical differences between the terms. While oppressive conduct is regarded as the most serious form of conduct on which a complainant

⁴⁰⁹ See 4.7.1–4.7.4 read with 4.7.5 above.

⁴¹⁰ See 4.7.5 above.

⁴¹¹ See 4.7.6.4 above.

⁴¹² See 4.7.6.3 above.

may rely,⁴¹³ conduct that is of an unfair prejudicial nature or is an unfair disregard of interests, is of a lesser serious nature when the conduct complained of is evaluated against the criteria of fairness in a commercial context.⁴¹⁴ It is not required that the conduct on which a complainant relies must be unlawful.⁴¹⁵ Further the lawfulness of conduct is not necessarily a defence against an application based on the unfair prejudice remedy.

The breach of a reasonable expectation can be regarded as unfair prejudicial conduct for purposes the statutory unfair prejudice remedy.⁴¹⁶ Some argue that the protection of reasonable expectations provides the justification for the statutory unfair prejudice remedy.⁴¹⁷

4.15.6 Corporations within a group

Section 241 does not leave the application of the statutory unfair prejudice remedy in the hands of the court. The legislature expressly provided that the remedy can be applied within a group of companies. The remedy applies to the 'affiliates' of a corporation.⁴¹⁸

4.15.7 Relief

The wording of section 241 provides clearly that the purpose of the relief is to rectify the conduct complained of.⁴¹⁹ When the statutory grounds for relief are established,

⁴¹³ See 4.7.6.2 above.

⁴¹⁴ See 4.7.6.3 and 4.7.6.4 above

⁴¹⁵ See 4.7.6.5 above.

⁴¹⁶ See 4.8.2 above.

⁴¹⁷ See 4.8.2 above.

⁴¹⁸ See 4.10 above.

⁴¹⁹ See 4.11.2 above.

a court can order a variety forms of relief. It is interesting to note that although a court may make an order for liquidation and dissolution in terms of section 241, section 214 provides for the same relief on the same grounds.⁴²⁰ However, what is important to note is that section 214 makes a direct cross reference to section 241 allowing a court to make an alternative order in an application for the liquidation and dissolution of a corporation.⁴²¹

Relief may be granted in the form of the delivery of financial statements to a court or interested person.⁴²² The registers or other records of a corporation can also be rectified in terms of the remedy.⁴²³

Section 241(3) expressly provides for the purchase or buy-out of securities. As with the case in other jurisdictions the Canada Business Corporations Act⁴²⁴ does not regulate the valuation of securities subject to a purchase order.⁴²⁵ The overall principle is that the valuation must be fair in light of the facts and circumstances of each case.⁴²⁶ The actual market value of the relevant securities is only one of the factors that is taken into account to determine their value.⁴²⁷ The valuation of securities is usually based on the opinions of various experts whose opinions must be based on certain legal principles that may have bearing on the value of the relevant securities. Important factors that must be taken into account in

⁴²⁰ See 4.9 and 4.11.15 above.

⁴²¹ See 4.9 above.

⁴²² See 4.11.12 above.

⁴²³ See 4.11.14 above.

⁴²⁴ RSC, 1985, c C-44.

⁴²⁵ For the position in England see 2.10.5 above. For the position in Australia see 3.10.4 above. For the South African position see 5.9.14 below.

⁴²⁶ See 4.11.9.2 (b) above.

⁴²⁷ See 4.11.9.2 (b) above.

the valuation of shares include whether the securities are freely traded,⁴²⁸ the date on which the valuation must be based,⁴²⁹ whether a minority discount must be applied⁴³⁰ and whether any adjustments must be made to neutralise any prejudice suffered as a result of the conduct complained of.⁴³¹

4.15.8 The relationship between the statutory unfair prejudice remedy and the statutory derivative claim

The Canadian unfair prejudice remedy does not provide for the authorisation of a complainant to commence or intervene in legal proceedings on behalf of a corporation. This means that a complainant who wishes to commence or intervene in legal proceedings on behalf of a corporation must rely on the statutory derivative claim. The importance of this observation is that lawmakers in Canada chose to maintain a strict division between the statutory unfair prejudice remedy and the statutory derivative claim. This is in contrast with the approach in some other jurisdictions researched in this thesis.⁴³² The implication of such an approach is that a litigant must be able to clearly identify the various rights and interests to be protected or enforced in order to rely on the correct application remedy. This is often a very complex task as demonstrated in the preceding chapters. This has the potential to create uncertainty and in some instance may even be unfair.

4.15.9 The right of dissent and the unfair prejudice remedy

A feature which distinguishes the Canadian unfair prejudice remedy is its

⁴²⁸ See 4.11.9.2 (c) above.

⁴²⁹ See 4.11.9.2 (d) above.

⁴³⁰ See 4.11.9.2 (e) read with 4.11.9.2 (g) above.

⁴³¹ See 4.11.9.2 (f) above.

⁴³² Compare with the position in England as discussed in 2.10.3 above and the position in Australia as discussed in 3.9.6 above.

relationship with the right to dissent. The two remedies are not exclusive. A holder of securities may rely on either of the remedies provided that he or she is able to satisfy the requirements of the particular remedy.⁴³³

4.15.10 Arbitration

Case law does allow for the arbitration of disputes based on the unfair prejudice remedy.⁴³⁴ An arbitrator may award the relief provided for in the remedy save for ordering the liquidation and dissolution of a corporation.⁴³⁵

4.15.11 Reasonable offers

The obiter remarks in *O'Neill* are acknowledged by Canadian courts.⁴³⁶ However, the Canadian courts are of the view that the scope of application of the remarks of the court in *O'Neill* is very limited and particular to the facts and circumstance of that particular case.⁴³⁷

4.15.12 The function of the statutory unfair prejudice remedy

The statutory unfair prejudice remedy recognised that internal disputes cannot be resolved on an equitable manner by the enforcement of rights or democratic company structures.⁴³⁸ The statutory unfair prejudice remedy does not cloak a stakeholder with rights he or she did not already enjoy in terms of the corporations law but provides a mechanism through which such rights or interests are protected.

⁴³³ See 4.13 above.

⁴³⁴ See 4.14 above.

⁴³⁵ See 4.14 read with 4.14.2.4 above.

⁴³⁶ See 4.14.3 above.

⁴³⁷ See 4.14.3 above.

⁴³⁸ See 4.4 and 4.4.2 above.

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5.1 Introduction

5.1.1 Shareholder protection as purpose of the Act

Adequate shareholder protection is an important aspect of company law. One of the purposes of the Companies Act 71 of 2008 ('the Act') is to promote investment and innovation in South African markets.¹ Investors are reluctant to invest in companies where good corporate governance is absent and if the jurisdiction in which the company operates does not possess an appropriate legislative framework in which investors are protected.

Shareholder protection is important for all types of companies irrespective of whether the shares in a company are held by institutional shareholders or by individuals holding relative small stakes in the company. The rise of shareholder activism further underscores shareholder protection and the need for companies to adopt good corporate governance practices to ensure that investors' rights and interests are protected and that the ultimate beneficiaries of the investments can enjoy the benefits of the value created by these companies.

5.1.2 Shareholder protection in context of the established company principles

The protection of shareholders should be viewed against the background that companies are separate juristic persons and that decision-making within a company is based on the principle of majority rule.² These principles were also strictly

¹ Companies Act 71 of 2008, s 7(c).

² See 5.2.1 and 5.2.3 below. See also 5.4.3 below for a discussion of the role fundamental corporate law principles play in determining oppression of unfair prejudice.

enforced at common law.³ The effect of the strict enforcement of traditional and established company law principles revealed that the common law position regarding the protection of shareholders, and more specifically minority shareholders, was inadequate.⁴ Prior to the Companies Act 46 of 1926 the protection of shareholders was dependent on the interpretation and application of the proper plaintiff rule as found in *Foss v Harbottle*.⁵ In recognition of the fact that the protection afforded by the proper plaintiff rule is inadequate, the legislature intervened and incorporated various statutory remedies aimed at strengthening the protection of shareholders.⁶

5.1.3 A critical evaluation of section 163 of the Act

In this chapter a critical analysis is provided of the statutory oppression or unfair prejudice remedy and related aspects as found in section 163 of the Act.⁷ This is done after a brief overview of the development of the statutory personal action in South Africa.⁸ The overview forms part of the background against which the provisions of section 163 of the Act should be considered. In some respects, the protection of shareholders, and more specifically minority shareholders, creates tension between established legal principles such as the principal of majority rule.⁹

³ See 5.2.2 below.

⁴ See 5.2.2 below.

⁵ (1843) 2 Hare 461, 67 ER 189.

⁶ See 5.2.2 below.

⁷ See 5.7–5.11 below.

⁸ See 5.2 below.

⁹ This will specifically be the case when the directors of a company or the majority of shareholders implement a resolution which prejudices a minority shareholder, but the minority shareholder is bound to the decision based on the provisions in the Memorandum of Incorporation of a company and the principle of majority decision-making.

A proper understanding of the fundamental principles of company law is therefore imperative to conduct a critical analysis of section 163 of the Act.¹⁰

To establish whether the provisions of section 163 of the Act is an advancement in the statutory protection of shareholders, the principles developed in terms of its predecessor, section 252 of the Companies Act 61 of 1973, must be considered together with developments in other comparable jurisdictions.¹¹ While the provisions of section 163 are measured against the provisions in comparable jurisdictions it is essential that the formulation of section 163 be evaluated against the criticisms of various authors raised against section 252 of the previous Act.¹² This is important to establish how the legislature approached the drafting of section 163 to ensure problems in relations to section 252 of the previous Act are not repeated in the current statutory form of the oppression or unfair prejudice remedy. A consideration of the predecessors of the current remedy also provides valuable insight into the interpretation and application of the remedy, as the development of the oppression or unfair prejudice remedy consists of certain unique features. One such unique feature is that South African company law has been substantially influenced by the English law. One would have anticipated that the South African legislature would follow the developments in English law with the necessary adjustments to refine the formulation of the South African oppression or unfair

¹⁰ See 5.4.3 below for the consideration of fundamental corporate law principles in determining whether conduct is oppressive or unfairly prejudicial.

¹¹ The findings in E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) in respect of section 252 of the Companies Act 61 of 1973 are also considered in the context of section 163 of the Companies Act 71 of 2008.

¹² See 5.2.4.3 below for the main criticisms raised against the formulation of section 252 of the previous Act.

prejudice remedy. It is indicated later in this chapter that it seems that in the formulation of the oppression remedy in the Act, the legislature preferred to follow the wording of the Canadian equivalent of the statutory oppression or unfair prejudice remedy.¹³

A critical analysis of the provisions of section 163 of the Act later in this chapter reveals that the approach followed by the legislature in the formulation of the oppression or unfair prejudice remedy is problematic for a number of reasons: firstly, it casts doubt on the weight that can be attributed the body of case law that developed under section 252 of the previous Act to interpret the provisions of the current remedy;¹⁴ secondly, it creates uncertainty in respect of established corporate law principles such as the nature of the relationship between the company, the directors, the shareholders and the shareholders *inter se*;¹⁵ thirdly, terminology that is foreign to South African law is introduced;¹⁶ fourthly, the South African legislature failed to incorporate certain essential provisions of the Canadian oppression and unfair prejudice remedy causing amongst others a disconnect between the remedies available in terms of the remedy and the person who enjoys standing for purposes of section 163;¹⁷ fifthly, the approach of the legislature ignored the valuable and constructive criticisms raised against the provisions of

¹³ See 5.4.4 below. For a discussion of the Canadian remedy see Chapter 4 above.

¹⁴ See 5.2.4.2 below for a discussion of the relevance of judgments handed down in terms of section 252 of the previous Act for purposes of obtaining guidance on the interpretation and application of section 163 of the Act.

¹⁵ See 5.5.1 and 5.5.3 below with regard to the contractual nature of the relationship between the company, directors and shareholders.

¹⁶ See, for example, the use of the term 'unanimous shareholder agreement'; in section 163(2)(d) as discussed in 5.9.5.3 (a) below.

¹⁷ See 5.7.1 below for the provisions relating to standing for purposes of section 163 of the Act read with 5.9 below. See, for example, specifically 5.9.12 below.

section 252 of the previous Act.¹⁸ The effect of the approach of the South African legislature is that in stead of utilising the available research to eradicate or avoid the problems associated with the oppression remedy in terms of section 252, it failed properly to address these problems and introduced new problematic aspects. The final point of criticism is that the legislature omitted important provisions from the current oppression remedy that were present in the predecessors of section 163 of the Act.¹⁹

5.1.4 The interrelationship between section 163 and other provisions in the Act

The unfair prejudice remedy in section 163 of the Act must also be considered in the context of a number of new innovative concepts and provisions. The remedy therefore has to be considered in light of the fact that some of the duties of directors are now partially codified and that the conduct of directors will be evaluated against the statutory business judgement rule contained in section 76(4) of the Act.²⁰ The Act now also contains provisions directed at delinquent directors.²¹ Section 164 of the Act contains a statutory form of the appraisal remedy which is also a novelty to

¹⁸ See 5.2.4.3 below for the most important criticisms raised against section 252 of the previous Act.

¹⁹ See 5.9.14 below where relief in the form of a buy-out order is discussed and where it is noted that section 163 of the Act does not expressly provide for this form of remedy.

²⁰ On the partial codification of the duties of directors see L Coetzee and JL van Tonder 'Advantages and disadvantages of partial codification of directors' duties in the South African Companies Act 71 of 2008' (2016) 41:2 *JJS* 1; FHI Cassim *et al Contemporary Company Law* (2nd ed, 2012) 507; Michael M Katz 'Governance under the Companies Act 71 of 2008: Flexibility is the keyword' 2010 *Acta Juridica* 248. See also the commentary on section 76 by PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018).

²¹ See 5.9.7.2 below.

South African corporate law.²² The Act further makes specific provision for the protection of the holders of securities by providing for a remedy in terms of section 161. The unfair prejudice remedy, also known as the statutory personal action, is contained in section 163 of the Act, while section 165 contains the statutory derivative action. These remedies differ from their predecessors in some material respects. The relationship between section 163 and section 165 of the Act is also considered.²³ To do a proper analysis of the provisions of the Act aimed at the protection of shareholders, one needs a broad understanding of the general philosophy pertaining to the protection of shareholders as contained in the Act.²⁴

5.1.5 Section 163 and the Constitution²⁵

All law is subject to the Constitution.²⁶ Company law is no exception. Therefore, the relevance of recent constitutional developments to section 163 of the Act are considered. In this regard constitutional developments in relation to the law of contract are of particular importance. The Memorandum of Incorporation is of a contractual nature and binds the company, directors, shareholders and shareholders *inter se*.²⁷ In this regard the approach of the courts to the role fairness, reasonableness and *bona fides* play in contractual relations is considered.²⁸ This

²² See 5.10 below for a discussion of the similarities and differences between a buy-out order in terms of section 163(2) and the appraisal remedy in section 164.

²³ See 5.9.15 below.

²⁴ See I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1 for a discussion of the shareholder protection philosophy adopted by the Companies Act 71 of 2008.

²⁵ Constitution of the Republic of South Africa, 1996.

²⁶ Constitution of the Republic of South Africa, 1996 s 2 read with s 172 (1)(a).

²⁷ See 5.5.1 and 5.5.3 below for a discussion of the nature of the relationship between the company, directors and shareholders.

²⁸ See 5.6 below.

may be directly relevant to the company law contract in light of the fact that the enforcement of rights in terms of the Memorandum of Incorporation of a company or, in some instances, the Act is dependent on the fairness (or unfairness) of the conduct complained of in terms of section 163 of the Act.

5.1.6 The balancing of interests

The conundrum presented to the legislature is to strike a fine balance between the rights of shareholders and the rights of directors in the context of the principles of majority rule and the separate juristic personality of a company.²⁹ In this balancing act a situation must be avoided in terms of which the rights and interests of the majority shareholders are undermined by the rights of minority shareholders.

5.2 The development of the statutory unfair prejudice remedy in South Africa

5.2.1 Introduction

Understanding the development of the oppression remedy in South Africa makes it possible critically to evaluate the current form of the remedy.³⁰ Prior to the introduction of the statutory forms of the oppression or unfair prejudice remedy, shareholders had to rely on the common law for protection. In this regard, the principles found in *Foss v Harbottle*³¹ were directional. The implications of the

²⁹ See section 7(i) which provides that one of the purposes of the Act is to balance the rights and obligations of shareholders and directors respectively. See also I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1.

³⁰ For an evaluation of section 163 of the Act see 5.4 and 5.7 below and onwards.

³¹ (1843) 2 Hare 461, 67 ER 189.

principles contained in *Foss v Harbottle*³² are considered and evaluated below.³³ In recognising the limitations associated with the strict application of the principles in *Foss v Harbottle*³⁴ the legislature responded by introducing the first form of the statutory oppression remedy in the form of section 111*bis* of the Companies Act 46 of 1926.³⁵ This Act was later replaced with the Companies Act 61 of 1973. The reforms in the Companies Act 61 of 1973 were mainly based on the recommendations of the Van Wyk De Vries Commission which specifically considered section 111*bis* of the Companies Act 46 of 1926.³⁶ Section 252 of the Companies Act 61 of 1973 contained the equivalent of section 111*bis* of the Companies Act 46 of 1926. More recently the Companies Act 71 of 2008 replaced the Companies Act 61 of 1973. The statutory oppression or unfair prejudice remedy is now contained in section 163 of the Act.³⁷

5.2.2 The proper plaintiff rule and the need for statutory reform

5.2.2.1 The proper plaintiff rule

The judgment in *Foss v Harbottle*³⁸ contains what is known as the ‘proper plaintiff rule’ and the ‘internal management rule’.³⁹ These rules and exceptions thereto

³² (1843) 2 Hare 461, 67 ER 189.

³³ See 5.2.2 below.

³⁴ (1843) 2 Hare 461, 67 ER 189.

³⁵ An overview of section 111*bis* of the Companies Act 46 of 1926 is provided in 5.2.3 below.

³⁶ Main Report of the Commission of Enquiry into the Companies Act (RP 45/1970). See also 5.2.3 below.

³⁷ A critical analysis of section 163 of the Companies Act 71 of 2008 is provided in 5.4, 5.7–5.11 below.

³⁸ (1843) 2 Hare 461, 67 ER 189.

³⁹ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 48. See also BA van der Merwe ‘Die Beskerming van Minderheidsaandeelhouers: Die Toepassingsveld van die Reël in *Foss v Harbottle*

formed part of the South African company law.⁴⁰ In terms of the proper plaintiff rule it is the company, and not a shareholder of the company, that must act to seek redress for a wrong committed against a company and/or a loss suffered by a company.⁴¹ This was the legal position even when the wrong committed against the company caused a shareholder or shareholders to suffer a loss in the form of the diminution of the value of their shareholding or a loss in dividend.⁴²

5.2.2.2 The proper plaintiff rule as enforcement of separate juristic personality

In *Itzikowitz v Absa Bank Ltd*⁴³ the court explained that the proper plaintiff rule enforces the concept of separate juristic personality.⁴⁴ The court further held that the purpose of the rule is not to protect the wrongdoer against the likelihood of a possible double recovery.⁴⁵ The principle is rather that if a wrong is committed

Uitgebrei?' (1993) 5 SA Merc LJ 216. See further 2.3.1 above for a discussion of the proper plaintiff rule in England.

⁴⁰ BA van der Merwe 'Die Beskerming van Minderheidsaandeelhouders: Die Toepassingsveld van die Reël in *Foss v Harbottle* Uitgebrei?' (1993) 5 SA Merc LJ 216, 226. Therefore, this discussion of the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 must be read and understood with the discussion in 2.3.1 above of the proper plaintiff rule in England.

⁴¹ *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) [108] and [109]. See the discussion of *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 and *Johnson v Gore Wood & Co (a firm)* [2001] 1 All ER 481; [2002] 2 AC 1 (HL) in the context of the no reflective loss principle in Chapter 2 above.

⁴² *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) [109]. See also 5.9.11 below for a discussion of the principles relating to the recovering of loss suffered by shareholders based on the diminution of the value of their shares.

⁴³ 2016 (4) SA 432 (SCA) [10].

⁴⁴ *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) [107]. See also E Hurter *Aspekte van statutêre minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 51.

⁴⁵ In *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) [16] the court specifically rejected the approach and reasoning adopted in *McCrae v Absa Bank Ltd* 2009 JDR 0782 (GSJ), *McLelland v*

against the company it is the company that suffers from the wrong and not the shareholders of the company.⁴⁶ The diminution in value of the shares of shareholders is only an indirect consequence of the wrong committed against the company.⁴⁷

5.2.2.3 The enforcement of the proper plaintiff rule when the wrongdoers are in control of the company

The problem with the 'proper plaintiff rule' as embodied in *Foss v Harbottle*⁴⁸ was that when a wrongdoer or wrongdoers were in control of a company against which they have committed a wrong, they could use their power in or control over the company to prevent the company from seeking redress against them.⁴⁹ In such circumstances the strict enforcement of the proper plaintiff rule may lead to inequitable consequences. This had the potential for the interests of minority shareholders to be prejudiced as a result of an abuse of power or control by the majority shareholders. The court in *Gihwala and Others v Grancy Property Ltd and*

Hullet 1992 (1) SA 456 (D), and *Kalinko v Nisbet* 2002 (5) SA 766 (W). The court specifically held that the proper plaintiff rule does not apply in cases where the shareholder institutes legal proceedings in his personal capacity. See specifically BA van der Merwe 'Die Beskerming van Minderheidsaandeelhouders: Die Toepassingsveld van die Reël in *Foss v Harbottle* Uitgebrei?' (1993) 5 SA Merc LJ 216, 227-28 for criticism of *McLelland v Hullet* 1992 (1) SA 456 (D).

⁴⁶ *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) [107].

⁴⁷ See also 5.9.11 below for discussion of the principles relating to the recovering of losses suffered by shareholders based on the diminution of the value of shares.

⁴⁸ (1843) 2 Hare 461, 67 ER 189.

⁴⁹ This is because the rule in *Foss v Harbottle* *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 confirmed the principle of majority rule, making it possible to ratify wrongs committed against a company, unless such wrongs are unratifiable. One of the problems that plagued the application of the proper plaintiff rule was that it was in some circumstances very difficult to distinguish between ratifiable and unratifiable wrongs. See BA van der Merwe 'Die Beskerming van Minderheidsaandeelhouders: Die Toepassingsveld van die Reël in *Foss v Harbottle* Uitgebrei?' (1993) 5 SA Merc LJ 216, 218.

*Others*⁵⁰ acknowledged that the strict enforcement of the proper plaintiff rule could lead to the ‘oppression’ of the shareholder and therefore in certain circumstances the shareholder should be allowed to recover the loss suffered by a company by way of a derivative action and in certain circumstances the shareholder should be permitted to recover his or her own loss.⁵¹

5.2.2.4 The exceptions to the proper plaintiff rule

To overcome the strict enforcement of the ‘proper plaintiff rule’ courts had over the years developed exceptions to the rule.⁵² When an exception applies, a shareholder will be allowed to proceed to recover the loss suffered by a company by way of a derivative action.⁵³ There is not consensus on the exceptions to the proper plaintiff rule regarding what constitutes unratifiable wrongs, but traditionally examples are *ultra vires* conduct or conduct in contravention of the law;⁵⁴ the absence or invalidity of a special resolution decision;⁵⁵ the breach of the individual rights of a

⁵⁰ [2016] 2 All SA 649 (SCA) [107].

⁵¹ See 5.2.2.4 below for the recognised exceptions to the proper plaintiff rule.

⁵² See BA van der Merwe ‘Die Beskerming van Minderheidsaandeelhouers: Die Toepassingsveld van die Reël in *Foss v Harbottle* Uitgebrei?’ (1993) 5 *SA Merc LJ* 216, 216 who explains that the ‘exceptions’ must rather be seen as instances where the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 does not apply at all.

⁵³ *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) [107].

⁵⁴ *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) [108]. These forms of breach cannot be ratified. See also *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204.

⁵⁵ The proper plaintiff rule further did not apply to circumstances where a transaction or conduct complained of could only be executed in accordance with a special resolution. Special resolutions serve to protect minority shareholders and therefore a simple majority cannot ratify or sanction transactions or conduct that required a special resolution. See *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) [108]. See also *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204. See also BA van der Merwe ‘Die Beskerming van

shareholder⁵⁶ and instances of fraud on the minority.⁵⁷ In *McLelland v Hulett*⁵⁸ the court held that the proper plaintiff rule can be ignored when it is in the interests of justice to do so. This exception received some criticism.⁵⁹

5.2.2.5 The problem with the exceptions to the proper plaintiff rule and the need for statutory reform

Although the exceptions⁶⁰ are helpful and essential in promoting justice, courts often find it difficult to determine whether the facts and circumstances of a particular case fall within the ambit of one the exceptions to 'the proper plaintiff rule'.⁶¹ Hurter⁶² found that one of the main problems with the proper plaintiff rule is that the application of the personal action and the derivative action may in certain circumstances overlap but that the courts are reluctant to acknowledge such an

Minderheidsaandeelhouders: Die Toepassingsveld van die Reël in *Foss v Harbottle* Uitgebrei?' (1993) 5 SA Merc LJ 216, 218.

⁵⁶ BA van der Merwe 'Die Beskerming van Minderheidsaandeelhouders: Die Toepassingsveld van die Reël in *Foss v Harbottle* Uitgebrei?' (1993) 5 SA Merc LJ 216, 218.

⁵⁷ BA van der Merwe 'Die Beskerming van Minderheidsaandeelhouders: Die Toepassingsveld van die Reël in *Foss v Harbottle* Uitgebrei?' (1993) 5 SA Merc LJ 216, 218.

⁵⁸ 1992 (1) SA 456 (D).

⁵⁹ See BA van der Merwe 'Die Beskerming van Minderheidsaandeelhouders: Die Toepassingsveld van die Reël in *Foss v Harbottle* Uitgebrei?' (1993) 5 SA Merc LJ 216, 226-27 who argues that although it may be required that some exceptions to the proper plaintiff be allowed, it is incorrect to argue that 'claims of justice' in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 must be regarded as a separate and independent exception to the proper plaintiff rule.

⁶⁰ See 5.2.2.4 above. See also 2.3.1.4 above for a discussion of the exceptions to the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 as developed under the English law.

⁶¹ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 53. See also BA van der Merwe 'Die Beskerming van Minderheidsaandeelhouders: Die Toepassingsveld van die Reël in *Foss v Harbottle* Uitgebrei?' (1993) 5 SA Merc LJ 216. For a similar criticism in the context of the approach of English courts to the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 see 2.3.1.5 above.

⁶² E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa).

overlap.⁶³ This creates conceptual problems as to which remedy applies to what circumstances and the determination of standing.⁶⁴

5.2.3 Section 111 *bis* of the Companies Act 46 of 1926

The provisions of section 111 *bis* of the Companies Act 46 of 1926 are quoted below to provide a complete view of the development of the statutory development of the statutory unfair prejudice (or oppression remedy) in South Africa.⁶⁵ This will assist in making comparisons between the various versions of the remedy that have been introduced in South Africa thus far. It would further make it possible to identify similarities and differences with the statutory development of the unfair prejudice remedy in other jurisdictions discussed in this thesis.

Section 111 *bis* provided:

‘Alternative remedy to winding-up in cases of oppression

- (1) Any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself), may make an application to the Court by petition for an order under this section; and in a case falling within sub-section (2) of section ninety-five the Minister may make the like application.
- (2) If on any such petition the Court is of opinion
 - (a) that the company’s affairs are being conducted as aforesaid;and
 - (b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the

⁶³ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 53-58. See also 5.9.15 below for a discussion of the relationship between section 163 and section 165.

⁶⁴ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 53-58.

⁶⁵ This provision was replaced by section 252 of the Companies Act 61 of 1973 which is discussed in 5.2.4 below. See also E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 324-329 for a brief discussion of section 111 *bis* of the Companies Act 46 of 1926.

making of a winding-up order on the ground that it is just and equitable that the company should be wound up,

the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

- (3) Where an order under this section make any alteration or addition to any company's memorandum or articles, then notwithstanding anything in this Act but subject to the provisions of the order, the company concerned shall not have the power without the leave of the Court to make any further alteration in or addition to the memorandum or articles inconsistent with the provisions of the order; but, subject to the foregoing provisions of this sub-section, the alterations or additions made by the order shall be of the same effect as if duly made by resolution of the company, and this Act shall apply to the memorandum or articles as so altered or added accordingly.
- (4) A copy of any order under this section altering or adding to, or giving leave to alter or add to, a company's memorandum or articles shall, within thirty days after the making thereof, be delivered by the company to the Registrar for registration; and if a company makes default in complying with this sub-section, the company shall be guilty of an offence and liable, on conviction, to a fine of two pounds for every day that the default continues.'

What is important to note from the formulation of section 111*bis* is the use of the term 'oppressive' to describe the conduct on which a member could rely for purposes of relief.⁶⁶ Further, the provisions of section 111*bis* made it clear that it aimed to introduce alternative forms of relief to the winding-up of companies in circumstances where such an order for the winding-up of a company would be unfairly prejudicial to other members of the company.⁶⁷ From a reading of section 111*bis* other interesting observations can be made and their relevance are explored in more detail in relation

⁶⁶ Companies Act 46 of 1926, s 111*bis*(1). In the Main Report of the Commission of Enquiry into the Companies Act (RP 45/1970) 247 it was recommended that the conduct of which a member may complain should rather be described as 'unfairly prejudicial, unjust or inequitable' instead of 'oppressive'.

⁶⁷ See 5.8 below.

to the discussion the provisions of section 163 of the Act. In this regard section 111 *bis* expressly provided for the buy-out of the shares of a member by other members or the company.⁶⁸ Further, the formulation of the provision maintains a direct relationship between the oppressive conduct in relation to the affairs of a company and the winding-up of a company.⁶⁹ Section 111 *bis*(2) also made it clear that the purpose of the order should be to bring an end to the conduct complained of.

5.2.4 Section 252 of the Companies Act 61 of 1973

5.2.4.1 Introduction

The Companies Act 61 of 1973 replaced the Companies Act 46 of 1926. Section 252 of the Companies Act 61 of 1973 was the equivalent of section 111 *bis* of the Companies Act 46 of 1926. Section 252 contained some reforms based on the recommendations of the Van Wyk De Vries Commission in relation to section 111 *bis* of the Companies Act 46 of 1926.

Section 252 provided:

'Member's remedy in case of oppressive or unfairly prejudicial conduct. –

- (1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfair prejudicial, unjust or inequitable to him or to some part of the members of the company, may, subject to the provisions of subsection (2), make an application to the Court for an order under this section.
- (2) Where the act complained of relates to –
 - (a) any alteration of the memorandum of the company under section 55 or 56;

⁶⁸ Companies Act 46 of 1926, s 111 *bis* (2). For the position in terms of section 163 of the Act see 5.9.14 below.

⁶⁹ Companies Act 46 of 1926, s 111 *bis* (2). See also 5.8 below.

- (b) any reduction of the capital of the company under section 83;
- (c) any variation of rights in respect of shares of a company under section 102; or
- (d) a conversion of a private company into a public company into a private company under section 22,

an application of the Court under subsection (1) shall be made within six weeks after the date of the passing of the relevant special resolution required in connection with the particular act concerned.

- (3) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable, or that the company's affairs are being conducted as aforesaid and if the Court considers it just and equitable, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the future conduct of the company's affairs or for the purchase of the shares of any members of the company by other members thereof or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.

(4)

(5).'

A number of aspects of section 252 deserve detailed attention as they are relevant to the interpretation of section 163 of the Act.⁷⁰ Firstly, the use of the concept 'oppressive' in section 252.⁷¹ The concept 'oppressive' was only used in the heading of section 252 and did not appear in the provisions of section 252. The word 'oppressive' in the body of the statutory oppression remedy was replaced by the concept of 'unfairly prejudicial' conduct with the purpose of breaking away from the restrictive interpretation associated with the concept of 'oppressive' conduct.⁷²

⁷⁰ See 5.2.4.2 below.

⁷¹ See 5.7.3.2 and 5.7.8 below for a discussion of the use of the oppressive concept in section 163 of the Act.

⁷² See the Main Report of the Commission of Enquiry into the Companies Act (RP 45/1970) 246-47 and 250 where it was recommended that the term 'oppressive' should be replaced by the phrase 'unfairly prejudicial, unjust or inequitable' as the term 'unfairly prejudicial' can be provided with content by judicial interpretation and the introduction of the phrase 'unjust or equitable' will assist in

Secondly, the remedy in section 252 was also limited to members of a company.⁷³

Section 252 clearly stated that the purpose of the relief that may be granted in terms of it was to end the matters complained of.⁷⁴ It must further be noted that section 252(3) expressly provided for the buy-out of a shareholder's shares in a company.⁷⁵

5.2.4.2 The relevance of the principles developed in terms of section 252 of the Companies Act 61 of 1973

Knowledge and understanding of the principles developed under section 252 of the previous Act are still relevant to the interpretation and application of section 163 of the Act.⁷⁶ Because there is a substantial overlap between the provisions of section 163 of the Act and section 252 of the previous Act the courts may consult case law decided under section 252 for guidance on interpreting section 163.⁷⁷ Even though section 163 of the Act replaced section 252 of the previous Act, South African courts in a number of judgments dealing with section 163 of the Act have referred to the

this process as the terms or concepts in the phrase already carried some form of meaning or content gained from judicial interpretation.

⁷³ See also the criticism of this requirement in 5.2.4.3 (a) below. See also 5.7.1.1 – 5.7.1.2 and 5.7.1.4 below regarding the standing of a shareholder for purposes of section 163 of the Act.

⁷⁴ See 5.9.1 below for a discussion of the purpose of the relief granted in terms of section 163(2) of the Act.

⁷⁵ Compare the formulation of section 252 of the previous Act with the position under section 163 of the Act. See 5.9.14 below for a discussion of buy-out orders in terms of section 163 of the Act.

⁷⁶ This especially the case in light of the fact that the provisions of section 252 of the previous Act made use of the term 'unfairly prejudicial' instead of the oppressive concept that had only occurred in the heading to section 252. See 5.2.4.1 above.

⁷⁷ *Omar v Inhouse Venue Technical Management (Pty) Ltd and Others* 2015 (3) SA 146 (WCC). See also *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP); *Grancy v Grancy Property Limited v Manala and Others* [2013] 3 All SA 111 (SCA) [22]; *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) [43]-[45]; *Knipe and Others v Kameelhoek (Pty) Ltd and Another* 2014 (1) SA 52 (FB) [31]; *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [53]. See further A Sibanda 'The Statutory Remedy for Unfair Prejudice in South African Company' (2013) 38:2 *JJS* 58, 73.

wording of section 252 of the previous Act in seeking guidance on the interpretation and application of section 163 of the Act.⁷⁸

This approach by South African courts makes the case law dealing with section 252 of the previous Act directly relevant to the interpretation and application of section 163 of the Act. However, the application of judgments delivered in terms of section 252 to disputes in terms of section 163 has to be done with caution. The court in *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others*⁷⁹ took the view that section 163 of the Act may find wider application than its predecessor, section 252 of the Companies Act 61 of 1973.⁸⁰ When compared there are important differences between the wording of section 252 of the previous Act and the formulation of section 163 of the Act.

5.2.4.3 The use of the criticism against section 252 of the previous Act to provide a critical evaluation of section 163 of the Act

The statutory remedy in section 252 was regarded as an improvement on section 111*bis* of the Companies Act 46 of 1926. Despite the reform brought about by section 252 of the previous Act, Hurter⁸¹ identified a number of deficiencies in the

⁷⁸ *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) [43] and [46]; *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP); *Grancy v Grancy Property Limited v Manala and Others* [2013] 3 All SA 111 (SCA); *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC). See also the commentary on section 163 by PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018) who argues that section 252 of the previous Act also made use of the terms unfairly prejudicial and therefore may provide courts with guidance on the interpretation of the concept or terms unfairly prejudicial for purposes of section 163 of the Act.

⁷⁹ 2014 (5) SA 179 (WCC).

⁸⁰ *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [53].

⁸¹ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa).

statutory oppression remedy.⁸² The criticism and recommendations of Hurter⁸³ in relation to the section 252 of the previous Act are used as one of the criteria critically to evaluate the oppression or unfair prejudice remedy contained in section 163 of the Act.

(a) *The restrictive approach to the interpretation of section 252*

Hurter argued that courts were too conservative in their approach in intervening in the affairs of companies when applying the provisions of section 252 of the previous Act.⁸⁴ The wording of section 252 justifies a liberal interpretation of the section. However, the liberal interpretation of section 252 is counteracted by the restrictive requirement by the courts that a member must prove that he or she suffered prejudice in his or her capacity as member of the company.⁸⁵ Such an interpretation of section 252 creates an artificial exclusion of the application of the provision in circumstances where the member has been prejudiced in a capacity other than that of a member of the company.⁸⁶ Conduct which may trigger relief under section 252

⁸² E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 389-96.

⁸³ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa).

⁸⁴ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 390.

⁸⁵ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 389-90. See 5.7.1.4 below for the approach of the court in terms of section 163 of the Act.

⁸⁶ MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg' (1981) *TSAR* 105, 113. See also E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 325 where the position under section 111*bis* of the Companies Act 46 of 1926 is discussed. See 5.7.1.4 below for a discussion of the capacity in which a shareholder or director must have suffered prejudice for purposes of section 163 of the Act.

may be prejudicial to a member in other capacities such as an employee, creditor, office, director or holder of a debenture.⁸⁷

(b) *The strict enforcement of the principle of majority rule*

According to Hurter⁸⁸ courts further placed far too much emphasis on the principle of majority rule.⁸⁹ The fact that a resolution has been lawfully adopted by the shareholders does not necessarily mean that other shareholders have not been prejudiced.⁹⁰ In the discussion of section 111*bis* of the Companies Act 46 of 1926, Hurter points out that the statutory oppression remedy should not be seen as an interference in the principle of majority rule, but should rather be evaluated in light of the results of the consequences of the conduct.⁹¹

(c) *The protection of rights in stead of interests*

Section 252 of the previous Act provided relief to a member whose member's rights

⁸⁷ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 389-90. See also MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg' (1981) *TSAR* 105, 113.

⁸⁸ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 390.

⁸⁹ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 390.

⁹⁰ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 390. See 5.7.3.5 below where it is demonstrated that reliance may be placed on the provisions of section 163 when commercial unfairness is proven and that unlawfulness is not a requirement for purposes of section 163.

⁹¹ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 327. See also the Main Report of the Commission of Enquiry into the Companies Act (RP 45/1970) 250-51 where it was favoured that the statutory personal action or remedy should be aimed at addressing the nature of the results flowing from the conduct of directors or majority shareholders.

had been infringed.⁹² The focus on the rights of a member, rather than on the interests of a member, is an unnecessarily restriction on the remedy contained in section 252.⁹³ The specific acknowledgement of the interests of members in section 252 would have been an express recognition that relief would also have been available in circumstances where the conduct of the majority was lawful.⁹⁴ Although all members may have the same rights they do not necessarily hold the same interests in the company.⁹⁵ The use of 'unfairly' indicates that although the rights of the members of a company may be equal the court may give effect to the fact that the interests of the various members may not be necessarily be equal.⁹⁶

(d) Protection against threatening unfair prejudicial conduct

A further criticism of section 252 of the previous Act, is that the remedy failed to protect a member or applicant against threatening unfair prejudicial conduct.⁹⁷ In this respect the remedy was regarded as reactive.⁹⁸ The remedy was only available

⁹² E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 391.

⁹³ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 391. Compare with the approach taken by the legislature in 5.7.4 below regarding section 163 of the Act.

⁹⁴ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 391.

⁹⁵ In E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 392.

⁹⁶ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 392.

⁹⁷ See 5.9.2.3 below for a discussion of relief against future or threatening conduct in terms of section 163(2).

⁹⁸ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 392. For the position in this regard in terms of section 163 see 5.9.2.3 below.

when actual prejudice was suffered.⁹⁹

(e) The 'just and equitable' requirement for relief

The requirement in section 252(3) that relief will only be granted when it is 'just and equitable' was also subjected to criticism.¹⁰⁰ This criticism was based on the fact that because a court enjoyed a broad discretion when considering the relief, it was unnecessary to require that a member must convince the court that such relief should be 'just and equitable'.¹⁰¹

(f) The list and description of possible forms of relief in terms of section 252

Hurter¹⁰² further recommended that the legislature should have given a more comprehensive list of orders that a court can make in terms of section 252(3) of the previous Act.¹⁰³ A more comprehensive list would give a better indication as to the nature of the list of orders that a court can make.¹⁰⁴

⁹⁹ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 392.

¹⁰⁰ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 392-93.

¹⁰¹ See the Main Report of the Commission of Enquiry into the Companies Act (RP 45/1970) where it was recommended that shareholder protection would be enhanced if the requirement that it has to be proven, in addition to prove conduct that is 'oppressive', that it would be just and equitable to wind-up a company be dispensed with. See also E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 392-93.

¹⁰² E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa).

¹⁰³ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 393-94.

¹⁰⁴ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 393-94.

5.3 The provisions of section 163 of the Act

Section 163 of the Act provides as follows:

'Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of a company –

- (1) A shareholder or a director of a company may apply to a court for relief if –
 - (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;
 - (b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or
 - (c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

- (2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including –
 - (a) an order restraining the conduct complained of;
 - (b) an order appointing a liquidator, if the company appears to be insolvent;
 - (c) an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131(4)(a) apply;
 - (d) an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement;
 - (e) an order directing an issue or exchange of shares;
 - (f) an order –
 - (i) appointing directors in place of or in addition to all or any of the directors then in office;
 - (ii) declaring any person delinquent or under probation, as contemplated in section 162;
 - (g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholders paid for shares, or pay the equivalent value, with or without conditions;
 - (h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;
 - (i) an order requiring the company, was in a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;

- (j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;
 - (k) an order directing rectification of the registers or other records of a company; or
 - (l) an order for the trial of any issue as determined by the court.
- (3) If an order made under this section directs the amendment of the company's Memorandum of Incorporation –
- (a) the directors must promptly file a notice of amendment to give effect to that order, in accordance with section 16(4); and
 - (b) no further amendment altering, limiting or negating the effect of the court order may be made to the Memorandum of Incorporation, until a court orders otherwise.
- (4)

[Sub-s (4) deleted by s 102 of the Act No 2 of 2011.]'

5.4 The interpretation of section 163 – specific principles and considerations

5.4.1 The relationship between section 158 and the interpretation of section 163 of the Act

Chapter 7 of the Act deals specifically with the enforcement of and the remedies in terms of the Act. Section 163 can be found in Part B of Chapter 7 of the Act. In interpreting section 163 of the Act, one must take the provisions of section 158 into consideration. Section 158 speaks directly to the remedies contained in the Act. In terms of its provisions, a court must promote the spirit, purpose and objects of the Act when interpreting and applying its provisions.¹⁰⁵

Further, when on reasonable construction or interpretation, a provision of the Act or any other document in terms of the Act, has more than one possible meaning

¹⁰⁵ Companies Act 71 of 2008, s 158(b)(i).

or interpretation, preference must be given to an interpretation that promotes the spirit and purpose(s) of the Act and advances the realisation and enjoyment of the rights in terms of the Act.¹⁰⁶

5.4.2 The development of the common law in terms of section 158 of the Act

When a court considers a matter in terms of the Act, it has a duty to develop the common law to achieve the realisation and enjoyment of the rights established in the Act.¹⁰⁷ This duty to develop the common law must be read with the Constitution.¹⁰⁸ The Constitution¹⁰⁹ contains the express duty to develop the common law and interpret legislation in the context of the Constitution to promote the spirit, purport and objects of the Bill of Rights.¹¹⁰ This duty of a court has also now been expressly confirmed in section 7(a) of the Act which provides that a court must promote the compliance with the Bill of Rights when applying company law.¹¹¹

5.4.3 Fundamental corporate law principles: The principle of separate juristic personality, majority decision-making and the board of directors

5.4.3.1 Introduction

The consideration of fundamental corporate principles is imperative in the application of section 163 and therefore a proper grasp of these principles is

¹⁰⁶ Companies Act 71 of 2008, s 158(b)(ii).

¹⁰⁷ Companies Act 71 of 2008, s 158(a).

¹⁰⁸ Constitution of the Republic of South Africa, 1996.

¹⁰⁹ Constitution of the Republic of South Africa, 1996.

¹¹⁰ See 5.5.2.2 below.

¹¹¹ Constitution of the Republic of South Africa, 1996, s 39(2). See also 5.5.2.4 below.

essential.¹¹² A brief overview of the most relevant principles is provided and, where applicable, how these principles differ or may differ from the principles that applied under the previous Act.

5.4.3.2 The management and decision-making within companies

Decision-making within companies is conducted in accordance with the principle of majority rule. This principle entails that minority shareholders are bound by the lawfully adopted resolutions of the majority.¹¹³ These principles were strictly enforced by the interpretation and application of the principles in *Foss v Harbottle*.¹¹⁴ It later became evident that circumstances may arise in which the principle of majority rule may adversely and unfairly affect the rights and interests of some of the shareholders.¹¹⁵

Companies enjoy separate juristic personality.¹¹⁶ As a fictitious person a company cannot conduct its own affairs. This brings the important provision of section 66(1) of the Act into play. The section clearly stipulates that the board of directors are responsible for the management of the business and affairs of a company.¹¹⁷ The management must be carried out in accordance with the fiduciary duties of a director, namely, to act *bona fide* and in the best interests of the

¹¹² See *Geffen and others v Martin and others* [2018] 1 All SA 21 (WCC). See also *Grancy Property Limited v Manala and Others* [2013] 3 All SA 111 (SCA) [32].

¹¹³ *Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [64]; *Knipe and Others v Kameelhoek (Pty) Ltd and Another* 2014 (1) SA 52 (FB) [31]; *Sammel v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) 678. For the position in England see 2.2 above.

¹¹⁴ (1843) 2 Hare 461, 67 ER 189. See 5.2.4.3 (b) above for criticism against the strict enforcement of the principle of majority decision-making.

¹¹⁵ See 5.2.2 above.

¹¹⁶ Companies Act 71 of 2008, s 19.

¹¹⁷ Companies Act 71 of 2008, s 66(1). See 3.5 above for the position in Australia.

company.¹¹⁸ Directors must also act with reasonable care, skill and diligence in the management of the business and affairs of the company.¹¹⁹

The relationship between the company and its directors is regulated by the common law, the Companies Act 71 of 2008, the Memorandum of Incorporation and any other contracts between the company and the directors. An important aspect to note is that a director is a party to the Memorandum of Incorporation of a company.¹²⁰

5.4.3.3 The power to manage the business and affairs of a company as an original power

The power and duty to manage the business and affairs of a company is now an original power derived from the provisions of the Act.¹²¹ This shift of power also has important implications for the reading of the Act. Because the board of directors are the main holders of the authority and powers of the company, shareholders cannot ratify any actions or conduct of directors in breach of their authority or duties in terms of the Act.¹²² The shareholders will only be able to ratify such conduct or breach

¹¹⁸ Companies Act 71 of 2008, s 76(3)(a) and (b).

¹¹⁹ Companies Act 71 of 2008, s 76(3).

¹²⁰ Companies Act 71 of 2008, s 15(6). In terms of the Companies Act 61 of 1973 directors were not bound to the constitutive documents of a company.

¹²¹ *Navigator Property Investments (Pty) Ltd v Silver Lakes Crossing Shopping Centre (Pty) Ltd and Others* [2014] 3 All SA 591 (WCC) [31]; *Kaimowitz v Delahunt and Others* 2017 (3) SA 201 (WCC) [12]. This is in contrast with the Companies Act 61 of 1973 where the power to manage the company was delegated by the shareholders to the board. See I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1, 4-5 and 8-9 and FHI Cassim *et al Contemporary Company Law* (2nd ed, 2012) 403.

¹²² I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1, 9-10.

when the act or the Memorandum of Incorporation provides for such ratification.¹²³

Some authors argue that because the board of directors is the ultimate organ that holds the power of the company, the references in the act to ‘the company’ should be read as to referring to the board and not the shareholders of the company.¹²⁴ Esser and Delpont further argue that section 66(1) may create an obstacle to the protection of shareholders in companies where the shareholding is dispersed.¹²⁵

5.4.3.4 In whose interests should a company be managed?

(a) *Partial codification of directors’ duties*

The duties of directors have now been partially codified in the Act.¹²⁶ The duties are also supplemented by the common law duties of directors as developed and interpreted by case law, unless the Act provides otherwise. Amongst others a director has the duty to act at all times *bona fide* and in the best interests of the company.¹²⁷ The conduct of directors is also indirectly regulated to some extent by

¹²³ I Esser and PA Delpont ‘Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008’ (2016) 79 *THRHR* 1, 10.

¹²⁴ I Esser and PA Delpont ‘Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008’ (2016) 79 *THRHR* 1, 10.

¹²⁵ I Esser and PA Delpont ‘Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008’ (2016) 79 *THRHR* 1, 10.

¹²⁶ I Esser and PA Delpont ‘Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008’ 2016 (79) *THRHR* 1, 1-2.

¹²⁷ Companies Act 71 of 2008, s 76(3)(a) and (b). An overview is only furnished to provide a context to establish how the criteria for a breach of directors’ duties and the grounds for relief in terms of section 163(1) may in some instances overlap and in other instances differ from each other. For a detailed study of the recognition of stakeholder interests see Irene-Marie Esser *Recognition of Various Stakeholder Interests in Company Management* (2008) (unpublished LLD thesis; University of South Africa).

voluntary codes such as the King reports on governance.¹²⁸ Although these codes are not law, courts have recently taken these codes and reports into consideration when determining whether or not a director or directors have breached their duties as such.¹²⁹

(b) *The interests of shareholders versus the interests of other stakeholders*

The main challenge of any corporate law system in the allocation of powers is to strike an appropriate balance between the directors and shareholders.¹³⁰ In the allocation of powers between the directors and shareholders one should also take the interests of stakeholders in consideration.¹³¹ However, such an approach may place the interests of stakeholders in competition with the interests of shareholders. This may erode the rights and interests of shareholders.¹³² For this specific reason it is important to determine what is meant by the duty of directors to manage and to act in the best interests of the company. It has to be determined whether the Act subscribes to the enlightened shareholder-value approach¹³³ or whether it promotes or advocates the pluralist approach or theory.¹³⁴

¹²⁸ I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1, 2.

¹²⁹ See, for example, *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W); *South African Broadcasting Corporation Ltd v Mpofu* [2009] 4 All SA 169 (GSJ).

¹³⁰ Companies Act 71 of 2008, s 7(i). See also I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1.

¹³¹ See Companies Act 71 of 2008, s 7(b)(iii) and s 7(d). See also I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1, 5.

¹³² I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1, 5.

¹³³ See 5.4.3.4 (c) below.

¹³⁴ See 5.4.3.4 (d) below

(c) *The enlightened shareholder-value theory*

In terms of the enlightened shareholder-value theory a company should be managed to the benefit of the shareholders.¹³⁵ According to this theory the purpose of a company is to generate maximum value for the shareholders of a company.¹³⁶

(d) *The plurism approach*

According to the plurism approach, shareholders are seen as one of the stakeholders of the company. In contrast with the enlightened shareholder-value theory, the interests of shareholders do not enjoy preference by default.¹³⁷ The success of the company is not seen and measured against the value created for shareholders and the advancement of their interests.¹³⁸ The success of the company is seen as dependent on and intertwined with the interests with all the potential stakeholders of the company.¹³⁹

(e) *The inclusive stakeholder value approach*

Esser and Delpont¹⁴⁰ argue that the King III¹⁴¹ report subscribes to the inclusive

¹³⁵ I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1, 15; FHI Cassim *et al Contemporary Company Law* (2nd ed, 2012) 518.

¹³⁶ I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1, 15; FHI Cassim *et al Contemporary Company Law* (2nd ed, 2012) 518.

¹³⁷ I Esser and PA Delpont 'Shareholder protection philosophy in terms of the Companies Act 71 of 2008' 2016 (79) *THRHR* 1, 15; FHI Cassim *et al Contemporary Company Law* (2nd ed, 2012) 518.

¹³⁸ I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1, 15.

¹³⁹ I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1, 15.

¹⁴⁰ I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1, 15.

¹⁴¹ The King Report on Corporate Governance for South Africa (The Institute of Directors in Southern Africa) September 2009.

stakeholder value approach.¹⁴² According to this approach the board should not only consider the interests of shareholders, but should also seriously consider the interests of all legitimate stakeholders.¹⁴³ The facts and circumstances of each case will determine how the interests of each legitimate stakeholder will be balanced against the interests of other competing stakeholders to determine the best interests of the company.¹⁴⁴ In applying this approach to the management of a company a long-term view is taken of what will be in the best interests of the shareholders as long as there is a link between the decision of the board and what is regarded as in the best interests of the company.¹⁴⁵ Esser and Delpont¹⁴⁶ argue that when interpreting the duty to act in the best interests of a company, a stakeholder inclusive approach should be followed. Such an approach entails that the board should act in the best interest of the company even though it may be detrimental or prejudicial to the interests of shareholders.

Esser and Delpont¹⁴⁷ emphasise that irrespective of whether a stakeholder inclusive approach is applied or the enlightened shareholder value approach is adopted the interests of stakeholders should be taken into account when managing

¹⁴² The King IV Report on Corporate Governance for South Africa 2016, Institute of Directors Southern Africa and the IoDSA is available at <http://www.iodsa.co.za/?page=AboutKingIV>.

¹⁴³ I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1, 15-6.

¹⁴⁴ I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1, 15-16.

¹⁴⁵ I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1, 16.

¹⁴⁶ I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1, 17.

¹⁴⁷ I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1, 17.

the company. Because section 7(d) of the Act states as an objective that a company should be managed to promote economic and social benefits, it can be argued that it recognises that the board may take into consideration the interests of stakeholders.¹⁴⁸

The authors do note that this does not create direct rights for stakeholders.¹⁴⁹

5.4.4 The consideration of foreign law in terms of section 5(2) of the Act

The consideration of foreign law, especially English law, is of particular importance.¹⁵⁰ The body of case law that developed under section 252 in many instances drew heavily upon English decisions. There are many instances where South African courts still refer directly to English legislation and case law in determining the correct interpretation and application of certain South African legislative provisions.¹⁵¹ However, in this regard it should be noted that the legislature followed the exact words of the Canadian equivalent of section 163 in the drafting of the South African statutory unfair prejudice remedy.¹⁵² This may indicate that the legislature intended to break away from the approach used in English case law and legislation, and it is imperative that the Canadian position be considered in the context of the wording of section 163.¹⁵³

¹⁴⁸ I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1, 18.

¹⁴⁹ I Esser and PA Delpont 'Shareholder Protection Philosophy in Terms of the Companies Act 71 of 2008' (2016) 79 *THRHR* 1, 18.

¹⁵⁰ Section 5(2) of the Act provides that when interpreting the provisions of the Act a court may consider foreign law. See 2.1 read with 5.2.4.2 above for a discussion of the value of English precedents in guiding South African courts in interpreting similar legislative provisions.

¹⁵¹ See, for example, *Geffen and others v Martin and others* [2018] 1 All SA 21 (WCC) and *De Sousa and another v Technology Corporate Management (Pty) Ltd and others* [2016] JOL 36298 (GJ).

¹⁵² *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* [2013] 2 All SA 190 (GNP) [17.9]. For a discussion of the Canadian oppression or unfair prejudice remedy see Chapter 4 above.

¹⁵³ See Chapter 4 below for an analysis of the position in Canada.

5.5 The Constitution¹⁵⁴

5.5.1 The Constitution and the interpretation of legislative provisions

The Constitution¹⁵⁵ reigns supreme and any law or conduct inconsistent with it is invalid.¹⁵⁶ Further the Constitution contains the Bill of Rights in Chapter 2.¹⁵⁷ The Constitution¹⁵⁸ read with the Act makes it imperative that when reading, interpreting and applying a legislative provision such as section 163 of the Act, preference must be given to an interpretation and meaning that falls within the ambit of the parameters of the Constitution.¹⁵⁹

The various branches of the law do not function in a vacuum and are subject to the Constitution.¹⁶⁰ The relationship between shareholders *inter se*, the shareholders and the company, and the company and its directors is regulated by the Memorandum of Incorporation and the Act.¹⁶¹ In some instances the relationship between the various parties is regulated by one or more shareholder agreements. The legal relationship between these parties is then of a contractual nature which

¹⁵⁴ Constitution of the Republic of South Africa, 1996.

¹⁵⁵ Constitution of the Republic of South Africa, 1996.

¹⁵⁶ Constitution of the Republic of South Africa, 1996, s 2 read with s 172 (1)(a).

¹⁵⁷ See 5.2.2 below for a discussion of the relevant provisions contained in the Bill of Rights forming Chapter 2 of the Constitution of the Republic of South Africa, 1996.

¹⁵⁸ Constitution of the Republic of South Africa, 1996.

¹⁵⁹ Section 2 of the Constitution of South Africa, 1996 read with sections 5(1) and 7(a) of the Act.

¹⁶⁰ Constitution of the Republic of South Africa, 1996.

¹⁶¹ Companies Act 71 of 2008, s 15(6). It is submitted that, as was the case under the previous Act, the relationship between the parties to a Memorandum of Incorporation is of a contractual nature. See the *obiter* remark in *De Lange v Presiding Bishop for the time being of the Methodist Church of Southern Africa and another* [2015] 1 All SA 121 (SCA) [52] and the discussion of section 15(6) by PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018). For a discussion of the most important developments in the law of contract that may be influential on the interpretation and enforcement of company contracts see 5.6 below.

makes the developments in the law of contract directly relevant to company law.¹⁶² In this regard the development of the law of contract in the context of the Constitution¹⁶³ is of particular importance.

5.5.2 The Bill of Rights, the interpretation of legislation and the development of the common law

5.5.2.1 The Bill of Rights

The Constitution reigns supreme, and any conduct, law or legislation in contravention thereof is invalid.¹⁶⁴ The Bill of Rights forms the cornerstone of the South African democracy.¹⁶⁵ It applies to all law and binds juristic persons such as companies.¹⁶⁶ The Bill of Rights also states very clearly that a juristic person may be the bearer of rights and obligations under the Constitution.¹⁶⁷ One of the purposes of the Act is the promotion of the compliance with the Bill of Rights in the application of company law.¹⁶⁸ The Bill of Rights is important as it significantly impacted and impacts of the development of the common law relating to company law and the law of contract.¹⁶⁹ The Bill of Rights further contains provisions pertaining to the interpretation of legislation.¹⁷⁰

¹⁶² Authors and case law regard the relationship in the Memorandum of Incorporation of a company created by section 15(6) of the Act as contractual. See also 5.5.3 below.

¹⁶³ Constitution of the Republic of South Africa, 1996. See 5.5.2.2 below for the duty of courts to develop the common law in light of the Bill of Rights. For a discussion of the interpretation of the Bill of Rights and other legislation see 5.5.2.1–5.5.2.3 and 5.5.2.4 below, respectively.

¹⁶⁴ Constitution of the Republic of South Africa, 1996, s 2 read with s 172 (1)(a).

¹⁶⁵ Constitution of the Republic of South Africa, 1996, s 7(1).

¹⁶⁶ Constitution of the Republic of South Africa, 1996, s 8(1) and (2).

¹⁶⁷ Constitution of the Republic of South Africa, 1996, s 8(4).

¹⁶⁸ Companies Act 71 of 2008, s 7(a).

¹⁶⁹ See 5.5.2.2 below.

¹⁷⁰ For a brief overview of the provisions relating to the interpretation of legislation see 5.5.2.4 below.

5.5.2.2 The duty to develop the common law

The Constitution¹⁷¹ is prescriptive regarding the application of the Bill of Rights. High courts are specifically entrusted with the inherent power to develop the common law in the interests of justice.¹⁷² When applying a right entrenched in the Bill of Rights, a court has to develop the common law to give effect to such a right in so far as specific legislation does not give effect to the relevant right in question.¹⁷³

5.5.2.3 The interpretation of the Bill of Rights

Section 39 of the Bill of Rights is applicable to the interpretation of the Bill of Rights itself. When the Bill of Rights is interpreted the values of human dignity, equality and freedom must be promoted.¹⁷⁴ When interpreting the Bill of Rights courts *must* consider international law and *may* consider foreign law.¹⁷⁵ This also requires that the provisions of the Act be interpreted to promote the values entrenched in the Bill of Rights.¹⁷⁶ Further, it allows for the consideration of foreign law in seeking

¹⁷¹ Constitution of the Republic of South Africa, 1996.

¹⁷² Constitution of the Republic of South Africa, 1996, s 173. See also *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA). See further *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) [34] where it was held that '[a] court should always be alive to the possibility of the development of the common law in light of the spirit, purport and objects of the Bill of Rights'.

¹⁷³ Constitution of the Republic of South Africa, 1996, s 8(3)(a). See also *Carmichele v Minister of Safety and Security and Another* 2001 (4) SA 938 (CC) [39] where the court held that 'the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately'.

¹⁷⁴ Constitution of the Republic of South Africa, 1996, s 39(1)(a).

¹⁷⁵ Constitution of the Republic of South Africa, 1996, s 39(1)(b) and (c). Compare with section 5(2) of the Act.

¹⁷⁶ Companies Act 71 of 2008, s 7(a).

guidance in the interpretation of the provisions of the Act.¹⁷⁷

5.5.2.4 The interpretation of legislation

When interpreting legislation every court is also under the duty to promote the spirit, purport and objects of the Bill of Rights.¹⁷⁸ The Bill of Rights does not deny any freedoms and rights that are enjoyed in terms of the common law as long as these rights and freedoms are aligned with the Constitution.¹⁷⁹ Courts are under a duty to deviate from the common law in cases where the common law is inconsistent with the Constitution.¹⁸⁰

5.5.2.5 The judicial approach to the interpretation of documents and legislation

Although the Constitution and the Act contain provisions that direct the interpretation of legislation, the judicial interpretation of legislation has become a complex matter and has become a topic of considerable academic debate.¹⁸¹ It is not the purpose here to provide a comprehensive and critical analysis of the judicial approaches to the interpretation of legislation and other legal documents, but rather to describe the legislative framework that guides judicial interpretation. The framework consists of

¹⁷⁷ See also Companies Act 71 of 2008, s 5(2).

¹⁷⁸ Constitution of the Republic of South Africa, 1996, s 39(2). See also *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC) [28].

¹⁷⁹ Constitution of the Republic of South Africa, 1996, s 39(3). See 5.6 below where courts reconsidered common law principles of the law of contract in light of the Constitution of the Republic of South Africa, 1996.

¹⁸⁰ *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA). See 5.5.2.2 above.

¹⁸¹ See Franziska Myburgh 'Thomas Kuhn's Structure of Scientific Revolutions, Paradigm Shifts, and Crises: Analysing Recent Changes in the Approach to Contractual Interpretation in South African Law' (2017) 134 *SALJ* 514 for a thorough analysis of the judicial approaches of the Supreme Court of Appeal to judicial interpretation.

the provisions relating to interpretation contained in the Constitution and the specific provisions contained the Act.¹⁸² One important aspect of judicial interpretation to note is that the same principles of judicial interpretation that apply to legislative provisions also apply to other documents such as contracts.¹⁸³ The Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁸⁴ held that it is insufficient only to consider the grammatical meaning of the words to enforce the provisions of a statute or contract.¹⁸⁵ In a later judgment the Supreme Court of Appeal¹⁸⁶ held that the judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality*¹⁸⁷ should not be understood to allow the leading of evidence about the intention of the parties and on how an agreement between parties should be interpreted, because it is the primary function and the role of the court to interpret the wording of agreements.¹⁸⁸ However, parties are allowed to lead evidence relating to the context of the agreement as a court may take the context of the agreement into consideration when interpreting an agreement.¹⁸⁹ Other considerations such as the context in which the provision or contract has been formulated and its purpose, amongst others, form part of the process to establish

¹⁸² See 5.4, and more specifically 5.4.1 and 5.4.2 above, for a discussion of the various statutory provisions dealing with interpretation.

¹⁸³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) [18]-[19].

¹⁸⁴ 2012 (4) SA 593 (SCA).

¹⁸⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) [18] and [25].

¹⁸⁶ *City of Tshwane Metropolitan v Blair Atholl Homeowners Association* [2019] 1 All SA 291 (SCA).

¹⁸⁷ 2012 (4) SA 593 (SCA).

¹⁸⁸ *City of Tshwane Metropolitan v Blair Atholl Homeowners Association* [2019] 1 All SA 291 (SCA) [62]-[64], [66] and [69].

¹⁸⁹ *City of Tshwane Metropolitan v Blair Atholl Homeowners Association* [2019] 1 All SA 291 (SCA) [61].

the correct interpretation of a statutory provision or contract.¹⁹⁰ Later, it is demonstrated that section 163 of the Act significantly influences the interpretation and enforcement of rights in terms of the Act, the Memorandum of Incorporation and shareholder agreements in a specific commercial context.¹⁹¹

5.5.3 The constitutional notion of fairness and its application to shareholder agreements and the Memorandum of Incorporation of a company

Subscribers to the shares of a company are contractually bound to the Memorandum of Incorporation of a company.¹⁹² The statutory unfair prejudice remedy contained in section 163 of the Act subjects the exercise and enforcement of rights in terms of the Memorandum of Incorporation and the Act to fairness.¹⁹³ The role that notions and concepts such as fairness, reasonableness and *bona fides* play in the formation, interpretation and enforcement of contracts needs to be considered in light of the Constitution.¹⁹⁴ Section 163 of the Act makes the remedy also directly applicable to shareholders' agreements.¹⁹⁵

Although, the company contract in the form of a Memorandum of

¹⁹⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) [18].

¹⁹¹ See 5.5.3 below for a discussion of the influence of fairness on shareholder agreements and the Memorandum of Incorporation. See 5.7.3.5 below for a discussion of the concept of commercial (un)fairness. See further 5.7.4 below for a discussion of the protection of interests, 5.7.6 below regarding the protection and enforcement of legitimate expectations and 5.9.5 below for an example of how relief in terms of section 163(2) of the Act may impact on the contractual relations between parties related to a company.

¹⁹² Companies Act 71 of 2008, s 15(6). See also 5.4.1 above.

¹⁹³ See 5.7.3.5 below for a discussion of the concept of commercial (un)fairness for purposes of section 163 of the Act.

¹⁹⁴ Constitution of the Republic of South Africa, 1996.

¹⁹⁵ Companies Act 71 of 2008, s 163(2)(d). For a discussion of section 163(2)(d) of the Act see 5.9.5.3 below.

Incorporation does differ from the ordinary common law contract in some respects, it may potentially contain provisions that may bring it in direct conflict with some of the provisions in the Constitution or the legal convictions of the community as contained in the Constitution. In the company law context, it is not only the fairness of the provisions contained in the Memorandum of Incorporation of a company that must be evaluated in light of the Constitution and the Act, but also the effect of the conduct of the various parties.¹⁹⁶ The Act introduced a new dimension to contracts, namely, that contracts must be measured against 'oppressive and unfairly prejudicial conduct'.¹⁹⁷ The impact of the Constitution¹⁹⁸ on the common law of contract is now analysed.¹⁹⁹ Specific focus is placed on the application of values such as fairness and the principle of *bona fides* to the law of contract.²⁰⁰ The Constitution²⁰¹ may also provide insight into how fairness as a normative consideration should be determined.²⁰²

¹⁹⁶ See 5.7.3.6 below where it is pointed out that the effect of the conduct complained of has to be evaluated in light of commercial fairness.

¹⁹⁷ PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018). See *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ) [61] where the court accepted that contracts should be measured against the oppressive and/or unfair prejudicial conduct. See also *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) [49]; *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [54].

¹⁹⁸ Constitution of the Republic of South Africa, 1996.

¹⁹⁹ See 5.6 below.

²⁰⁰ See 5.6 and particularly 5.6.2 below.

²⁰¹ Constitution of the Republic of South Africa, 1996.

²⁰² It has to be noted that 'fairness' is not explicitly mentioned as a value of the Constitution of the Republic of South Africa, 1996 or the Bill of Rights. However, it will be pointed out in 5.6 below that fairness does form an element of the legal convictions of the community or public policy as found in the Constitution of the Republic of South Africa, 1996.

5.6 The role of fairness, reasonableness and the principle of *bona fides* in the constitutional development of the law of contract

5.6.1 Introduction

Recently, the highest courts in the country had to consider the common law principles underlying the enforcement of contractual clauses in light of the Constitution.²⁰³ Amongst others, consideration had been given to the role *bona fides*, reasonableness and fairness play in the formation, interpretation and enforcement of contracts.²⁰⁴

5.6.1.1 Legality as a requirement for a valid contract

One of the fundamental requirements for a valid and enforceable contract is legality.²⁰⁵ Legality comprises of public policy. In *Afrox Healthcare Bpk v Strydom*²⁰⁶ the court held that public policy or alternatively the legal convictions of the community is determined with reference to the values of human dignity, equality and freedom in the Constitution.²⁰⁷ The broader question to be answered is: to what extent do fairness, reasonableness and *bona fides* influence the legal convictions of the community and how do they impact on the formation and enforcement of contracts?²⁰⁸

²⁰³ See 5.6 below where these cases are discussed.

²⁰⁴ See 5.6 and in particularly 5.6.2 below.

²⁰⁵ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [29]; *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) [39]. See also S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* (5th ed, 2016) 187-88.

²⁰⁶ 2002 (6) SA 21 (SCA).

²⁰⁷ See also *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [28]; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) [18]; *Brisley v Drotzky* 2002 (4) SA 1 (SCA) [91].

²⁰⁸ See 5.6 and in particularly 5.6.2 below.

5.6.1.2 The importance of understanding the role of fairness, reasonableness and *bona fides* in the context of companies

An evaluation of fairness, reasonableness and *bona fides* in the context of the South African company law is essential for three reasons. Firstly, it can be argued that *bona fides*, reasonableness and fairness are introduced to the law of contract by the Constitution.²⁰⁹ Secondly, because English company law substantially influenced South African company law, and English company law derived from the law of partnership that was based on *bona fides*.²¹⁰ Thirdly, an understanding of the enforcement of contracts in light of fairness may provide insight into the operation of company contracts that must be measured against ‘oppressive and unfairly prejudicial conduct’ or in other words commercial fairness.²¹¹ ‘Commercial fairness’ is considered later as a specific form of fairness.²¹²

²⁰⁹ See 5.6.3 read with 5.6.4 below. See Jacques du Plessis ‘Giving practical effect to good faith in the law of contract’ (2018) 3 *Stell LR* 379, 404 argues that ‘[t]hus, while South African law may not have a good faith clause like German Law, it is through the public policy requirement that effect could be given to good faith as a value’. The author is further of the view (417) that the South Africa legal system ‘accepts that good faith as constitutional value could be taken into account when determining whether public policy should invalidate a term good faith may indirectly assist in deciding whether contractual terms should be “corrected”’.

²¹⁰ See 1.5.1 and 2.1 above for a brief discussion of the influence of English law on South African company law.

²¹¹ PA Delport *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018). See *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ) [61] where the court accepted that contracts should be measured against the oppressive and/or unfair prejudicial conduct. See also *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) [49]; *Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [54].

²¹² See 5.7.3.5 below.

5.6.1.3 *Pacta sunt servanda*

The doctrine of *pacta sunt servanda* entails that courts must enforce contractual obligations that are created within the boundaries of the freedom of contract and are based on consensus.²¹³ It is trite that public policy supports freedom of contract and therefore a court will use its discretion not to enforce a contractual clause sparingly.²¹⁴

Later it will be demonstrated that the lawful exercise of legal rights may be interdicted or restrained based on the provisions of section 163 of the Act.²¹⁵ This has important implications for the application of the principle of *pacta sunt servanda*, when the Memorandum of Incorporation and shareholders' agreement are viewed as contracts to which the parties voluntarily and freely agreed.

5.6.2 Fairness, reasonableness and the principle of *bona fides* as legal convictions of the community

5.6.2.1 The principle of *pacta sunt servanda* at common law

In contractual disputes a court will traditionally use the rules of interpretation to establish the intention of the parties. Once their intention is established from the wording of the contract or agreement, a court in principle does not have the power to deviate from the enforcement of the parties' intention as contained in the

²¹³ See S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* (5th ed, 2016) 11.

²¹⁴ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [70]; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 9B-E. See also GB Bradfield *Christie's The law of contract in South Africa* (7th ed, 2016) 12-13. See further *Brisley v Drotsky* 2002 (4) SA 1 (SCA) [12] where the court held that it has no discretion on whether or not to enforce a valid contractual term.

²¹⁵ See 5.7.6 below regarding the protection of legitimate expectations.

contract.²¹⁶ Agreements that are freely and voluntarily concluded by parties will be strictly enforced on the basis of the principle of *pacta sunt servanda*.²¹⁷ The doctrine of *pacta sunt servanda* entails that courts must enforce contractual obligations that are created within the boundaries of the freedom of contract and are based on consensus.²¹⁸ It is trite that public policy supports freedom of contract and therefore a court will sparingly use its discretion not to enforce a contractual clause based on the principle of *pacta sunt servanda*.²¹⁹ The enforcement of the principle of *pacta sunt servanda* is not absolute.²²⁰ A court will not enforce contractual rights and obligations on the basis of the principle of *pacta sunt servanda* where such contractual rights and obligations offend public policy.²²¹ In *Barkhuizen v Napier*²²² the court held that courts must be careful to intervene in the contractual arrangements of parties when such arrangements were freely and voluntarily arrived at by the parties.²²³

5.6.2.2 Balancing the doctrine of *pacta sunt servanda* against other rights contained in the Constitution

The doctrine of *pacta sunt servanda*, the notion of fairness, the freedom to contract,

²¹⁶ *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) [30].

²¹⁷ *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC) [23] and [24]; *SA Sentrale Ko-op Graanmaatskappy Beperk v Shifren en Andere* 1964 (4) SA 740 (A) 767. See also S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* 5th (2016) (Juta: Cape Town) 11.

²¹⁸ See S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* (5th ed, 2016) 10-11.

²¹⁹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [70]; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 9B-E. See also GB Bradfield *Christie's The law of contract in South Africa* (7th ed, 2016) 12-13.

²²⁰ *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) [37].

²²¹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [87].

²²² 2007 (5) SA 323 (CC).

²²³ 2007 (5) SA 323 (CC) [70]-[71].

and the right to dignity may potentially come into conflict with each other and the rights contained in the Constitution and must then be weighed and balanced in light of public policy as envisaged in the Constitution.²²⁴ In an attempt to avoid the enforcement of a contractual clause, it is not enough to demonstrate that the contract or a particular clause offends one's individual's sense of fairness nor can contractual clauses be avoided on the basis of good faith.²²⁵ Recently, the Supreme Court of Appeal reiterated that 'although fairness and reasonableness inform policy they are not selfstanding principles'.²²⁶

(a) Decisions based on equity and fairness as judicial functions of courts

To accept that courts will have a discretion to avoid contractual principles in circumstances where such principles are unfair or do not comply with the principle of *bona fides*, will give courts the power to apply their own views of fairness.²²⁷ Such power will stretch beyond the judicial function of courts.²²⁸ This is because courts do not reach decisions based on equity and fairness, but on the application of the law.²²⁹ The judicial function of the court is to apply the law to the facts and

²²⁴ Constitution of the Republic of South Africa, 1996.

²²⁵ See also *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) [31]; *Brisley v Drotzky* 2002 (4) SA 1 (SCA) [31]; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 7-8. See also Jacques du Plessis 'Giving practical effect to good faith in the law of contract' (2018) 3 *Stell LR* 379, 404. However, Du Plessis does point out (416) that South African courts 'have at times at least indicated that *pacta sunt servanda* cannot be a trump card that defeats any attempt to deal with changed circumstances'.

²²⁶ *Trustees for the Time Being of the Oregon Trust v BEADICA 231 CC and Others* (74/2018) [2019] ZASCA 23 (28 March 2019) [35].

²²⁷ *Brisley v Drotzky* 2002 (4) SA 1 (SCA) [24].

²²⁸ *Brisley v Drotzky* 2002 (4) SA 1 (SCA) [24].

²²⁹ *Potgieter and Another v Potgieter NO and Others* 2012 (1) SA 637 (SCA) [34]; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

circumstances of each case.²³⁰

(b) Legal uncertainty and the principle of bona fides and fairness

Adjudicating cases based on the principle of *bona fides* and fairness will also cause legal uncertainty between parties to a contract.²³¹ A dispute between the parties would then not only be resolved based on the terms and conditions of their contract, but also in accordance with the sense of reasonableness and fairness of the individual judge that presides over the particular dispute.²³²

The adjudication of disputes on the basis of fairness and reasonableness will contribute to legal uncertainty.²³³ The content of what is fair or reasonable will differ from person to person and from court to court.²³⁴ In *South African Forestry Co Ltd v York Timbers Ltd*²³⁵ the court cautioned against finding that agreements are unenforceable because they are unfair and inequitable.²³⁶

In *Brisley v Drotsky*²³⁷ it was held that the principle of *bona fides* is not an independent separate legal rule, but is underlying to the law of contract like the value that parties who voluntarily commit themselves to contracts should honour

²³⁰ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) [24].

²³¹ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) [24].

²³² *Brisley v Drotsky* 2002 (4) SA 1 (SCA) [24].

²³³ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) [22] and [93]; *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) [32]; *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) [53]; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA) [23] and [25]; *Potgieter and Another v Potgieter NO and Others* 2012 (1) SA 637 (SCA) [34].

²³⁴ *Potgieter and Another v Potgieter NO and Others* 2012 (1) SA 637 (SCA) [34].

²³⁵ 2005 (3) SA 323 (SCA).

²³⁶ *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) [27]. See also the discussion of the approach in *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC) in 5.6.4 below.

²³⁷ 2002 (4) SA 1 (SCA).

their undertakings.²³⁸ The duty rests with the party who wishes to avoid the enforcement of the contractual clause, to set out the circumstances in which the enforcement of the contractual clause will offend public policy.²³⁹ In *Brisley v Drotsky*²⁴⁰ the court emphasised that it will only find a clause in a contract to be contrary to public policy when the inequity of the clause is clear and exceptional.²⁴¹

5.6.3 The need for substantive justice between parties to a contract

Van der Merwe highlights the notion that though fairness and reasonableness form part of the principles of the law of contract, they do not necessarily ensure the fair operation of a contract.²⁴² To achieve the fair operation of a particular contract one must consider ‘the general concepts that underlie the doctrines, rules and remedies intended to effect the fair operation of contracts, such as the concept of reasonable balance between performance and counter-performance or the concept of “conscionability”’.²⁴³

²³⁸ 2002 (4) SA 1 (SCA) [22]-[23]. See *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) [32].

²³⁹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [84]-[85].

²⁴⁰ *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

²⁴¹ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) [31]-[32].

²⁴² See S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* (5th ed, 2016) 310 who note that ‘[i]n principle, agreements that comply with the requirements for the creation of contracts will be executed and enforced strictly in terms of the consensus, or reasonable reliance on consensus, between the parties. This should generally be fair and just towards the contractants: some measure of fairness and reasonableness is already incorporated in the principles on which contractual liability is based, in the principle that agreement must be obtained properly, in the agreement of legality and in the process of interpreting contracts. Nevertheless, these factors alone cannot ensure justice in every instance where a contract is put into operation, and the question remains how the law can further provide for the fair operation of a particular contract’ (footnotes omitted).

²⁴³ S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* (5th ed, 2016) 310. As regards the concept of ‘conscionability’ the authors (310 n 483) remark that the concept ‘is usually encountered in its negative counterpart “unconscionability”, a “hold-all” which

According to Van der Merwe the problem can also be approached by focussing on the specific remedies that embody the changing convictions of what is just and fair.²⁴⁴ One such a remedy is the *exceptio doli generalis*.²⁴⁵ The *exceptio doli generalis* is a contractual defence that a party could raise against a contractual claim in unfair circumstances that developed after the conclusion of the contract.²⁴⁶ The effect of the defence was that a court could refuse a claim even if such claim falls squarely within the parameters of the contract, but enforcement of the contract would be regarded as unreasonable, unconscionable or oppressive.²⁴⁷

The roots of this remedy are found in the Roman law.²⁴⁸ Van der Merwe points out that South African courts were prepared to accept the remedy as part of South African law to be an instrument of equity.²⁴⁹ However, the court in *Bank of Lisbon and South Africa Ltd v De Ornelas*²⁵⁰ held that the remedy does not form

may encompass unacceptable conduct *in contrahendo*, unfair terms, unfairness in attempting to enforce a contract and the like’.

²⁴⁴ S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* (5th ed, 2016) 275.

²⁴⁵ See *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W). See also S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* (5th ed, 2016) 310-11; GB Bradfield *Christie’s The law of contract in South Africa* (7th ed, 2016) 16-17.

²⁴⁶ GB Bradfield *Christie’s The law of contract in South Africa* (7th ed, 2016) 16. See also S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* (5th ed, 2016) 310.

²⁴⁷ See also Jacques du Plessis ‘Giving Practical Effect to Good Faith in the Law of Contract’ (2018) 3 *Stell LR* 379, 397 who explains that the *exceptio doli* prevents a party from exercising a right in a manner that is contrary to good faith.

²⁴⁸ S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* (5th ed, 2016) 310.

²⁴⁹ S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* (5th ed, 2016) 311.

²⁵⁰ 1988 (3) SA 580 (A).

part of South African law.²⁵¹ Van der Merwe *et al* emphasise the fact that the courts did not point or allude to any other remedies that will perform the same function as the *exceptio doli*.²⁵²

The fact that South African law does not have a remedy which ensures substantive justice between contract parties does not mean that there is not a need for such remedy.²⁵³ The need to do simple justice between parties to a contract is recognised by the Constitutional Court.²⁵⁴ In *Barkhuizen v Napier*²⁵⁵ the Constitutional Court held that reasonableness, justice and fairness are elements of public policy.²⁵⁶ The test to avoid the enforcement of a contract or contractual clause is neither the principle of *bona fides* nor fairness, but rather the interests or legal convictions of the legal community based on the values of equality, freedom and human dignity.²⁵⁷ It is the role of the court to balance these competing principles.²⁵⁸ Abstract considerations such as equity, reasonableness and justice are not legal rules but form part of the considerations that form the basis of the law of contract

²⁵¹ See also *Bredenkamp and Others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) [32].

²⁵² S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* (5th ed, 2016) 311.

²⁵³ S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* (5th ed, 2016) 311.

²⁵⁴ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [73].

²⁵⁵ 2007 (5) SA 323 (CC).

²⁵⁶ 2007 (5) SA 323 (CC) [73]. See also Jacques du Plessis 'Giving Practical Effect to Good Faith in the Law of Contract' (2018) 3 *Stell LR* 379, 388-89.

²⁵⁷ Constitution of the Republic of South Africa, 1996, s 39(2). See also *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [28]; *Brisley v Drotzky* 2002 (4) SA 1 (SCA) [92]-[93].

²⁵⁸ *Brisley v Drotzky* 2002 (4) SA 1 (SCA) [24].

and public policy.²⁵⁹

5.6.4 *Botha and Another v Rich NO and Others*²⁶⁰

5.6.4.1 Introduction

The court in *Botha and Another v Rich NO and Others*²⁶¹ acknowledged that the law of contract, based on the principle of good faith, has the necessary flexibility to ensure fairness.²⁶² The principle of reciprocity originated from notions such as justice, reasonableness and fairness.²⁶³ These notions and concepts constitute good faith in a contract.²⁶⁴

5.6.4.2 The position prior to *Botha and Another v Rich NO and Others*²⁶⁵

It was argued and accepted by the courts that the principle of *pacta sunt servanda* brings legal certainty and is aligned with the values of freedom and human dignity as entrenched in the Constitution.²⁶⁶ Although this view is held by various courts and particularly the Supreme Court of Appeal²⁶⁷ it cannot be denied that the strict

²⁵⁹ *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [73] and [82]. See also *Brisley v Drotzky* 2002 (4) SA 1 (SCA) [22] on *bona fides* and the law of contract. According to R Sharrock 'Unfair Enforcement of a Contract: A Step in the Right Direction? *Botha v Rich and Combined Developers v Arun Holdings*' (2015) 27 SA Merc LJ 174, 181-82 the same argument applies to the notion that contractual parties owe a duty of *bona fides* to each other.

²⁶⁰ 2014 (4) SA 124 (CC).

²⁶¹ 2014 (4) SA 124 (CC).

²⁶² 2014 (4) SA 124 (CC) [45].

²⁶³ *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC) [45].

²⁶⁴ *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC) [45].

²⁶⁵ 2014 (4) SA 124 (CC).

²⁶⁶ *Barkhuizen v Napier* 2007 (5) SA 323 (CC). See also *Potgieter v Potgieter* 2012 (1) SA 637 (SCA) [34] where the court cautioned against deciding cases on the basis of fairness.

²⁶⁷ See, for example, *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) and *Brisley v Drotzky* 2002 (4) SA 1 (SCA).

application of the principle may be unreasonable or unfair in certain circumstances.²⁶⁸

The recognition that fairness and reasonableness are underlying values of the law of contract can be found in the common law.²⁶⁹ Examples can be found in the principles relating to misrepresentation, duress, the rules of interpretation and that a contract may not offend the public policy.²⁷⁰ In the application of the said principles courts developed these concepts to meet the changing needs of society who are the ultimate users of these principles.²⁷¹

5.6.4.3 The importance of the judgment in *Botha and Another v Rich NO and Others*²⁷²

In *Botha and Another v Rich NO and Others*²⁷³ the court refused to enforce a contractual clause, because the result of the implementation of a clause of the relevant contract would offend public policy on the basis that it was unfair and unreasonable on the facts and circumstances of the particular case.²⁷⁴ Although the judgment is welcomed, the reasoning in the written judgment failed to provide the

²⁶⁸ *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC); *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [73].

²⁶⁹ See *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) [32].

²⁷⁰ GB Bradfield *Christie's The law of contract in South Africa* (7th ed, 2016) 14-15.

²⁷¹ GB Bradfield *Christie's The law of contract in South Africa* (7th ed, 2016) 14-15.

²⁷² 2014 (4) SA 124 (CC).

²⁷³ 2014 (4) SA 124 (CC).

²⁷⁴ *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC) [49]-[50]; See also R Sharrock 'Unfair Enforcement of a Contract: A Step in the Right direction? *Botha v Rich and Combined Developers v Arun Holdings*' (2015) 27 SA Merc LJ 174, 183.

guidance required in respect of this matter.²⁷⁵

5.6.5 The criticism against *Botha and Another v Rich NO and Others*²⁷⁶

Sharrock²⁷⁷ questions the reasoning in the written judgment as it failed to provide the required guidance. The approach in the judgment is also criticised by the Supreme Court of Appeal in *Trustees for the Time Being of the Oregon Trust v BEADICA 231 CC and Others*.²⁷⁸

5.6.5.1 The failure to follow a principled approach to promote legal certainty in the application of the relevant principles and doctrines

The court did not expressly explain the principles that justify the non-enforcement of a contract or contractual clause based on unfairness.²⁷⁹ The failure by the court to clearly define the principles upon which the court has exercised its discretion is problematic as this may now lead courts to enforce contracts in accordance with their own views or ideas of fairness.²⁸⁰ This position is highly undesirable and threatens the object of legal certainty. Although it may be argued that the concepts

²⁷⁵ See the analysis of R Sharrock 'Unfair Enforcement of a Contract: A Step in the Right Direction? *Botha v Rich and Combined Developers v Arun Holdings*' (2015) 27 SA Merc LJ 174. See also 5.6.5 below.

²⁷⁶ 2014 (4) SA 124 (CC).

²⁷⁷ R Sharrock 'Unfair Enforcement of a Contract: A Step in the Right Direction? *Botha v Rich and Combined Developers v Arun Holdings*' (2015) 27 SA Merc LJ 174.

²⁷⁸ (74/2018) [2019] ZASCA 23 (28 March 2019). In this judgment the court rejected [38] the notion in *Botha and Another v Rich NO and Others* 2014 (4) SA 124 (CC) that a contract may be unenforceable because the consequences that follows the breach of a contract or the failure to adhere to the terms of a contract are disproportionate. According to the Supreme Court of Appeal [38] the correct test is rather whether or not the terms of the contract offend public policy.

²⁷⁹ R Sharrock 'Unfair Enforcement of a Contract: A Step in the Right Direction? *Botha v Rich and Combined Developers v Arun Holdings*' (2015) 27 SA Merc LJ 174, 180.

²⁸⁰ R Sharrock 'Unfair Enforcement of a Contract: A Step in the Right Direction? *Botha v Rich and Combined Developers v Arun Holdings*' (2015) 27 SA Merc LJ 174, 180.

of fairness and reasonableness, or in their negative forms unfairness and unreasonableness, are abstract values and concepts it must be noted that the content of these concepts are determinable by using a principled approach to determine whether or not public policy is offended.²⁸¹

5.6.5.2 The status of relevant judgments of the Supreme Court of Appeal

The court further failed to consider the legal position regarding the unfair enforcement of contracts without referring to the most important judgments of the Supreme Court of Appeal dealing with the issue.²⁸² The effect of this is that the legal status of the body of case law developed by the Supreme Court of Appeal is uncertain.²⁸³

5.6.6 The application of fairness within companies: Lessons learned from the law of contract

5.6.6.1 Fairness and reasonableness as elements of the legal convictions of the community

Recently, the constitutional court held that the enforcement of contracts is also subject to the legal convictions of the community based amongst others on fairness and reasonableness.²⁸⁴ The validity of contracts is also subject to public policy or

²⁸¹ R Sharrock 'Unfair Enforcement of a Contract: A Step in the Right Direction? *Botha v Rich and Combined Developers v Arun Holdings*' (2015) 27 SA Merc LJ 174, 184-85. See also *Barkhuizen v Napier* 2007 (5) SA 323 (CC) [51] where the court held that fairness and reasonableness form elements of public policy.

²⁸² R Sharrock 'Unfair Enforcement of a Contract: A Step in the Right Direction? *Botha v Rich and Combined Developers v Arun Holdings*' (2015) 27 SA Merc LJ 174, 181. See also *Bredenkamp v Standard Bank of South African Ltd* 2010 (4) SA 468 (SCA) regarding the notion that the enforcement of a contract can be barred upon the ground of unfairness.

²⁸³ R Sharrock 'Unfair Enforcement of a Contract: A Step in the Right Direction? *Botha v Rich and Combined Developers v Arun Holdings*' (2015) 27 SA Merc LJ 174, 181.

²⁸⁴ See 5.6.4 above. See also Jacques du Plessis 'Giving practical effect to good faith in the law of contract' (2018) 3 *Stell LR* 379, 388-89.

the legal convictions of the community.²⁸⁵ *Bona fides*, reasonableness and fairness form elements of the legal convictions of the community.²⁸⁶ These elements require the enforcement of contracts to be fair and reasonable taking into consideration the facts and circumstances of a case.

5.6.6.2 The strict application of *pacta sunt servanda*

Traditional principles and doctrines of the law of contract acknowledge that the enforcement of contracts may in some instances be unconscionable, oppressive or alternatively that the enforcement of a contract may be unfair or unreasonable in circumstances that were unforeseen at the time of the conclusion of the contract.²⁸⁷ Thus, the free and voluntary acceptance of contractual obligations is not the only consideration to be taken into account in the enforcement of contractual obligations.²⁸⁸ This is now evident from the judgment in *Botha and Another v Rich NO and Others*.²⁸⁹

5.6.6.3 Section 163 of the Act as a criterion for the enforcement of rights and obligations between the company, directors and shareholders

Delpont is of the view that the oppression or unfair prejudice remedy in section 163 of the Act introduces a new dimension against which company contracts and shareholder agreements will be measured.²⁹⁰ These contracts or agreements will

²⁸⁵ See 5.6.1 above.

²⁸⁶ See 5.6.3 above.

²⁸⁷ See 5.6.3 above.

²⁸⁸ See 5.6.4 above.

²⁸⁹ 2014 (4) SA 124 (CC). See also 5.6.4 above.

²⁹⁰ PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018). See *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ) [61] where the court accepted that contracts should be measured against the oppressive and/or unfair prejudicial conduct. See also *Peel and Others v Hamon J&C*

be measured against results flowing from oppressive or unfair prejudicial conduct or an unfair disregard of interests. In short the remedy is triggered by commercial unfairness.²⁹¹ This is aligned with the notion that the principles underlying the law of contract aim to achieve fairness.

5.6.6.4 The need for fairness within the company structure

Due to the nature of companies and the relationships it embodies, the need to ensure fairness between parties presents itself to a certain degree more acutely than for instance in the law of contract. Firstly, it is because the Memorandum of Incorporation of a company (and applicable shareholder agreements) applies to and regulates multidimensional relationships. Secondly, it is because of the often dynamic nature of the relationships of the company, directors and shareholders as parties to a Memorandum of Incorporation (and shareholder agreement where applicable). Thirdly, unlike with an ordinary common law contract, the Memorandum of Incorporation may be amended by a special resolution.²⁹² It is also a common feature that the constitutive documents of a company do not exhaustively regulate the relationship between the parties thereto and arrangements and understandings may exist that are not necessarily contained in the Memorandum of Incorporation or an applicable shareholder agreement.²⁹³

Engineering (Pty) Ltd and Others 2013 (2) SA 331 (GSJ) [49]; *Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [54].

²⁹¹ See 5.7.3 and more specifically 5.7.3.5 below.

²⁹² Companies Act 71 of 2008, s 16.

²⁹³ See 5.7.6 below.

5.6.6.5 Section 163 as a specific embodiment of the legal convictions of the community

Section 163 of the Act makes it possible for company law to avoid some of the problems with which the law of contract grapples. The status of the remedy is certain and makes fairness directly applicable to conduct in terms of the Memorandum of Incorporation, shareholder agreements or other documents of the company and is available to temper the unfair results that may result from company-related conduct. To follow a principled approach in the context of the application of fairness for purposes of section 163 is to a degree easier than in the context of the law of contract. The reason for this is that in terms of section 163 one deals with a particular form of fairness, namely, commercial fairness. The commercial fairness of the effect of conduct complained of always has to be determined in a particular context, namely, the statutory framework and fundamental principles of company law in which companies function. Although the articles or provisions of the Memorandum of Incorporation of a company or a shareholders' agreement are also subject to the legal convictions of the community as found in the Constitution, very specific considerations apply in the company law context to determine whether conduct is oppressive, unfairly prejudicial or an unfair disregard of interests.²⁹⁴ It is therefore submitted that section 163 of the Act refines aspects of the legal convictions of the community in the context of relationships within the company structure.²⁹⁵

²⁹⁴ See 5.7.3 below for a discussion of the concepts oppressive, unfairly prejudicial and unfair disregard of interest.

²⁹⁵ See 5.4 above for a discussion of the specific principles and considerations that apply to companies.

5.7 Relief for oppressive or unfair prejudicial conduct under the Companies Act 71 of 2008

5.7.1 Standing²⁹⁶

Section 163 of the Act provides that a director or a shareholder may approach the court for relief.²⁹⁷ The standing of a shareholder and a director as applicants or plaintiffs in terms of section 163 of the Act is now be considered.²⁹⁸ The wording of section 163(1) does not furnish a court with a discretion to extend standing to persons who have not been specifically mentioned.²⁹⁹ The remedy in section 163 is only available to a *shareholder* or *director* of a company.³⁰⁰

²⁹⁶ See also 5.9.15 below for the interrelationship between the standing requirements for purposes of section 163 and section 165.

²⁹⁷ It should be noted that section 163(2)(l) of the Act does provide for the referral to trial of any issue that is not appropriate to be determined by way of motion proceedings.

²⁹⁸ See 5.7.1.1 below for a discussion of a shareholder as an applicant or plaintiff in terms of section 163 of the Act and 5.7.1.3 below for a discussion of a director as an applicant or plaintiff for purposes of section 163.

²⁹⁹ See HGJ Beukes and WJC Swart 'Peel v Hamon J&C Engineering (Pty) Ltd: Ignoring the Result-Requirement of Section 163(1)(a) of the Companies Act and Extending the Oppression Remedy Beyond its Statutorily Intended Reach' (2004) 14:4 PER/PELJ 1691, 1699-700. See also *Smyth and Others v Investec Bank Ltd and Another* 2016 (4) SA 363 (GP) [30] where the court in the consideration of the definition of 'member' for purposes of section 252 of the previous Act held that 'to include a beneficial owner of shares registered in the of a nominee, it would in my view amount to judicial legislation, and not interpretation' and [48] where the court stated that 'in adopting a purposive approach, the court engages in the process of interpretation relating to the remedy, and does not assume a legislative role by expanding the term "member" to include persons who are not referred to in the definition of "member" in s 103, and for whom the legislature did not see fit to create a statutory exception'.

³⁰⁰ See *Du Plooy v De Hollandsche Molen Share Block Ltd* [2016] 1 All SA 748 (WCC) [56].

5.7.1.1 The shareholder as applicant (or plaintiff)

(a) Introduction

Although the remedy in section 163 is not restricted to minority shareholders it would usually be utilised by a minority shareholder because of his or her position in the company.³⁰¹ In *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others*³⁰² the court noted that section 252 of the previous Act, the predecessor of section 163, was not only available to minority shareholders but could be applied in instances where all shareholders have equal voting control.³⁰³ The remedy therefore comes to the assistance of a shareholder or director who is prejudiced by unfair or oppressive conduct, and the shareholder or director is unable to protect him- or herself from such conduct due to his or her lack of control in the company.³⁰⁴

When reading provisions of the Act one must be conscious of the fact that the term 'shareholder' does not carry the same meaning or definition throughout the Act.³⁰⁵ The definition or meaning of a shareholder is dependent on where in the Act the term is used. The definition of a shareholder for purposes of the Act and in

³⁰¹ See 5.7.1.1 (e) below.

³⁰² [2012] 4 All SA 203 (GSJ).

³⁰³ [2012] 4 All SA 203 (GSJ) [51] and [77]. The court in *Grancy Property Limited v Manala and Others* [2013] 3 All SA 111 (SCA) [32] cautioned that the provisions of section 163 must not be used to oppress the majority.

³⁰⁴ See 5.7.1.1 (e) below for a discussion of the position of majority or controlling shareholders.

³⁰⁵ Compare the definition of 'shareholder' in section 1 of the Act with the definition of a 'shareholder' in section 57 of the Act for purposes of Part F of Chapter 2 of the Act dealing with the formation, administration and dissolution of companies.

particular in terms of section 163 of the Act is now considered.³⁰⁶

(b) *The definition of shareholder*

Section 1 of the Act defines a 'shareholder' as a holder of a share issued by the company and whose name has been entered as such in the securities register of the company, irrespective of whether the securities are certificated or uncertificated. This definition of a shareholder corresponds with the definition given to a 'member' in section 103 of the previous Act. The legislator does not use the term 'member', as the case was in terms of the previous Act. The definition of a shareholder in section 1 of the Act will apply unless the Act provides otherwise for purposes of other chapters, parts or provisions of the Act.³⁰⁷

(c) *The extended definition of a shareholder*

Part F of Chapter 2 of the Act deals with the governance of companies. For purposes of Part F of the Act, the definition of 'shareholder' in section 1 has an extended meaning.³⁰⁸ The definition of a shareholder in section 1 of the Act is extended by section 57 (1) to 'a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which those voting rights are attached'.³⁰⁹ This definition of a shareholder only applies to Part F of Chapter of the Act.

³⁰⁶ See 5.7.1.1 (c) below for a discussion of the definition of a 'shareholder' in section 57 of the Act for purposes of Part F of Chapter 2 of the Act.

³⁰⁷ See, for example, section 57 of the Act for purposes of Part F of Chapter 2 of the Act.

³⁰⁸ Companies Act 71 of 2008, s 57(1).

³⁰⁹ FHI Cassim *et al Contemporary Company Law* (2nd ed, 2012) 356.

(d) The definition of a shareholder for purposes of section 163 of the Act

Chapter 7 of the Act consists of Parts A to F. Section 163 is contained in Part B that regulates the right to seek specific remedies. In contrast with Part F of Chapter 2, Part B of Chapter 7 does not contain a specific provision defining a shareholder for purposes of this specific part in the Act. Therefore, unless the Act specifically provides otherwise, the default definition of a ‘shareholder’ in section 1 applies to Part B of Chapter 7 of the Act.³¹⁰ This has the result that for purposes of section 163 the legislature chose to give term shareholder a narrow meaning for purposes of Part B of Chapter 7 compared with the definition of the same term in Part F of Chapter 2 of the Act.³¹¹ The implication of this is that a shareholder whose name does not appear on the securities register will be unable to make use or rely on section 163 for relief. This is because the entering of the name of the shareholder

³¹⁰ Under the previous Act a person must have been a ‘member’ to have standing for purposes of section 252. Who constituted a ‘member’ was determined with reference to section 103 of the previous Act. This occasionally invited the argument that the description of a member in section 103 should not be regarded as a definition of the term ‘member’ as it does not fall within the section 1 of the Act containing the definitions of the Act. This argument was rejected by the court in *Smyth and Others v Investec Bank Ltd and Another* 2016 (4) SA 363 (GP) [23]-[26] and *Smyth and Others v Investec Bank Ltd and Another* 2018 (1) SA 494 (SCA) [42].

³¹¹ Such a narrow approach to who is entitled to approach a court for relief in terms of section 163 is not new in South African company law. See the approach taken by the court in *Smyth and Others v Investec Bank Ltd and Another* 2016 (4) SA 363 (GP) where the court considered who is a ‘member’ for purposes of section 252 of the previous Act. The definition of a ‘member’ in section 103 of the previous Act is substantially similar to the definition of a shareholder in section 1 of the Act. Section 103 of the previous Act defined a member as follows: -

‘103 Who are members of a company

- (1) The subscribers of the memorandum of a company shall be deemed to have agreed to become members of a company upon its incorporation, and shall forthwith be entered as members in its register of members.
- (2) Every other person who agrees to become a member of a company and whose name is entered in its register of members, shall be a member of the company.’

in a company's register of securities is a prerequisite for purposes of the definition of a shareholder in section 1 and subsequently for having standing for purposes of section 163 of the Act.³¹²

(e) Majority shareholders

The remedy in section 163 is not limited or restricted to minority shareholders although it would usually be utilised by a minority shareholder because of his or her position in the company.³¹³ In *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others*³¹⁴ the court noted that the application of the predecessor of section 163, namely, section 252 of the Companies Act 61 of 1973, was not only available to minority shareholders but could be applied in instances where all shareholders have equal voting control.³¹⁵ However, the court in *Grancy v Grancy Property Limited v Manala and Others*³¹⁶ cautioned that the provisions of section 163 should not be used to oppress the majority.³¹⁷

³¹² For a similar remark in the context of section 103 of the previous Act see *Smyth and Others v Investec Bank Ltd and Another* 2016 (4) SA 363 (GP) [17]-[19].

³¹³ See 5.5.3 above. See also SJ Naudé *Die Regsposisie van die Maatskappydirekteur met Besondere Verwysing na die Interne Maatskappyverband* (1969) (unpublished LLD thesis; University of South Africa) 399-411 for a discussion of forms of control that shareholders can exercise within the company structure.

³¹⁴ [2012] 4 All SA 203 (GSJ).

³¹⁵ [2012] 4 All SA 203 (GSJ) [51] and [77].

³¹⁶ [2013] 3 All SA 111 (SCA).

³¹⁷ [2013] 3 All SA 111 (SCA) [32]. See also *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [64] where the court noted that in evaluating the fairness of conduct 'the principle of majority rule and the binding nature of the company's constitution as its starting point'. See further *Knipe and Others v Kameelhoek (Pty) Ltd and Another* 2014 (1) SA 52 (FB) [31]. In *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) the court also made reference to the separate juristic personality of a company.

5.7.1.2 Persons excluded from the definition of a shareholder for purposes of section 163 of the Act

(a) Introduction

This definition excludes beneficial shareholders (or owners)³¹⁸ or persons such as curators or executors from acting as applicants in terms of section 163.³¹⁹ This would leave beneficial shareowners without a remedy or a person who has as a result of unfair prejudicial conduct parted with his or her shares.³²⁰ To interpret the definition of a shareholder in section 1 to include a beneficial shareholder (or owner) could be regarded as judicial legislation which falls beyond the power of a court.³²¹ A court is entrusted with the duty imposed by the Constitution to interpret legislation and not to create legislation.³²²

(b) The criticism against limiting section 252 of the previous Act to registered members

Oosthuizen criticised the provisions relating to standing under section 252 of the

³¹⁸ See *Smyth and Others v Investec Bank Ltd and Another* 2018 (1) SA 494 (SCA) [54]-[55] where the court considered the definition of a member in section 103 and the provisions of section 252 of the previous Act to find that a beneficial shareowner does have standing to rely on the oppression remedy.

³¹⁹ See MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg' (1981) *TSAR* 105, 109 who also argued that the definition of a member for purposes of section 252 of the previous Act was too restrictive as it excluded curators and executors.

³²⁰ See also MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg' (1981) *TSAR* 105, 110 who demonstrates and criticises the position under section 252 of the Companies Act 61 of 1973 where the purchaser of shares cannot rely upon the remedy in circumstances where the name of the purchaser is not entered into the register of members.

³²¹ However, see 5.7.1.2 (b) below.

³²² See *Smyth and Others v Investec Bank Ltd and Another* 2016 (4) SA 363 (GP) [30] and [48]; *LD v Technology Corporate Management (Pty) Ltd and Others*; *SD v LD* (40036/16; 35926/16) [2018] ZAGPJHC 69 (23 February 2018) [51]; *Ferreira v Levin* 1996 (1) SA 984 (CC) [182]. Note that all these cases have been decided in terms of section 252 of the previous Act.

previous Act.³²³ He argued that limiting or restricting standing only to members whose names appear on the register of members of the company is too formalistic a requirement that ignores the reality that the executors or curators of estates should be able to rely on the provision.³²⁴

In *Lourence and Others v Ferela (Pty) Ltd and Others (No 1)*³²⁵ the court held that a person who is not registered as a member of a company does not have standing for purposes of section 252 of the Companies Act 61 of 1973.³²⁶ The applicants in *Smyth and Others v Investec Bank Ltd and Another*³²⁷ failed to persuade the court that the definition of a member for purposes of section 252 included a beneficial shareholder.³²⁸ However, in *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others*³²⁹ the court held that although the second applicant who sold all his shares in terms of a sale and transfer agreement was not a registered shareholder at the time of the application in terms of section 163, the second applicant 'may have an interest in the repayment of the purchase price in

³²³ MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg' (1981) *TSAR* 105, 109-10.

³²⁴ MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg' (1981) *TSAR* 105, 109-10.

³²⁵ 1998 (3) SA 281 (T).

³²⁶ The case dealt with the situation where the applicants inherited shares.

³²⁷ *Smyth and Others v Investec Bank Ltd and Another* 2016 (4) SA 363 (GP).

³²⁸ See *Smyth and Others v Investec Bank Ltd and Another* 2016 (4) SA 363 (GP) [27] read with [67] where this argument was rejected by the court. The court [71] read with [76] further held that the economic interest that a shareholder has in shares did not entitle him to rely on section 252 of the previous Act when those shares are registered in the name of a nominee. The Supreme Court of Appeal upheld the last mentioned judgment in *Smyth and Others v Investec Bank Ltd and Another* 2018 (1) SA 494 (SCA). The court further held [44] that no 'utterly glaring' absurdities arise when the definition of a 'member' is interpreted according to its ordinary meaning that excludes beneficial shareholders from the definition.

³²⁹ 2013 (2) SA 331 (GSJ).

terms of a wider interpretation of section 163 of the new Companies Act'.³³⁰ It is submitted that the court incorrectly extended standing to the second applicant as he was not a shareholder of the company anymore and the definition of a shareholder for purposes of section 163 did not allow for the inclusion of a former shareholder.³³¹

(c) Conclusion

An analysis of the meaning of shareholder revealed that creditors, employees, the holders of debentures, curators or executors of estates and shareholders whose names are not registered in the securities register of the company do not have standing to apply for relief in terms of section 163. It has been settled under section 252 of the previous Act that a court does not have a discretion to extend standing for purposes of the last mentioned provision to persons not identified by the section. In this regard legislative intervention is required as this matter has not been settled in section 163 of the Act. Legislative intervention is required to provide certainty on who enjoys standing for purposes of section 163 and to address the criticism raised to standing in terms of section 252 of the previous Act which still applies to the requirements for standing in terms of section 163 of the Act.³³²

³³⁰ 2013 (2) SA 331 (GSJ) [26].

³³¹ See 5.7.1.1 above.

³³² See 6.3.3.6 below for recommendations in this regard.

5.7.1.3 The director as an applicant

(a) *Introduction*

One of the important differences between the formulation of section 163 of the Act and section 252 of the previous Act is that the current remedy is extended to a director.³³³ Hurter argued that the requirement under section 252 of the previous Act that the member should have been prejudiced in his or her capacity as member was too restrictive and failed take cognisance of the business realities of a company.³³⁴ It is submitted that the extension of the remedy to directors must be viewed as an acknowledgement by the legislature that, in some instances, oppressive or unfair prejudicial conduct or alternatively an unfair disregard of the interests of a shareholder may in certain specific circumstances be prejudicial to someone in a capacity other than that of a shareholder.³³⁵ Although it is not required by section 163, early indications are that courts will require applicants in terms of section 163 to prove that the conduct prejudiced the applicant (or plaintiff) in his or

³³³ Section 252 of the Companies Act 61 of 1973 made the statutory personal action only available to members of the company. See also Leon van Rooyen 'Die Statute Beskerming van Minderheidsbelange in die Maatskappyreg – Belangrike Ontwikkelings in die Engelse regspraak' (1988) 2 *TSAR* 268, 273 where he suggested that standing for purposes of section 252 of the previous Act be extended to persons other than members. The author (273) cited directors, debenture holders, creditors and officers of a company as persons to whom standing can be extended in recognition of the fact that a shareholder may suffer prejudice in a capacity other than than that of a shareholder. See also MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyreg' (1981) *TSAR* 105, 118 proposes that it may be helpful if the personal remedy is extended to a member in his or her capacity as director or officer of the company.

³³⁴ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 389.

³³⁵ See also the interpretation of A Sibanda 'The Statutory Remedy for Unfair Prejudice in South African Company' (2013) 38:2 *JJS* 58, 71 who argues that a director should demonstrate that he or she has been prejudiced in his or her capacity as director of the company. See FHI Cassim *et al Contemporary Company Law* (2nd ed, 2012) 760-63.

her capacity as shareholder or director.³³⁶

(b) The removal of a director

(i) The legitimate expectation to participate in the management of a company

The prejudice suffered by the director is not necessarily prejudice suffered by a director in his or her capacity as such, but is prejudicial to him or her in the capacity as a member or is unfairly prejudicial to other members.³³⁷ The removal of a director may be prejudicial to a shareholder. This will usually be the case where a director is excluded from the management or board of a company in the face of an agreement or legitimate expectation³³⁸ that he or she will have the right to participate in the management of the business and affairs of the company in which he or she holds shares. It is submitted that extending standing for purposes of section 163 of the Act to directors has neutralised the argument that the removal of a director is prejudice suffered in the capacity as shareholder.³³⁹ This argument had the potential

³³⁶ See also the interpretation of A Sibanda 'The Statutory Remedy for Unfair Prejudice in South African Company' (2013) 38:2 *JJS* 58, 71. See FHI Cassim *et al Contemporary Company Law* (2nd ed, 2012) 760-63. For a discussion of the capacity in which shareholders should be prejudiced see 5.7.1.4 (c) below.

³³⁷ See *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 (1) SA 517 (K) 531 where the court held that the removal of a director may be prejudicial to the interests of shareholders.

³³⁸ See 5.7.6 below for a discussion of the protection of legitimate expectations.

³³⁹ This is because courts require that a shareholder must have suffered prejudice in his or her capacity as shareholder. If a similar approach is adopted in relation to a director as an applicant or plaintiff, the consequence for purposes of section 163 of the Act will be that a shareholder will only be able to rely on prejudice suffered in his or her capacity as a shareholder and a director will only be able to rely on section 163 if he or she suffered prejudice in his or her capacity as director. It is demonstrated below that the emphasis should rather have been that a shareholder could experience prejudice in other capacities as a shareholder. See 5.7.1.3 (c) for a discussion of the requirement that a shareholder or director has to suffer prejudice in a particular capacity. It will also be demonstrated that this approach by the courts neutralised the efforts of the legislature to

of leaving both the shareholder and director without the benefit of the unfair prejudice remedy.

(ii) The protection of a director's employment interests

Some directors may be executive directors while others are appointed as non-executive directors. One should be mindful of the fact that section 163 provides protection to a director as an officer of a company and not necessarily to an employee. It is further doubtful whether it was the intention of the legislature to provide the remedy to a director only because of his or her removal from the board or to protect an executive director against unfair labour practices or unfair dismissals that are regulated by the Labour Relations Act.³⁴⁰ A director will not be able to rely on section 163 to protect or enforce his or her rights under an employment contract. It could not have been the intention of the legislature to provide additional protection to an executive director's employment rights which are specifically provided for in specific legislation such as the Labour Relations Act.³⁴¹ The purpose of section 163 could not have been to protect the employment interests of a director.

(iii) The duty to manage

The directors of a board have a duty to act collectively in the management of the business and affairs of the company.³⁴² To be able to participate meaningfully in the

acknowledge that shareholders may be prejudiced in other capacities related to his or her shareholding.

³⁴⁰ 66 of 1995. See also PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018) for commentary in this regard on section 163.

³⁴¹ 66 of 1995. See specifically section 5(4)(b)(i)(bb) which clearly states that when the provisions of the Act and the Labour Relations Act 66 of 1995 cannot be applied concurrently, the provisions of the Labour Relations Act 66 of 1995 will prevail.

³⁴² Companies Act 71 of 2008, s 66(1).

management and affairs of a company, directors should have access to all relevant information pertaining to the company. Frustrating or denying a director such information may constitute unfair prejudicial conduct for purposes of section 163.³⁴³

This would enable a director to argue that he or she is prejudiced in the capacity of a director when the conduct of the affairs of the company is in breach of the Companies Act 71 of 2008, the Memorandum of Incorporation or rules of the company.³⁴⁴ It can be specifically argued that a director may rely on the provisions of section 163 in the event of interference with his or her right to manage the business and affairs of the company³⁴⁵ or in circumstances where the company is in financial distress³⁴⁶ and the company fails to take the necessary steps in terms of the Companies Act 71 of 2008.³⁴⁷

(c) Concluding remarks on the standing of a director for purposes of section 163

The extension of standing for purposes of section 163 to persons other than shareholders is in line with developments in other jurisdictions evaluated in this thesis. However, the provision of standing to directors has little value for two reasons. Firstly, it seems that courts will require a director to prove that he or she

³⁴³ See also 5.9.10 below.

³⁴⁴ *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP) [17.5].

³⁴⁵ See *Kaimowitz v Delahunt and Others* 2017 (3) SA 201 (WCC) where the applicant argued that the respondents frustrated or denied him to fulfil his fiduciary duties to the company. However, the court found ([33]-[34]) that the applicant failed to present the factual evidence to prove such allegation.

³⁴⁶ See specifically 5.9.4 below.

³⁴⁷ *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP) [17.5].

has suffered prejudice in his or her capacity as director. Such an approach will restrict the application of the remedy. In this respect the legislature should rather have acknowledged expressly that a shareholder could experience prejudice in other capacities related to his or her shareholding. The prejudicial conduct towards a director may in fact prejudicially affect the interests of shareholders. Secondly, directors often experience prejudice in the form of the exclusion from the management of a company. If such exclusion entails the removal of the director from the board, he or she will not have standing for purposes of section 163 of the Act as such a person will not be a director anymore.³⁴⁸ This will especially be the case when such a removal has been effected in accordance with the provisions of the Act, but was in breach of a legitimate expectation. The provisions would therefore be of little value to a director who does not also hold shares in the relevant company or is not representing a specific shareholder on the board.

5.7.1.4 Prejudice and the capacity in which a person has suffered unfair prejudice

(a) Introduction

A distinction must be drawn between prejudice to the interests of an applicant as a result or consequence of the application of normal corporate law principles, to which an applicant agreed to prior to joining the particular corporate structure, and conduct or consequences which can be regarded as being unfairly prejudicial.³⁴⁹ A

³⁴⁸ See 6.3.3.6 below for recommendations in respect of former directors of a company.

³⁴⁹ See 5.5 and more specifically 5.5.3 above read with 5.7.3 below. For example, a shareholder cannot claim that he or she is unfairly prejudiced by being constantly be outvoted by the majority. In *Pakade NO and Others v Lukhanji Leisure (Pty) Ltd* 2017 JDR 0449 (ECG) [31] the court stated, footnotes omitted, that '[f]urthermore, a Court faced with an application of this nature must also not easily enter into the commercial space and must respect the majority rule. This is so because by

shareholder must not only prove that the conduct or the result complained of is prejudicial but must prove that it is unfairly prejudicial.³⁵⁰ The nature of prejudice that a shareholder has to prove for purposes of section 163 of the Act is considered next.³⁵¹ The controversial requirement that a shareholder (and now director) must suffer prejudice in his or her capacity as such is also evaluated.³⁵²

(b) Prejudice

(i) The nature of prejudice

For purposes of section 163 a wide interpretation is to be given to prejudice.³⁵³ The prejudice suffered by a shareholder is usually of a financial nature. The financial prejudice suffered can take the form of a loss in the value of shareholding, but may include a loss of income, dividends, profits and remuneration.³⁵⁴ Prejudice or

becoming a shareholder in a company, person undertakes by his contract to be bound by the decisions of the prescribed majority, if those decisions on the affairs of the company are arrived at in accordance with the law, even where they adversely affect his own rights'. See also *Knipe and Others v Kameelhoek (Pty) Ltd and Another* 2014 (1) SA 52 (FB) [31]. See further *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* [2013] 2 All SA 190 (GNP) [16.3] where the court held that '[c]orporate fairness is not requiring lawfulness to override unfairness of consequences, but is recognition of corporate context and its basic democratic principle of majority rule as a particle concept of fairness'. See also MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyreg (slot)' (1981) *TSAR* 223, 226-27.

³⁵⁰ See *Geffen and others v Martin and others* [2018] 1 All SA 21 (WCC) [29] and [31]; *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd* [2013] 2 All SA 190 (GNP) [90.5]; *De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others* [2016] JOL 36298 (GJ) [30] and [46]; *Oosthuizen v Oosthuizen and Others* [2017] JOL 39213 (WCC) [50].

³⁵¹ See 5.7.1.4 (b) below.

³⁵² See 5.7.1.4 (c) below.

³⁵³ See *Smyth and Others v Investec Bank Ltd and Another* 2016 (4) SA 363 (GP) [63] where the court stated that the concept or term 'prejudice' should be given a wide interpretation. See also *Smyth and Others v Investec Bank Ltd and Another* 2018 (1) SA 494 (SCA) where the judgment of the court *a quo* was upheld.

³⁵⁴ *Geffen and others v Martin and others* [2018] 1 All SA 21 (WCC) [26].

damage may also be suffered by a shareholder when the conduct complained of unfairly prejudices a debt owed by a company to the relevant shareholder.³⁵⁵ It will be difficult to prove prejudice if a shareholder cannot prove financial damage. This will be the case where the interests of a shareholder are unfairly disregarded.³⁵⁶

(ii) *Conduct affecting all shareholders*

It is uncertain whether reliance may be placed on the remedy in section 163 of the Act where all the shareholders of a company have been affected by the same unfair prejudicial conduct. There is authority available in support of the possible reliance on the unfair prejudice remedy in circumstances where the conduct complained of prejudiced all the shareholders of a company.³⁵⁷ This is because all the

³⁵⁵ *Geffen and others v Martin and others* [2018] 1 All SA 21 (WCC) [26].

³⁵⁶ *Geffen and others v Martin and others* [2018] 1 All SA 21 (WCC) [26]. See also 5.7.3.3 below for a more detailed discussion of the concept unfair disregard of interests.

³⁵⁷ See the comments made by the court regarding section 252 of the previous Act in *De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others* [2016] JOL 36298 (GJ) in considering an exception to the particulars of claim to the plaintiff. The court remarked [28] that 'there is no warrant for the proposition that section 252 does not apply where prejudice is suffered by all members' and further stated that '[i]t is artificial to reason that there is no unfair prejudice to a member or several members if all members are prejudiced'. See also L van Rooyen 'Versuim om Dividend te Verklaar: Onredelik Benadelende Optrede of Likwidasiëgrond' (1989) *TSAR* 706, 711 who criticised the approach by English courts that the oppression or unfair prejudice remedy did not find application when the conduct complained of affects all shareholders. According to Van Rooyen (711) such an approach is contrary to the opinion of most authors who ventured an opinion on the interpretation and application of the unfair prejudice remedy. According to the author (711) such an interpretation may lead to 'absurde en onaanvaarbare resultate' and ignores the fact that 'die gevaarlikste onderdrukkers juis diegene is wat kan bekostig om hulself terselfdertyd te benadeel'. See further MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyreg (slot)' (1981) *TSAR* 223, 225 who argued that oppression or unfair prejudice does not have to contain an element of discrimination by stating '[n]ietemin is dit duidelik dat diskriminasie nie 'n *sine qua non* vir onderdrukking is nie. Onderdrukking kan derhalwe bestaan selfs al word alle aandeelhouers gelykelyk benadeel' (footnotes omitted). Oosthuizen (226) further argued that oppression may be present even if the oppressors do not gain or strive to gain a personal or financial benefit.

shareholders' rights may be affected by the same conduct, but because shareholders have the same rights the various interests of shareholders may have the effect that the nature and manner of prejudice experienced by some shareholders may differ.³⁵⁸ However, in the context of section 163 of the Act, it may also be argued based on the strict wording of section 163 that the remedy may not be available to a shareholder in instances where all the shareholders of a company suffered prejudice from the same conduct.³⁵⁹

(c) *The capacity in which the prejudice is suffered*

When a shareholder wishes to rely on section 163, the shareholder will have to prove that he or she has been prejudiced in his or her capacity as such.³⁶⁰ If this approach of the courts is applied consistently it would also include that a director

³⁵⁸ See *De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others* [2016] JOL 36298 (GJ) [21] read with [28] and [36] where the court in considering the merits of an exception to a plaintiff's claim refused to accept an argument that a shareholder cannot argue that he or she suffered prejudice for purposes of section 252 of the previous Act, as all the shareholders were affected by the same conduct. The fact that the prejudice is committed against a company did not preclude a shareholder from relying on section 252 of the previous Act [28]. This approach is similar to the approach in England - see 2.6 above.

³⁵⁹ See PA Delport *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018) for comments on section 163 of the Act. He is of the view that despite the fact that the phrase 'to some part of the members of the company, may' has previously been interpreted to include situations where all the shareholders has been prejudiced equally, section 163(1) of the Act specifically refers 'a shareholder' as an applicant. He further argues that such an interpretation may be regarded too restrictive when viewed in light of the objective to balance the rights of shareholders and directors in section 7(i) of the Act

³⁶⁰ See *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP) [17.5]-[17.6] and [17.12]. In [17.12] where the court held '[a]s the applicant is relying specifically thereon I do not find it necessary to decide whether all the phrases must be read as a composite whole, but I do find that interests unfairly prejudiced must result in commercial unfairness affecting the applicant in such capacity'. See also the commentary in JL Yeats *et al Commentary on the Companies Act of 2008* (1st ed Juta 2018) on section 163 of the Act.

should prove that he or she has been prejudiced in his or her capacity as director.

The strict application of the requirement that a shareholder must be prejudiced in his or capacity as shareholder is open to criticism.³⁶¹ The effect of such an approach can also be illustrated with reference to recent case law. *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others*³⁶² serves as an example where the seller of the shares brought an application in terms of section 163 to compel the board of the company to record the purchaser's name in the securities register of the company. On the wording of section 163(1), the purchaser in *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others*³⁶³ did not have standing to rely on section 163.³⁶⁴ It is important to consider the argument of Oosthuizen who argued that the seller of the shares would not be successful in relying on the provisions of section 252 of the Companies Act 61 of 1973 as the seller of the shares would be unable to demonstrate that he or she suffered prejudice in his capacity as a member

³⁶¹ See Leon van Rooyen 'Die Statutêre Beskerming van Minderheidsbelange in Die Maatskappyreg – Belangrike Ontwikkelings in die Engelse Regspraak' (1988) 2 *TSAR* 268, 272. Van Rooyen (273) explains, for example, that it is often very difficult to make a clear distinction between the capacity of a member (shareholder) as shareholder or as director. This is especially the case when a shareholder is removed as a director from the board (273). Such a removal causes the shareholder to lose his ability to participate in the management of the company and may also deprive a shareholder from his or her income from the company (273). The shareholder often has no choice but to either dispose of his share on unfavourable terms or resort to liquidation, both of which options are often undesirable (273). Van Rooyen (274) suggested that one approach of alleviating this problem is to allow a member (shareholder) to approach the court irrespective of the capacity in which the member (shareholder) has been prejudiced. The author (274 read with 276 and 277) further supports a judicial approach where a wide interpretation is given to the interests of a member which will have the effect that a shareholder will have the right to obtain relief when interests related to his or her capacity as shareholder are prejudiced.

³⁶² 2014 (5) SA 179 (WCC).

³⁶³ *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC).

³⁶⁴ See 5.7.1, and more especially 5.7.1.1 above.

of the company as it would the purchaser of the shares that suffers the prejudice.³⁶⁵ However, it may now be argued that based on the decisions in *Smyth and Others v Investec Bank Ltd and Another*³⁶⁶ the interests of the nominee (for example, the seller) that may be subject to prejudice may include the contractual and economic interests of the beneficial owner.³⁶⁷ The argument of Oosthuizen³⁶⁸ on the requirement that a shareholder must be prejudiced in his capacity as such remains relevant in other contexts and in light of the judgment in *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others*³⁶⁹ which required that a shareholder should prove that he suffered prejudice in his capacity as shareholder.³⁷⁰

A further dimension of the judicial requirement that a shareholder must be prejudiced in his or her capacity as such, is the question whether it excludes a shareholder's reliance on the unfair prejudice remedy when a wrong is committed

³⁶⁵ MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg' (1981) *TSAR* 105, 110.

³⁶⁶ 2016 (4) SA 363 (GP) and 2018 (1) SA 494 (SCA).

³⁶⁷ For a discussion of the position of beneficial owners regarding their standing for purposes of section 163 of the Act see 5.7.1.2 above. See also FHI Cassim *et al Contemporary Company Law* (2nd ed, 2012) 759 who submit that a person may be able to rely to on section 163 if the conduct of the affairs of the company is conducted in a manner which prevents an applicant to obtain registration and such prevention is regarded as oppressive or unfairly prejudicial towards the applicant. For a more detailed discussion of the application of the unfair prejudice remedy in the context of the registration of shares see 5.9.12 below where a misalignment between the requirements for standing for purposes of section 163 of the Act and the available relief is illustrated.

³⁶⁸ MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg' (1981) *TSAR* 105, 110.

³⁶⁹ [2013] 2 All SA 190 (GNP).

³⁷⁰ *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP) [17.5]. See also the commentary on section 163 by PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018) who points out that section 163 of the Act does not require that the interests of an applicant must be affected or unfairly prejudiced in a particular capacity.

against the company and the shareholder is indirectly prejudiced.³⁷¹ The position must be considered in light of the fact that a company has separate legal personality and the availability of the statutory derivative action.³⁷² Allowing a shareholder relief based on wrongs committed against the company may have some undesirable consequences.³⁷³ However, on the other hand the utilisation of the derivative action may not always address the underlying unfair prejudice suffered by the shareholders of a company.³⁷⁴ In light of the fact that the courts enjoy a wide discretion under section 163(2) of the Act and that the derivative action may in some instances be unable to provide the required redress, it appears justified that relief may be granted to shareholders based on wrongs committed against the company.³⁷⁵

³⁷¹ Leon van Rooyen 'Die Statutêre Beskerming van Minderheidsbelange in die Maatskappyreg – Belangrike Ontwikkelings in die Engelse Regspraak' (1988) 2 *TSAR* 268, 278.

³⁷² See also Leon van Rooyen 'Die Statutêre Beskerming van Minderheidsbelange in die Maatskappyreg – Belangrike Ontwikkelings in die Engelse Regspraak' (1988) 2 *TSAR* 268, 277-78. For a detailed discussion of the relationship between the unfair prejudice remedy and the derivative actions in the Act see 5.9.15 below.

³⁷³ Leon van Rooyen 'Die Statutêre Beskerming van Minderheidsbelange in die Maatskappyreg – Belangrike Ontwikkelings in die Engelse Regspraak' (1988) 2 *TSAR* 268, 279 footnote 45 points out that companies may be entangled in multiple legal proceedings which could have been more effectively disposed of in terms of derivative proceedings. Such an approach further exposes the wrongdoers to liability to the company and the aggrieved shareholders. Some forms of relief may affect the interests of creditors and impact of the principle of the legal personality of a company. It may also lead to the redundancy of the derivative action.

³⁷⁴ Leon van Rooyen 'Die Statutêre Beskerming van Minderheidsbelange in die Maatskappyreg – Belangrike Ontwikkelings in die Engelse Regspraak' (1988) 2 *TSAR* 268, 281.

³⁷⁵ Leon van Rooyen 'Die Statutêre Beskerming van Minderheidsbelange in die Maatskappyreg – Belangrike Ontwikkelings in die Engelse Regspraak' (1988) 2 *TSAR* 268, 280 explains that a court would for purposes of section 252 of the Act take into consideration the status and nature of the relationship between the members (shareholders), the prospect of the parties working together in future; the reasonableness for requiring a shareholder to remain a member (shareholder) of the company; and the fact that the investment of the member (shareholder) are for all practical purposes

5.7.2 The jurisdictional grounds in section 163(1)

5.7.2.1 The formulation and interpretation of section 163 of the Act

After an applicant (or plaintiff) has satisfied the standing requirements for purposes of section 163, a shareholder or director must prove the jurisdictional requirements of section 163(1). These jurisdictional requirements require that a shareholder or director must prove a result or conduct that is oppressive, or/and is unfairly prejudicial to or unfairly disregards the interests of the applicant.³⁷⁶ To be entitled to relief in terms of section 163 an applicant should place 'clear evidence'³⁷⁷ before a court of oppressive, unfairly prejudicial conduct or conduct that unfairly disregards the interests of a shareholder or director.³⁷⁸ When a shareholder or director is able to prove the jurisdictional requirements he or she would be entitled to the relief deemed fit by the court.³⁷⁹

locked in the company as factors in the exercise of its discretion to grant relief of a personal nature. Van Rooyen (282) argues that although there are instances where the provision of personal relief is justified when wrongs are committed against a company, it is undesirable that the provisions of the statutory personal remedy be invoked in every instance where a wrong is committed against a company. See *Civils 2000 Holdings (Pty) Ltd v Black Empowerment Partner Civils 2000 (Pty) Ltd and others* [2011] 3 All SA 215 (WCC) [21] where the court held, in dismissing an exception to the particulars of claim of the plaintiff, that 'the breach of their fiduciary duty on the part of the directors who represent the first defendant on the board of the company is conduct of the company as contemplated under section 252 of the Act, is legally sound. In my view, there is therefore no merit in the first ground of exception raised by first and third respondents'. The last mentioned defendant argued [12] that the plaintiff could not successfully rely on section 252 of the previous Act, as the conduct complained of, a breach of the fiduciary duties of directors, does not constitute conduct by the company.

³⁷⁶ Companies Act 71 of 2008, s 163(1)(a)-(c).

³⁷⁷ *Harilal v Rajman and Others* [2017] 2 All SA 188 (KZD) [83].

³⁷⁸ *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [55].

³⁷⁹ Companies Act 71 of 2008, s 163(2).

In drafting the provisions of section 163 the legislature made use of wide and open concepts. Section 163 requires a liberal interpretation to advance the remedy.³⁸⁰ The use of wording of this nature in this section does create some degree legal uncertainty. One will not always be able to establish exactly what types of conduct or results will be met with the application of section 163 by only considering the wording of the provision. Weighing against the degree of uncertainty created by the wording of section 163, the provision dresses courts with the freedom to consider the facts and circumstances of each case and to tailor the relief to fit the unique aspects of a particular case.³⁸¹ An analysis of judgments delivered in terms of section 163 reveals that an interpretation that advances the remedy is preferred to an interpretation which restricts the application of the remedy.³⁸²

In summary, a shareholder or director may rely on this section if the conduct of the company or a related person³⁸³ has had a result that is oppressive or is unfairly prejudicial or unfairly disregards the interests of the applicant.³⁸⁴ The grounds on which a shareholder or a director may rely are stipulated in section

³⁸⁰ *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) [52]-[53]; *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [53] where it was held that the provisions in section 163 are wider than that of section 252 of the Companies Act 61 of 1973. *Kudumane Investment Holdings Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ) [60]; *Grancy v Grancy Property Limited v Manala and Others* [2013] 3 All SA 111 (SCA) [26]; *De Villiers v Kapela Holdings (Pty) Ltd* 2016 JDR 1942 (GJ) [62].

³⁸¹ See Leon van Rooyen 'Die Statutêre Beskerming van Minderheidsbelange in die Maatskappyreg – Belangrike Ontwikkelings in die Engelse Regspraak' (1988) 2 *TSAR* 268, 285 for a similar argument in the context of section 252 of the previous Act.

³⁸² *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) [52]; and [53]; *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ) [60] and [61].

³⁸³ See definition of related person in section 2 of the Act.

³⁸⁴ See specifically section 163(1)(a) of the Act.

163(1)(a)-(c). These provisions are evaluated below.³⁸⁵

5.7.2.2 The jurisdictional requirements of section 163(1) of the Act

(a) Section 163(1)(a)

(i) *The tense in which section 163(1)(a) is formulated*

It is important to notice the tenses used in the formulation of section 163(1). In particular section 163(1)(a) requires conduct that 'has had a result' that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an applicant. It is clear from the wording of section 163(1)(a) that the conduct complained of must have produced a result at the time of the legal proceedings.³⁸⁶ This formulation of the provision has the further important implication of excluding the application of section 163(1)(a) to threatening conduct.³⁸⁷ This implies that

³⁸⁵ See 5.7.2.2 below.

³⁸⁶ *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ) [52]-[53]. The court in *Kudumane* [53] specifically stated that there are 'no reason why there cannot be a continuing state of affairs which constitutes the complaint – after all an act may be repeated; an omission may be enduring; the current state of affairs will certainly have commenced in the past and may continue indefinitely'. See also *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP) [17.6]. See also 5.6.2.2 (a)(ii) for a further discussion of the result-requirement.

³⁸⁷ See *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ) [52]. A Sibanda 'The Statutory Remedy for Unfair Prejudice in South African Company' (2013) 38:2 *JJS* 58, 68-69 argues that the provisions of section 252 spoke to the conduct complained of. The author (68) further argues that one of the weakness created by the approach is that an applicant first has to wait for the effects of the conduct complained of to materialise before such an applicant can approach a court to seek relief in terms of section 252 of the Companies Act 61 of 1973. See also 5.2.4.3 (d) above and 5.9.2.3 below for a similar criticism against the provisions of section 252 of the previous Act. See further 5.9.2.3 and 5.9.2.4 below for a discussion of the application of section 163 for protection against future and/ threatening conduct.

threatening conduct is not covered by the provision.³⁸⁸ However, conduct which has materialised a result and is continuing into the future is not excluded from relief under section 163.³⁸⁹

(ii) *The result requirement*

A reading of section 163 also raises some other interesting questions. In the context of section 163(1)(a) it is specifically provided that the conduct of the company or related person should have had a *result* as a consequence that is oppressive or is unfairly prejudicial to the applicant.³⁹⁰ In *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others*³⁹¹ the court held that the exposure of the applicant to an unreasonable business risk is a result for purposes of section 163.³⁹² The court in *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others*³⁹³ held that the uncertainty regarding the identity and the validity of the

³⁸⁸ *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ) [52]. See the criticism of E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 350 on the failure of section 252 of the Companies Act 71 of 2008 to provide for relief against threatening conduct.

³⁸⁹ *Kudumane Investment Holdings Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ) [53] and [55].

³⁹⁰ See *Pakade NO and Others v Lukhanji Leisure (Pty) Ltd* 2017 JDR 0449 (ECG) [28]; *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) [46] read with [53]; *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ) [57]; *Knipe and Others v Kameelhoek (Pty) Ltd and Another* 2014 (1) SA 52 (FB) [31]. See in this regard also *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP) [17.6] and [19] where the court held that it is the effect of the conduct that is crucial to determine whether the jurisdictional requirements of section 163(1) are met.

³⁹¹ 2013 (2) SA 331 (GSJ).

³⁹² 2013 (2) SA 331 (GSJ) [46] read with [53].

³⁹³ *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ).

appointment of the directors of a company can be regarded as a result for purposes of section 163.³⁹⁴

The result requirement in the first part of section 163(1)(a) appears not to be a requirement if a shareholder or director argues that the conduct complained of unfairly disregards the interests of the shareholder or director which further creates uncertainty as what will be regarded as a result of purposes of section 163(1)(a).³⁹⁵ According to *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others*³⁹⁶ the grounds in section 163(1) must be read as a whole.³⁹⁷ If such an approach is followed it is implied that section 163(1)(b) and (c) would require a result although these sections do not expressly make reference to a result.³⁹⁸ If such an approach is not followed the impression may be created that relief may be provided based only on the nature of the act or omission committed without taking into consideration the nature of the consequences flowing from such conduct.³⁹⁹

Until the legislature intervenes or until the Supreme Court of Appeal or Constitutional Court delivers a judgment dealing specifically with this aspect, the position remains uncertain. It will be recommended below that some legislative amendments be introduced to clarify the position and to provide guidance on the

³⁹⁴ [2012] 4 All SA 203 (GSJ) [57].

³⁹⁵ Section 163(1)(b) and (c) refers to the manner in which the conduct complained of took place. See also 5.7.2.2 (b) and (c) below.

³⁹⁶ 2014 (5) SA 179 (WCC).

³⁹⁷ 2014 (5) SA 179 (WCC) [54].

³⁹⁸ Christiaan Swart and Marianne Lombard 'Vonnisbespreking: Statutêre Aandeelhouders-beskerming: Die Geregtelike Beoordeling van Onderdrukkende en Onredelik Benadelende Direksiebesluite *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC)' (2015) 12:1 *Litnet Akademies* 387, 393-94.

³⁹⁹ The relationship between the nature of the act or omission (conduct) and the nature of the results or consequences flowing therefrom is considered in 5.7.3.6 below.

application of this provision in accordance with a principled approach.⁴⁰⁰ It is submitted that the result requirement rather refers to the fact that a court must apply an objective test to determine whether the jurisdictional requirements of section 163 had been proven by a shareholder or director.⁴⁰¹ Such a test will make the subjective intentions of the parties involved irrelevant, but may have an effect on the nature of relief that may be granted.⁴⁰²

(b) Section 163(1)(b)

The wording of section 163(1)(b) follows substantially the same wording as section 163(1)(a). However, section 163(1)(b) does differ from section 163(1)(a) in two respects, namely the tense in which section 163(1)(b) is formulated and the reference in this section to the manner with which conduct is committed.

(i) Tense in which section 163(1)(b) is formulated

Section 163(1)(b) applies to when the business of a company ‘is being or has been carried on or conducted’ in a particular way. The tense in which this provision is formulated differs from the tense in which section 163(1)(a) is formulated. It is

⁴⁰⁰ See 6.3.4 below.

⁴⁰¹ See also *Geffen and others v Martin and others* [2018] 1 All SA 21 (WCC) [31] read with [78]; *De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others* [2016] JOL 36298 (GJ) [30].

⁴⁰² See *De Villiers v Kapela Holdings (Pty) Ltd* 2016 JDR 1942 (GJ) [70] where the court made specific reference to the *mala fide* conduct of the respondents. It should be noted that the applicant in this case disputed the lawfulness of her retrenchment and the implementation of the deemed offers in terms of the shareholders’ agreement. The applicant sought an interdict to preserve her rights in restraining the implementation of a shareholders’ agreement pending the outcome of the proceedings instituted by the applicant. The court held that the applicant had a right not to be unlawfully excluded from favourable transactions. This judgment therefore does not serve as authority that the subjective intention of the respondent should be taken into consideration when determining whether the jurisdictional requirements of section 163 have been met.

difficult to explain the inconsistent use of tenses in the formulation of the grounds stipulated in section 163(1)(a)-(c).

(ii) *The manner with which the business of a company is conducted*

While section 163(1)(a) required a *result*, section 163(1)(b) only refers to the *manner* in which the business of a company is conducted. A shareholder or director may be entitled to relief when the *manner* in which the business a company is conducted can be described as oppressive, or unfairly prejudicial to or in unfair disregard of the interests of an applicant. Such an approach will result that conduct may be found to be oppressive or unfairly prejudicial without considering the effects or consequences flowing from the conduct complained of. This approach will also be inconsistent with the interpretation of the court in *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others*⁴⁰³ requiring that the grounds in section 163(1) must be read as a whole.⁴⁰⁴

(iii) *The rationale of section 163(1)(b) and the reference to the business of a company*

The rationale for the introduction of this ground in section 163 may be viewed against the judgment in *Investors Mutual Funds Ltd v Empisal (South Africa) Ltd*⁴⁰⁵ in terms of section 252 of the previous Act. In this case the court held that it did not have the jurisdiction to intervene in the internal affairs or ordinary running of a company.⁴⁰⁶ This approach of the court is problematic as it establishes the principle

⁴⁰³ 2014 (5) SA 179 (WCC).

⁴⁰⁴ See 5.7.2.2 (a)(ii) above.

⁴⁰⁵ 1979 (3) SA 170 (W).

⁴⁰⁶ *Investors Mutual Funds Ltd v Empisal (South Africa) Ltd* 1979 (3) SA 170 (W) 177. In this case a group of minority shareholders attempted to obtain an interdict against the holding of a meeting for

that a court would never interdict certain conduct of a company as it would be regarded as an interference with the internal affairs of a company over which the court has no jurisdiction.⁴⁰⁷ Viewed against the purpose of the statutory unfair prejudice remedy and the modern approaches to the interpretation of statutory unfair prejudice remedies, the judgment in *Investors Mutual Funds Ltd v Empisal (South Africa) Ltd*⁴⁰⁸ can be seen as unjustifiably restrictive. It is submitted in light of the judgment in this case, that the purpose of section 163(1)(b) may be seen as disposing of any uncertainty regarding the power of a court to intervene in the internal affairs of a company by confirming in the section that a court now has the jurisdiction to do so in terms of section 163. However, this will only be done while taking established corporate law principles into consideration.

It is further interesting to note that section 163(1)(b) refers to the business and not the 'affairs' of a company. It is unfortunate that the word 'affairs' or 'business and affairs' are not used in the section. The current use of 'business' in section 163(1)(b) creates the impression that one has to differentiate between the 'business' of a company on the one hand and its 'affairs' on the other. Although there usually is an overlap between the affairs and the business of a company, the 'affairs' of a company are usually regarded as a wider concept as the 'business' of a company.

(c) Section 163(1)(c)

Section 163(1)(c) deals with the exercise of powers by a director or a prescribed officer of the company or a person related to the company. From this section it is

the purpose of obtaining approval in terms of section 228 of the previous Act to sell the company's assets, pending an investigation by the Minister of Economic Affairs.

⁴⁰⁷ See 5.9.2 below where such a reactive approach to prejudice is criticised.

⁴⁰⁸ 1979 (3) SA 170 (W).

clear that a complaint can be brought against a director or prescribed officer if the powers entrusted to the particular director or prescribed officer are exercised in a manner that it is oppressive or unfairly prejudicial or unfairly disregards the interests of the applicant. There is doubt whether this ground adds something more that is not already covered by the grounds in section 163(1)(a) and (b).⁴⁰⁹ In this regard it is argued that a corporate power will usually be exercised by a director or prescribed officer and such exercise of power is conduct by the company.⁴¹⁰

5.7.3 The concepts oppressive, unfair prejudicial or an unfair disregard of interests (commercial unfairness)

5.7.3.1 Introduction

The Act does not define the terms or concepts ‘oppressive’ or ‘unfairly prejudicial’ nor does it describe what constitutes an unfair disregard of the interests of a shareholder or director.⁴¹¹ Content should be given to the concepts in section 163 of the Act through judicial interpretation. The meaning of these concepts or terms may be determined with reference to section 252 of the previous Act.⁴¹² However, the use of the terms or concepts ‘oppressive’ or ‘unfairly prejudicial’ or an ‘unfairly disregard of the interests’ of a shareholder or director in section 163 of the Act,

⁴⁰⁹ See *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [53].

⁴¹⁰ See, for example, *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [53].

⁴¹¹ See also M Lehloenyana and T Kgarabjang ‘Defining the Limits of the “Oppression Remedy” in the Wake of the Section 163 of the Companies Act 71 of 2008 *Grancy Properties Limited v Manala* [2013] 3 All SA 111 (SCA)’ (2015) 2 *Obiter* 511, 514 who argue that the definition of these terms is uncertain.

⁴¹² *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ) [60].

differs from the terms and concepts used in section 252 of the previous Act to describe the conduct against which relief may be sought in terms of the last mentioned remedy. Section 252 of the previous Act referred to conduct that was ‘unfairly prejudicial, unjust or inequitable’.⁴¹³

When interpreting legislative provisions, the rules of interpretation must be observed.⁴¹⁴ One of the rules of statutory interpretation requires that each and every word of the relevant legislative provision must be given a meaning.⁴¹⁵ When this rule is to be applied to section 163, a court should assign an individual meaning to the terms ‘oppressive’ and ‘unfairly prejudicial’ and ‘unfairly disregards of the interests’.⁴¹⁶ Drawing from judgments in terms of section 252 of the previous Act the court in *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others*⁴¹⁷ described conduct that is covered by the provisions of the Act as conduct that can be described as ‘burdensome’, or deprives a minority shareholder from ‘a fair participation in the affairs of the company’, or conduct which is ‘unfairly prejudicial, unjust or inequitable’ or conduct that is ‘doing them an injury in their business’. When one interprets the provisions and concepts of section 163(1) one needs to pay specific attention to the use of term ‘oppressive’ in

⁴¹³ It is important to note that the previous Act only used the term ‘oppressive’ in its heading and not within the body of the provision. It is argued below that the reintroduction of the term oppressive is unfortunate in light of the development of the unfair prejudice remedy in South Africa and other jurisdictions. See 5.7.3.1 below.

⁴¹⁴ See in this regard 5.4 and 5.5 above.

⁴¹⁵ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) [18]. See also *NST Ferrochrome (Pty) Ltd v Commissioner for Inland Revenue* 2000 (3) SA 1040 (SCA) where the court held that when interpreting legislation effect should as far as possible be given to each word or phrase in order to avoid tautology.

⁴¹⁶ All these concepts are found in section 163(1)(a)-(c) of the Act.

⁴¹⁷ [2012] 4 All SA 203 (GSJ) [60].

conjunction with concepts such as unfairly prejudicial or an unfair disregard of the interests of an applicant. The use of the concepts 'oppressive', 'unfairly prejudicial' and an 'unfair disregard' is analysed below.

5.7.3.2 Oppressive

The previous Act only made reference to the term 'oppressive' in the heading of section 252.⁴¹⁸ In contrast with section 252 of the previous Act, section 163 uses the term 'oppressive' in both the heading and text of the provision.⁴¹⁹ The reintroduction and use of the term 'oppressive' is against the trend in other jurisdictions of moving away from using the term and replacing it with the term or concept of 'unfairly prejudicial' conduct.⁴²⁰ The use of the term 'oppressive' is also

⁴¹⁸ See the commentary in JL Yeats *et al Commentary on the Companies Act of 2008* (1st ed Juta 2018) on section 163 of the Act.

⁴¹⁹ It is interesting to note that in section 111*bis* of the Companies Act 46 of 1926 the term 'oppressive' was the only term used to describe the conduct that an applicant could complain of. Section 111*bis* of the Companies Act 46 of 1926 was the predecessor of section 252 of the previous Act.

⁴²⁰ See Chapter 2 above for the position in England. However, see Chapter 3 above for the position in Australia and Chapter 4 above for the position in Canada where the concept oppressive or oppression was retained, but wider concepts such as unfair prejudice were added to the grounds for relief. These jurisdictions removed the reference to oppressive conduct from their corporate law in order to move away from the restrictive meaning the courts have given to the concept or term oppressive or oppression. One of the restrictive interpretations given to the term 'oppressive' was that a person had to prove that the affairs of a company were conducted in an unlawful manner to be able to rely on the oppression remedy for relief. In *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [55] and [57] the court held that the term 'oppression' refers to unfairness 'if not something worse'. The court ([60]) remarked with the reference to the English case of *Scottish Co-operative Wholesale Society Ltd v Meyer* [1958] 3 All ER 66 (HL) that the term 'oppression' includes the element of legality. In *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP) [19.5] the court expressly held that the term 'unfairly prejudicial' carries a wider meaning than the term 'oppressive'. The terms should not be equated. The court clearly stated its preference for the wider term 'unfairly prejudicial'.

strange in light of the recommendation of the Van Wyk De Vries Commission in relation to section 111*bis* of the Companies Act 46 of 1926 – the predecessor of section 252 of the Companies Act 61 of 1973 – that terminology must be used that will extend the application of the remedy as the use of the concept of ‘oppression’ is too restrictive.⁴²¹ Conduct or a result that is ‘oppressive’ is regarded by some commentators and courts as being harsher than a result or conduct that is only ‘unfairly prejudicial’ or ‘unfairly disregards the interests of the applicant’.⁴²² In *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others*⁴²³ the court held that with the addition of the ground ‘unfairly prejudicial’ to the interests of the applicant, the legislature had the objective to extend the remedy beyond grounds that are usually regarded as oppressive or that are ‘unfairly prejudicial, unjust or inequitable.’⁴²⁴

From this reasoning it follows that although the establishment of oppressive conduct or an oppressive result can be a starting point, section 163 covers conduct

⁴²¹ See the Main Report of the Commission of Enquiry into the Companies Act (RP 45/1970) 246-47 read with 250.

⁴²² In this regard the court in *Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [54] held that conduct that is found to be oppressive or an unfair disregard of interests would also translate into the conduct being unfairly prejudicial. See the commentary on section 163 by PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018) who points out that the concepts oppressive conduct or result include the unfair disregard of interests, but that the ‘the opposite will not hold true’.

⁴²³ 2013 (2) SA 331 (GSJ).

⁴²⁴ *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) [53.1]. In the context of ‘oppressive’ conduct see *Grancy Property Limited v Manala and Others* [2013] 3 All SA 111 (SCA) [23]. See also *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 (1) SA 517 (C) 525-26 where it was held that ‘oppressive’ can be defined as ‘unjust or harsh or tyrannical’ or ‘burdensome, harsh and wrongful’ or which involves ‘at least an element of lack of probity or fair dealing’ or ‘visible departure from the standards of fair dealing’.

and results of a much wider ambit as what can be described as oppressive.⁴²⁵ Thus, the term 'oppressive' should be interpreted with the other grounds set out in section 163(1) which entitles a shareholder or director to relief.⁴²⁶

5.7.3.3 Unfair prejudice

To obtain relief an applicant must not only show that the result or the manner of the conduct complained of is prejudicial but should convince the court that the conduct or the result thereof is unfair.⁴²⁷ This concept was incorporated into section 252 of the previous Act on recommendation of the Van Wyk De Vries Commission in an attempt to free the application of the remedy from the restrictive interpretation of the concept 'oppression' in section 111*bis* of the Companies Act 46 of 1926.⁴²⁸

⁴²⁵ The court in *Omar v Inhouse Venue Technical Management (Pty) Ltd and Others* 2015 (3) SA 146 (WCC) [9] held that an applicant would be entitled to relief in terms of section 163 where an applicant has proven a 'lack of probity or fair dealing, or a violation of the conditions of fair play on which every shareholder is entitled to rely'. A Sibanda 'The Statutory Remedy for Unfair Prejudice in South African Company' (2013) 38:2 *Journal for Juridical Science* 58, 66 n 44 argues that when the courts had to establish whether particular conduct was unfairly prejudicial, unjust or inequitable for purposes of section 252 of the previous Act, the interpretation of 'oppressive' conduct was used as a starting point.

⁴²⁶ See also Christiaan Swart and Marianne Lombard 'Vonnisbespreking: Statutêre Aandeelhoudersbeskerming: Die Geregtelike Beoordeling van Onderdrukkende en Onredelik Benadelende Direksiebesluite *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC)' (2015) 12:1 *Litnet Akademies* 387 at 393 who argue that the grounds in section 163(1) should not be interpreted to form separate concepts or grounds, but should be viewed as a whole in which reasonableness in a commercial context is promoted.

⁴²⁷ In *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [55] the court held that an applicant should prove that the conduct is prejudicial and unfair. See also *Omar v Inhouse Venue Technical Management (Pty) Ltd and Others* 2015 (3) SA 146 (WCC) [8].

⁴²⁸ See the Main Report of the Commission of Enquiry into the Companies Act (RP 45/1970) 250.

5.7.3.4 Unfair disregard of interests

In *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* the court left open the question on whether specific meaning must rather be given to each of the terms or concepts stated in section 163(1).⁴²⁹ The court avoided the question by stating that the applicant relied specifically on an unfair disregard of his interests and further stated that such an unfair disregard of interests must result in 'commercial unfairness' affecting the applicant in his capacity as shareholder.⁴³⁰ The reference by the court to *Louw and Others v Nel*⁴³¹ and more specifically the reference to the phrase 'unfairly prejudicial to the interest of a dissenting minority' justifies the inference that the ground, 'unfairly disregards the interests' of the applicant, can be equated to conduct that is 'unfairly prejudicial, unjust or inequitable'.⁴³² Viewed in this light it cannot be argued that the concept 'unfairly disregards the interests of the applicant' is a new ground upon which an applicant can rely. However, the court in *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others*⁴³³ held that the ground 'unfairly prejudicial to the interests' of the applicant is a new ground upon which relief can be sought.⁴³⁴ It is submitted that

⁴²⁹ [2013] 2 All SA 190 (GNP) [17.12]. See also Leon van Rooyen 'Die Statute Beskerming van Minderheidsbelange in die Maatskappyreg – Belangrike Ontwikkelings in die Engelse Regspraak' (1988) 2 TSAR 268, 285 where he argued that the concept or words 'unfairly prejudicial' carries a wider meaning than the term 'oppressive'.

⁴³⁰ *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP) [17.12].

⁴³¹ [2011] 2 All SA 495 (SCA).

⁴³² *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP) [17.12].

⁴³³ 2013 (2) SA 331 (GSJ) [53].

⁴³⁴ See further A Sibanda 'The Statutory Remedy for Unfair Prejudice in South African Company' (2013) 38:2 JJS 58, 73.

this concept can also be understood to provide for those instances where an applicant is excluded from participation in a company in breach of a mutual understanding or agreement which may take the form of a legitimate expectation. Prejudice in this form does not always take the form of a financial nature.⁴³⁵

5.7.3.5 The concept of commercial fairness (or unfairness)

Neither the Act nor the courts provide clear guidance on the correct interpretation and application of the provisions of section 163. This is evident from the judgments on section 163(1), where the courts seldom pronounced on which specific grounds in section 163(1) a judgment was based. Although the result of the judgments in terms of section 163 is aligned with the purpose of the statutory unfair prejudice remedy, the failure of the courts to deal in detail with the correct interpretational approach of the grounds and conduct described in section 163(1)(a)-(c) stifles the development of principles in accordance with which cases based on the statutory unfair prejudice remedy can be disposed of. Though some cases do indicate that the provisions of section 163(1)(a)-(c) must be read as a whole, these cases do not provide a detailed reasoned justification for the deviation from the general rules of interpretation in this regard.

A similar problem presents itself in respect of the interpretation of the concepts oppressive, unfairly prejudicial and an unfair disregard of interests. While some courts adopted the view that these concepts must be understood to form a composite whole or unified concept, other court courts expressed some discomfort

⁴³⁵ See also 5.7.1.4 (b) above.

with such approach.⁴³⁶ An evaluation of the provisions of section 163 reveals that the section is aimed at providing relief⁴³⁷ in circumstances where a shareholder⁴³⁸ or director⁴³⁹ is unfairly prejudiced as a result of the conduct of a company and/or related persons,⁴⁴⁰ including the directors of a company or its shareholders.⁴⁴¹

Case law supports the view of Delpont who argues that section 163 introduces a new dimension to contracts as these contracts will be measured against ‘oppressive and unfairly prejudicial conduct’.⁴⁴² In terms of section 163 conduct has to be evaluated against the concept of ‘commercial fairness’.⁴⁴³ Therefore the concepts in section 163 must be read and interpreted in such a manner as to form elements of the concept commercial fairness against which the result of the conduct complained of is measured.⁴⁴⁴

⁴³⁶ With reference to the position in Australia the court in *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) [49] read with [52] noted in [49] that ‘the words “oppressive to”, “unfairly prejudicial to” and “unfairly discriminatory to” should be seen as a composite whole and the individual elements mentioned in the section should be considered merely as different aspects of the essential criterion, namely, commercial unfairness’. See *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP) [15.4] where the court held that the Australian approach that concepts should be interpreted as to form a ‘composite whole’ is not an acceptable approach as South African law requires that ‘if possible effect is given to each word or phrase in order to avoid tautology’. See also 3.5.5.2 above for the position in Australia.

⁴³⁷ See 5.9 below.

⁴³⁸ See 5.7.1.1 above.

⁴³⁹ See 5.7.1.3 above.

⁴⁴⁰ See section 1 read with section 2(1)(a)-(c) of the Act. See also 5.7.7 below.

⁴⁴¹ See 5.7.2.1 and 5.7.2.2 above.

⁴⁴² See *Kudumane Investment Holdings Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ) [61] n 14.

⁴⁴³ *Visser Citrus (Pty) Ltd v Goede Hoop Citrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [54].

⁴⁴⁴ See also *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP) [17.12] where the court described the criterion for relief under section 163 of the Act as commercial unfairness. In *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others*

In essence an applicant must prove unfairness, and more specifically commercial unfairness. Commercial unfairness will be determined objectively⁴⁴⁵ while taking into consideration established corporate law principles⁴⁴⁶ together with any other relevant considerations.⁴⁴⁷ It needs to be stressed that the fairness or unfairness of the results flowing from the conduct needs to be evaluated and not the nature of the conduct itself.⁴⁴⁸ Because the application of section 163 is dependent on the commercial unfairness of the result of the conduct complained of, a shareholder or director is not required to prove conduct that is unlawful.⁴⁴⁹ The

[2013] 2 All SA 190 (GNP) [16.3] the court held that it is the fairness of the consequences of the conduct. The fairness of the consequences will be adjudicated in the corporate context taking into consideration the principle of majority rule as an aspect of fairness. See also *Pakade NO and Others v Lukhanji Leisure (Pty) Ltd* 2017 JDR 0449 (ECG) [31] where the court held, footnotes omitted, that 'the act or conduct complained of must be judged in a commercial sense. Furthermore, a court faced with an application of this nature must also not easily enter into the commercial space and must respect the majority rule'. The court in *De Villiers v Kapela Holdings (Pty) Ltd* 2016 JDR 1942 (GJ) [75] held that the provisions of section 163 of the Act should be applied while taking into consideration established principles of company law which 'include notion of bona fides, probity, fair dealing, and respect for clear and legitimate understandings between company members'.

⁴⁴⁵ *Geffen and Others v Martin and Others* [2018] 1 All SA 21 (WCC) [31] and [78]; *De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others* [2016] JOL 36298 (GJ) [30]. See also L van Rooyen 'Versuim om Dividend te Verklaar: Onredelik Benadelende Optrede of Likwidasiëgrond' (1989) TSAR 706, 712 in the context of section 252 of the previous Act.

⁴⁴⁶ *Pakade NO and Others v Lukhanji Leisure (Pty) Ltd* 2017 JDR 0449 (ECG) [31]. See also *Geffen and others v Martin and Others* [2018] 1 All SA 21 (WCC) [24].

⁴⁴⁷ Such as the protection of legitimate expectations.

⁴⁴⁸ See 5.7.3.6 below.

⁴⁴⁹ In *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP) [16.3] the court held that it is the fairness of the consequences of the conduct that should be evaluated and not necessarily the lawfulness thereof. See also the *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC). In *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [65] the court remarked that it will seldom be found that the conduct of a director or directors is unfairly prejudicial when there is not a breach of the duties of directors in section 76 of the Act or a breach of a company's Memorandum of Incorporation. It is submitted that although such an approach seems sensible it needs to be

motive of the party whose conduct is complained of is generally also irrelevant for the establishing commercial unfairness.⁴⁵⁰ Although the remedy in section 163 of the Act is flexible, the starting point for the determination of commercial unfairness remains the wording of the provision.

5.7.3.6 Conduct and result

The requirement that a shareholder or director has to prove that the result or consequences of the conduct complained must justify relief is not new. In terms of section 252 an applicant had to prove that the *conduct* (act or omission) and the *consequences* (result) of the conduct complained of were 'unfairly prejudicial, unjust or inequitable'.⁴⁵¹ In contrast with the position under section 252 of the previous Act

cautioned that the criterion for relief in terms of section 163 of the Act remains the wording of the provision. For example, the fact that directors acted *bona fide* and in the interests of the company does not place the conduct of directors beyond scrutiny in terms of section 163. This is because it is commercial fairness of the result or consequences of the conduct complained of that should be evaluated and not necessarily the lawfulness thereof. See also MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg' (1981) *TSAR* 223, 229. Oosthuizen (229) further warns that the problematic meaning of *bona fide* and in the interests of the company should not be applied to form part of the statutory criteria to obtain relief in terms of section 252 of the previous Act.

⁴⁵⁰ *Grancy Property Limited v Manala and Others* [2013] 3 All SA 111 (SCA) [27]. See also MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg' (1981) *TSAR* 223, 226 regarding section 252 of the previous Act.

⁴⁵¹ *Garden Province Investment v Aleph (Pty) Ltd* 1979 (2) SA 525 (D) 531; *Ben-Tovim v Ben-Tovim and Others* 2001 (3) SA 1074 (C) 1091. For criticism of *Garden Province Investment v Aleph (Pty) Ltd* 1979 (2) SA 525 (D) see E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 361-62 where she agrees with the argument of MJ Oosthuizen (1981) *TSAR* 223-240 that the judgment in *Garden Province* regarding section 252 of the previous Act requiring that both the conduct and the result must be unfairly prejudicial is not binding. Hurter (361) further argues that the nature of the conduct can only be determined with reference to the consequences or results flowing from the conduct. Therefore, it does not follow that both the conduct and the results from the conduct should be unfairly prejudicial (361). Such an interpretation or requirement would limit the application of the

the court in *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* held that the effect or result of the conduct needs to be evaluated and not the act complained of.⁴⁵² However, it appears that the Supreme Court of Appeal adopted a different view on this aspect. In citing *Livanos v Swartzberg and Others*⁴⁵³ as authority the court held that ‘it is not the motive of the conduct complained of that the court must look at but the conduct itself and the effect which it has on the other members of the company’.⁴⁵⁴ This position and approach under section 252 of the previous Act were criticised⁴⁵⁵ and the approach now adopted by the Supreme Court of the Appeal may be open to the same criticism. This will be the case if a court requires that the act and the effect or result of the act must be unfairly prejudicial.⁴⁵⁶ Such an approach will unjustifiably restrict the application of section

remedy in section 252 of the previous Act as the applicant would carry an additional burden of proof (361). See further the commentary on section 163 of the Act by PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018) who points out that the judgment in *Garden Province* has only been followed in *Oosthuizen v Oosthuizen and Others* [2017] JOL 39213 (WCC). Regarding the words ‘unfairly prejudicial, unjust or inequitable’ see *De Sousa and Another v Technology Corporate Management (Pty) Ltd and Others* [2016] JOL 36298 (GJ) [47] where the court remarked that these words are ‘of wide import and encompass both legal and commercial unfairness’.

⁴⁵² [2013] 2 All SA 190 (GNP) [17.6].

⁴⁵³ 1962 (4) SA 395 (W).

⁴⁵⁴ *Grancy v Grancy Property Limited v Manala and Others* [2013] 3 All SA 111 (SCA) [27].

⁴⁵⁵ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 361-62.

⁴⁵⁶ See *Garden Province Investment v Aleph (Pty) Ltd* 1979 (2) SA 525 (D) 531. See MJ Oosthuizen ‘Statutêre Minderheidsbeskerming in die Maatskappyereg’ (1981) *TSAR* 223, 231 who argues that the judgment in *Garden Province* was based on a misinterpretation of *Livanos v Swartzberg and others* 1962 (4) SA 395 (W) 399 which interpretation was accepted in *Aspek Pipe Co (Pty) Ltd v Mauerberger* 1968 (1) SA 517 (K) 529. According to the author (231-32) the last mentioned cases are not authority for the argument that the act complained of must be oppressive independently from the consequences thereof. See also E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 361-62.

163 of the Act as it will have the implication that a shareholder or director will not be able to rely on section 163 where the consequences or result of an act are unfairly prejudicial but the act or conduct that led to the result can be regarded as fair.⁴⁵⁷ It is regrettable that the court in *Grancy*⁴⁵⁸ did not properly contextualise the judgment in *Garden Province*.⁴⁵⁹

5.7.4 The nature of interests that are protected

In order to obtain relief a shareholder or director must demonstrate that the result of the conduct complained of are unfairly prejudicial to the *interests*⁴⁶⁰ of a shareholder or director. By the use of the term *interests* instead of *rights* the legislature has acknowledged that a shareholder or director may suffer prejudice not only in the form of a breach of his or her rights but also as a result of infringement on his or her interests.⁴⁶¹ The difficulty with the use of the concept of interests, is that the concept

⁴⁵⁷ See MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg' (1981) *TSAR* 223, 232 who explains that '[d]ie vereiste dat die handeling sowel as die uitwerking daarvan onredelik benadelend, onregverdig of onbillik moet wees, lei tot 'n ernstige beperking op die trefwydte van artikel 252. Die besluit van die meerderheid om byvoorbeeld 'n sekere bate van die maatskappy te verkoop, kan *bona fide* in die belang van die maatskappy wees en die verkoping self objektief redelik en billik. Nogtans kan dit teenoor minderheidsaandeelhouers onredelik benadelend wees. Ook sal dit binne die konteks van artikel 252.2 beteken dat die wysiging self onredelik benadelend moet wees *en* dat dit sodanige gevolge moet hê. Die omskepping van 'n publieke na 'n private maatskappy of *vice versa* kan egter maklik onredelik benadelende gevolge vir sekere aandeelhouers teweegbring ten spyte van die feit dat die omskepping self 'n regverdige en billike handeling was.'

⁴⁵⁸ *Grancy v Grancy Property Limited v Manala and Others* [2013] 3 All SA 111 (SCA).

⁴⁵⁹ *Garden Province Investment v Aleph (Pty) Ltd* 1979 (2) SA 525 (D).

⁴⁶⁰ See also MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg (slot)' (1981) *TSAR* 223, 224 who argues that the provisions of section 252 protected the interests of a member or shareholder, despite the fact that no reference had been made to the interests of a member or shareholder.

⁴⁶¹ *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)* 2016 JDR 0773 (ECP) [58]. See also Leon van Rooyen 'Die Statute Beskerming van Minderheidsbelange

is not defined in the Act. One is reliant upon the courts to give content to the concept of interests. The use of the concept or term interest is not foreign to our company law.⁴⁶² The court in *Utopia*⁴⁶³ held that interests have a wider meaning than rights.⁴⁶⁴ However, the court in *Utopia*⁴⁶⁵ confined the concept of interests to benefits that are of patrimonial nature.⁴⁶⁶ It is argued that such an approach to the concept of interests is too narrow in the context of seeking relief for purposes of section 163 of the Act. The interests of shareholders as defined in section 1 of the Act overlap with those of beneficial shareholders (or owners) where the interests of the first mentioned shareholder can include the economic and contractual interests of the beneficial shareholder.⁴⁶⁷

in die Maatskappyreg – Belangrike Ontwikkelings in die Engelse Regspraak’ (1988) 2 TSAR 268, 275-76 who argues that the interests of a shareholder included the legitimate interests of each of the parties to the dispute. He (271-72) further states that the protection of interests in addition to rights is supported in that the conduct of the affairs of a company may not necessarily affect the rights of the shareholder but may impact on the interests of a shareholder in a company. See 5.7.6 below for a discussion of legitimate expectations.

⁴⁶² In *Utopia Vakansie-Oorde Bpk v Du Plessis* 1974 (3) SA 148 (A) the court dealt with the concept of interests in the context of section 62quat(4) of the Companies Act 1926. The court had to determine the interests of preference shareholders whose dividend was in arrears.

⁴⁶³ *Utopia Vakansie-Oorde Bpk v Du Plessis* 1974 (3) SA 148 (A); *Smyth and Others v Investec Bank Ltd and Another* 2016 (4) SA 363 (GP).

⁴⁶⁴ *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ) [58] See also *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [54] where the court held that section 163 includes the protection of interests and not only rights. See also BA van der Merwe ‘Die Beskerming van Minderheidsaandehouers: Die Toepassingsveld van die Reël in *Foss v Harbottle* Uitgebrei?’ (1993) 5 SA Merc LJ 216, 221 remarked that the concepts interests appear to be wider than the terms rights.

⁴⁶⁵ *Utopia Vakansie-Oorde Bpk v Du Plessis* 1974 (3) SA 148 (A); *Smyth and Others v Investec Bank Ltd and Another* 2016 (4) SA 363 (GP).

⁴⁶⁶ *Utopia Vakansie-Oorde Bpk v Du Plessis* 1974 (3) SA 148 (A) 181-82.

⁴⁶⁷ *Smyth and Others v Investec Bank Ltd and Another* 2016 (4) SA 363 (GP) [64]. See also 5.7.1.2 read with 5.7.1.4 (b) above.

When considering the interests of the applicant one should not lose sight of the interests of a shareholder or director who finds him- or herself not to be a party to a dispute. A court must take into consideration the interests of parties who are not directly involved in the dispute before the court.⁴⁶⁸ A careful balance should be struck between the applicant or plaintiff, the company, other directors and other shareholders.

To define the term interests is not the only problematic task in interpreting section 163 of the Act. The use of this term creates difficulty in that the statutory derivative action contained in section 165 and the personal statutory action contained in 163 of the Act will often overlap.⁴⁶⁹ The question then arises whether an applicant can make use of section 163 to approach the court for relief for prejudice suffered by him or her in the capacity of a shareholder or director or whether the applicant is obliged to make use of section 165.⁴⁷⁰

5.7.5 The conduct of the applicant or plaintiff (shareholder or director)

The conduct of a shareholder or director may be relevant in determining whether the conduct of the other party is unfairly prejudicial.⁴⁷¹ The conduct of a shareholder or director may also be a factor that a court will take into consideration to determine the appropriate relief in light of the facts and circumstances of the case.⁴⁷² The

⁴⁶⁸ See *Bayly and Others v Knowles* 2010 (4) SA 548 (SCA) in the context of section 252 of the Act.

⁴⁶⁹ See 5.9.15 below.

⁴⁷⁰ See 5.9.15 below for a discussion of the interrelations between section 163 and section 165 of the Act.

⁴⁷¹ *McMillan NO v Pott* 2011 (1) SA 511 (WCC) [40]. For the position in England see 2.6.4 above. For the position in Australia see 3.6.5 above.

⁴⁷² *McMillan NO v Pott* 2011 (1) SA 511 (WCC) [40]

conduct of a shareholder or director may influence the terms of the buy-out order.⁴⁷³ Amongst others it may impact on whether an order is made that the shares of the applicant should be bought by other shareholders of a company or the company itself. The fact that the conduct of a shareholder or director attracts a degree of blameworthiness does not bar an applicant from relying on section 163 of the Act.⁴⁷⁴

5.7.6 The protection of legitimate expectations

The legitimate or reasonable expectations of shareholders fall within the protection of section 163 of the Act.⁴⁷⁵ The legitimate expectations of shareholders form part of the interests of a shareholder or shareholders.⁴⁷⁶ These legitimate expectations

⁴⁷³ See *McMillan NO v Pott* 2011 (1) SA 511 (WCC) [38].

⁴⁷⁴ See PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018). In the context of section 252 of the previous Act see *McMillan NO v Pott* 2011 (1) SA 511 (WCC) [40]-[41] where it was also held that the 'clean hands' principle does not apply. The court [40] held that '[h]aving regard to the equitable nature of the remedy, and the attendant wide ambit of the judicial discretion to grant or withhold it on terms appropriate to the peculiar characteristics of the given case, there is no compelling reason why fault on the part of the applicant should as a rule preclude the grant of relief in terms of s 252' (footnote omitted). This position differs from when an applicant applies for a winding-up order on just and equitable grounds and the applicant's conduct wrongfully contributed to the circumstances on which the applicant relies for relief. See in this regard *Knipe and Others v Kameelhoek (Pty) Ltd and Another* 2014 (1) SA 52 (FB) [27] where the court noted that an '[a]pplicant who relies on the just-and-equitable ground must come to court with clean hands. He must not himself have been wrongfully responsible for, or have connived at bringing about, the state of affairs which he relies upon for winding-up of the company'.

⁴⁷⁵ See *McMillan NO v Pott* 2011 (1) SA 511 (WCC) [34] where the court emphasised the significance of understandings or arrangements between shareholders, especially in the context of a quasi-partnership. For the protection of legitimate expectations in England see 2.6.5 above. For the position Australia and Canada see 3.6.7 and 4.8.2 above, respectively. See also 5.9.5.3 (c) below for a discussion of the enforcement of legitimate expectations.

⁴⁷⁶ See also Leon van Rooyen 'Die Statutêre Beskerming van Minderheidsbelange in die Maatskappyreg – Belangrike Ontwikkelings in die Engelse Regspraak' (1988) 2 *TSAR* 268, 275 in relation of section 252 of the previous Act who states that '[o]nder sekere omstandighede moet daar ook kennis geneem word van regte, pligte of verwagtinge wat nie in die Maatskappywet of konstitusie vervat is nie, maar uit 'n onderlinge verstandhouding, ooreenkoms of ander feite voortvloei', and

will only be protected if such legitimate expectation can be proven. The legitimate expectation may not necessarily take a contractual form or be contained in the Memorandum of Incorporation, but may be found in a fundamental understanding between the parties.⁴⁷⁷

5.7.7 The application of the unfair prejudice remedy in company groups

A reading of section 163(1) reveals that reliance can be placed on the section for relief not only against a company but also against a 'related person'. An individual or juristic person could be a person related to a company.⁴⁷⁸

Control is an essential element to determine whether an individual or juristic person is related to a company.⁴⁷⁹ An individual is a related person to a company when the individual can directly or indirectly control the company (juristic person).⁴⁸⁰ Persons are related to one another when one can control the majority of the voting rights in relation to the securities of a company⁴⁸¹ or control the majority votes on the board of a company.⁴⁸²

A juristic person is related to another juristic person if either of the juristic persons has the ability to control the other directly or indirectly or the business of

'[o]ptrede in stryd met die geregverdigde of redelike verwagtinge van 'n lid betreffende die deelname aan die bestuur van die maatskappy kan beskou word as gedrag wat op die belange van die lid inwerk en kan die basis vorm van 'n bevel ingevolge die onderhawige statutêre remedie desondanks die feit dat die gewraakte optrede ooreenkomstig konstitusionele of statutêre voorskrifte geskied het'.

⁴⁷⁷ See *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP) [17.4].

⁴⁷⁸ Companies Act 71 of 2008, s 2.

⁴⁷⁹ Companies Act 71 of 2008, s 2(2).

⁴⁸⁰ Companies Act 71 of 2008, s 2(1)(b).

⁴⁸¹ Companies Act 71 of 2008, s 2(2)(a)(ii)(aa).

⁴⁸² Companies Act 71 of 2008, s 2(2)(a)(ii)(bb).

the other.⁴⁸³ Juristic persons in a holding-subsidary relationship are also related to each other.⁴⁸⁴ Juristic persons are also related when each of them of them are controlled by the same person.⁴⁸⁵

In some instances, the relationship between individuals may be relevant. Individuals are related to each other when they are married or live together in a similar relationship⁴⁸⁶ or are not separated by more than two degrees of consanguinity or affinity.⁴⁸⁷

What is critical to gain from this discussion is that a person is not related to a company by merely being a shareholder or director of a company. For such a relationship to exist the shareholder or director must be able to exercise a form of control over the company.

5.7.8 The heading of section 163

A further peculiar aspect of section 163 is its heading. The reference in the heading of the section to the abuse of the separate juristic personality of a company is unclear. The reference to the abuse of the separate juristic personality of the company was erroneously made by the legislature and should be rectified by way of a

⁴⁸³ Companies Act 71 of 2008, s 2(1)(c)(i) read with 2(2)(a)(i).

⁴⁸⁴ Companies Act 71 of 2008, s 2(1)(c)(ii).

⁴⁸⁵ Companies Act 71 of 2008, s 2(1)(c)(iii). A company is a subsidiary of another company if the last mentioned company has the ability to directly or indirectly control the majority of the voting rights associated with the issued securities in a company (see s 3(1)(a)(i)) or alternatively controls the majority of the voting rights on the board of a company (see s 3(1)(a)(ii)).

⁴⁸⁶ Companies Act 71 of 2008, s 2(1)(a)(i).

⁴⁸⁷ Companies Act 71 of 2008, s 2(1)(a)(ii).

legislative amendment, as the relevant remedy is contained in section 20(9).⁴⁸⁸

The heading of section 163 also refers to prejudicial conduct. The remedy is aimed at oppressive or unfairly prejudicial conduct. To prove only prejudicial conduct will not be enough to entitle the applicant to relief.⁴⁸⁹

5.8 Alternative remedy

The development of the statutory unfair prejudice remedy reveals that the legislature had the objective of creating a remedy that provides alternative form of relief to the winding-up of a company.⁴⁹⁰ It must further be noted that a direct relationship between relief in terms of the unfair prejudice remedy and the winding-up of a company on 'just and equitable' grounds does not exist anymore.⁴⁹¹ The implication of this is that although an overlap does exist between the grounds for relief in the form of a winding-up order on 'just and equitable' grounds and unfair prejudice, the grounds for obtaining a winding-up order on 'just and equitable' grounds are wider than the grounds in section 163(1). A breakdown of confidence or dissatisfaction with the manner with which the affairs of a company are conducted generally does not constitute unfair prejudice and therefore will not attract relief in terms of section 163 of the Act, while such breakdown in confidence or dissatisfaction may constitute grounds for the winding-up of a company on 'just and

⁴⁸⁸ See the commentary on section 163 by PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018). See 6.3.1 below for recommendations in this regard.

⁴⁸⁹ See 6.3.1 below for recommendations in this regard.

⁴⁹⁰ See 5.2 above for a discussion of the statutory development of the remedy.

⁴⁹¹ See MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg' (1981) *TSAR* 223, 233 in the context of section 252 of the previous Act. See 5.2.3 above for a discussion of section 111*bis* of the Companies Act 46 of 1926 where a direct relationship existed between relief based on oppression and the winding-up of a company on just and equitable grounds.

equitable' grounds.⁴⁹²

In the context of insolvent companies, it is important to consider the provisions of section 347(2) of the previous Act that still apply to the winding-up and liquidation of an insolvent company. This section provides that in an application by members (shareholders) of a company for the winding-up of a company consideration needs to be given to the availability of alternative forms of relief. In dealing with solvent companies a similar approach is taken.⁴⁹³

5.9 Relief in terms of section 163(2)

5.9.1 Introduction

Once the jurisdictional requirements in section 163(1) are proven a court may exercise its discretion to grant relief in terms of section 163(2).⁴⁹⁴ A court enjoys a wide discretion in granting relief.⁴⁹⁵ The court may grant relief that it 'considers fit' and appropriate in the particular circumstances of each case.⁴⁹⁶ The relief that a

⁴⁹² See *Count Gotthard SA Pilati v Witfontein Game Farm (Pty) Ltd and Others* [2013] 2 All SA 190 (GNP) [19.5] where the court found that the mere dissatisfaction with or disapproval of the conduct of a company's affairs does not constitute unfair prejudice.

⁴⁹³ In *Knipe and Others v Kameelhoek (Pty) Ltd and Another* 2014 (1) SA 52 (FB) [47] the court stated that a solvent company will be wound-up as a measure of 'last resort only'.

⁴⁹⁴ M Lehloeny and T Kgarabjang 'Defining the Limits of the "Oppression Remedy" in the Wake of the Section 163 of the Companies Act 71 of 2008 *Grancy Properties Limited v Manala* [2013] 3 All SA 111 (SCA)' (2015) 2 *Obiter* 511, 514.

⁴⁹⁵ *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ) [61].

⁴⁹⁶ Companies Act 71 of 2008, s 163(2). It should also be noted that relief can take the form of interim or final relief. See *Inhouse Venue Technical Management (Pty) Ltd and Others v Omar and Another; In re: Omar v Inhouse Venue Technical Management (Pty) Ltd and Others* (13902/2015) [2016] ZAWCHC 18 (26 February 2016) [25] where the court held that '[t]he purpose of section 163 is to provide redress when unfairness between directors or shareholders is found to exist'. The court further [25] found that there is no indication in the provisions of section 163 that a court may in the

court may grant is not limited to the possible orders or relief expressly stated in section 163(2).⁴⁹⁷ The statutory personal action provides for an alternative remedy to the winding-up of a company on 'just and equitable' grounds.⁴⁹⁸

The forms of relief under section 163(2) are analysed below. The scope of the analysis is not limited to the relief listed in terms of section 163(2). At the end of the analysis of the forms of relief that could be granted by a court in terms of section 163, some weaknesses of these provisions are pointed out. In light of the wide ambit of the discretion to grant relief for the conduct complained of it must be kept in mind that the high courts have the inherent power to develop the common law.⁴⁹⁹

5.9.2 Order restraining conduct

5.9.2.1 Introduction

In terms of section 163(2)(a) a court may issue an order in terms of which the conduct complained of is restrained or interdicted. As with its predecessor, section

exercise of its discretion impose sanctions or penalties on parties that participated in unfair prejudicial conduct.

⁴⁹⁷ See the wording of section 163(2) of the Act where it provides: 'Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including'.

⁴⁹⁸ It should be noted that the legislature specifically avoided the qualification that the relief should be 'just and equitable'. Section 252 of the previous Act required that the relief should be 'just and equitable'. This requirement was criticised by E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 392-93. See 2.9 above for a discussion of the unfair prejudice remedy as an alternative to the liquidation of companies on 'just and equitable' grounds in England. See 3.3, and more specifically 3.3.2 above, for the position in Australia. For the position in Canada see 4.9 above and 5.8 above for the South African position.

⁴⁹⁹ See section 173 of the Constitution which also provides that such development of the common law should take into account the interests of justice. See 5.5.2.2 above.

163 does not make explicit provision for interdicting threatening or future conduct.⁵⁰⁰ Based on the manner in which the provisions of section 163 are formulated a shareholder or director cannot rely on the express provisions of the section to bring an application for relief in the form of an interdict, preventing the passing of a resolution or other forms of threatening or future conduct, that may constitute conduct that is oppressive or unfairly prejudicial to the rights or interests of the a shareholder or director.⁵⁰¹

5.9.2.2 Protection in terms of section 252 of the previous Act from threatening or future unfair prejudicial conduct

For a proper understanding of the position under section 163 of the Act one has to consider the application of section 252 of the previous Act in relation to threatening and future conduct. One of the criticisms against section 252 was that it appeared that courts were reluctant to issue interdicts restraining future or threatening conduct.⁵⁰² Judgments handed down under section 252 suggested that an applicant would be unable to rely on the statutory oppression remedy to prevent the passing of a proposed resolution.⁵⁰³ One of the reasons for this is that there is, prior to the adoption of the resolution, an absence of conduct (an act or omission) on which an applicant can base his or her complaint.⁵⁰⁴ In *Investors Mutual Funds Ltd v Empisal*

⁵⁰⁰ See 5.9.2.3 and 5.9.2.4 below. For a discussion of the relief against future or threatening conduct in terms of section 252 of the previous Act see 5.9.2.2 below.

⁵⁰¹ See 5.9.2.2 below.

⁵⁰² E Hurter *Aspekte van statutêre minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 350 and 392. See also MJ Oosthuizen 'Statutêre minderheidsbeskerming in die Maatskappyereg' (1981) *TSAR* 223, 232.

⁵⁰³ See *Porteus v Kelly* 1975 (1) SA 219 (W); *Investors Mutual Funds Ltd v Empisal (South Africa) Ltd* 1979 (3) SA 170 (W).

⁵⁰⁴ The court in *Porteus v Kelly* 1975 (1) SA 219 (W) 222 held that '[t]he first question to be considered, however, is whether at this stage the applicant has *locus standi* under sub-sec (1) to

(*South Africa*) *Ltd*⁵⁰⁵ the court held that it did not have the discretion 'to interfere with the ordinary running of the business of a company by its directors or controlling shareholders'.⁵⁰⁶ Despite the acknowledgment of the court that the provisions of section 252 did not expressly exclude the possibility to interdict (or restrain) future unfair prejudicial conduct and the fact that the legislature's failure to regulate the restraining of future unfair prejudicial conduct was due to a possible oversight, the court refused to grant an interdict.⁵⁰⁷ The unfortunate result of this interpretational approach adopted by the courts in terms of section 252 of the previous Act was that a court would only be able to intervene after the alleged unfair prejudicial conduct had been committed or after an unfairly prejudicial resolution had been adopted.⁵⁰⁸

apply for an order under the section, and whether the Court has jurisdiction under sub-sec (3) to grant an order. In the present case it is said that the "complaint" (which is necessary in an applicant under the section) is a complaint that an "act is unfairly prejudicial, unjust or inequitable"; and that the act complained of is the passing of the resolution, alternatively the calling of the meeting at which such resolution will be proposed. But something to be done in the future is not yet an "act", which is something done or performed; and, although the calling of a meeting is an "act", such calling cannot in itself be "unfairly prejudicial, unjust or inequitable" to the applicant'.

⁵⁰⁵ 1979 (3) SA 170 (W).

⁵⁰⁶ *Investors Mutual Funds Ltd v Empisal (South Africa) Ltd* 1979 (3) SA 170 (W) 177. See also E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 374-75 who is of the opinion that the principle on which the judgment was based cannot be reconciled with the provisions of section 252(3) of the Companies Act 61 of 1973 in that the last mentioned section made express provision for a court to make an order to regulate the future affairs of the company.

⁵⁰⁷ See *Porteus v Kelly* 1975 (1) SA 219 (W) 222 where the court stated that '[c]ounsel for the applicant argued that there was no reason in principle, why, if the Court could interfere after the resolution was passed, it could not interfere to prevent it being passed. It may well be that in this, as in other cases, prevention of an act would be better than curing it after it has been committed, but the answer is that the section does not provide therefor. This may be a *casus omissus*'.

⁵⁰⁸ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 392.

Such an approach unjustifiably restricted the availability of the remedy.⁵⁰⁹ As the remedy only applied when the consequences of threatening or future conduct presented, the remedy could not be used to prevent unfair prejudicial consequences. The remedy therefore could not be used to obtain relief when the consequences of the threatening or future conduct may cause the demise of the company or when the conduct resulted in the removal of the name of shareholder from the company's register of members.⁵¹⁰

5.9.2.3 Future and/or threatening conduct and section 163 of the Act

Based on the wording of section 163(1) of the Act, Cassim is of the view that a shareholder or director would be unable to obtain relief in terms of section 163 against future conduct or threatening conduct.⁵¹¹ The court in *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)*⁵¹² took an interesting approach to the question whether section 163 can be used to interdict threatening or future conduct.⁵¹³ In its judgment, the court considered the

⁵⁰⁹ E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 392. See also MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg' (1981) *TSAR* 223, 233 suggested that the remedy should have been extended to future or threatening conduct.

⁵¹⁰ MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg' (1981) *TSAR* 223, 232.

⁵¹¹ See FHI Cassim *et al Contemporary Company Law* (2nd ed, 2012) 765 regarding section 163(1)(a) where they point out that a 'result' is required before reliance can be placed on this particular section. According to the authors (766) an applicant will also not be able to rely on section 163(1)(b) as the section applies to the manner which the business of the company 'is being or has been' carried.

⁵¹² 2016 JDR 0773 (ECP).

⁵¹³ In this case a proposed general meeting of a company was interdicted.

judgment in *Porteus v Kelly*⁵¹⁴ which was decided under section 252 of the previous Act. The court clearly distinguished section 163 of the Act from section 252 of the previous Act.⁵¹⁵ The court held that in contrast with section 163 of the Act, section 252 only referred to an 'act' or an 'omission' that had *already* taken place, which was also the basis on which the case in *Porteus v Kelly*⁵¹⁶ was decided.⁵¹⁷ The court further found that, unlike section 252 of the previous Act, section 163 of the Act does not only deal with conduct (acts or omissions) but now covers an unfair disregard of the interests of a shareholder or director.⁵¹⁸ The court also considered and emphasised that a shareholder or director does not have to prove that his or her *rights* have been affected or 'violated' because the focus of section 163 is the protection of the *interests* of a shareholder or director.⁵¹⁹

In this case the court interdicted the proposed meeting. This was done on the basis that in terms of the principle of majority rule, minority shareholders are bound

⁵¹⁴ 1975 (1) SA 219 (W).

⁵¹⁵ *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)* 2016 JDR 0773 (ECP) [86].

⁵¹⁶ 1975 (1) SA 219 (W).

⁵¹⁷ *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)* 2016 JDR 0773 (ECP) [86].

⁵¹⁸ The court in *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)* 2016 JDR 0773 (ECP) [86] distinguished the wording of section 163 of the Act from section 252 of the previous Act that was considered in *Porteus v Kelly* 1975 (1) SA 219 (W) by stating that 'section 163 not only incorporates act or omissions but refers to any unfair disregard of the interests of the applicant'.

⁵¹⁹ *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)* 2016 JDR 0773 (ECP) [58].

by the decisions of the majority.⁵²⁰ Because shareholders are bound by the decisions adopted by the majority of shareholders it is an important aspect of shareholder protection that shareholders who are entitled to attend and vote at such meetings must be properly informed and must be furnished with sufficient information to make an election on whether or not to attend the relevant meeting with the purpose of influencing the adoption of the resolution.⁵²¹ The right of a shareholder to be properly informed of all the relevant information pertaining to a proposed resolution is not limited to the shareholder him- or herself, but also entails that the a shareholder has the right that his or her co-shareholders must be properly informed about the relevant information pertaining to the proposed resolution.⁵²² The proposed meeting in this case was interdicted on the basis that shareholders who exercised their rights in terms of section 164 on the basis of a decision taken during a previous meeting triggering the provisions of section 164, were excluded from a proposed meeting where the latter decision would be reconsidered.

⁵²⁰ *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)* 2016 JDR 0773 (ECP) [84]. See also *Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others* 2009 (4) SA 89 (SCA) [36].

⁵²¹ *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)* 2016 JDR 0773 (ECP) [84] and [88].

⁵²² *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)* 2016 JDR 0773 (ECP) [88]. See also *Trinity Asset Management (Pty) Ltd and Others v Investec Bank Ltd and Others* 2009 (4) SA 89 (SCA) [36].

5.9.2.4 Protection against future and/or threatening conduct in terms of section 163 of the Act

(a) *The importance of Juspoin Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)*⁵²³ for the interpretation of section 163 of the Act

The inference to be drawn from this case is that the court did not exclude the possibility that section 163 can be used to interdict future or threatening conduct based on its interpretation of 'unfairly prejudicial disregard' of interests. However, the facts of each case must be carefully examined to determine whether there is a real possibility that the rights and interests of a shareholder or director would be unfairly prejudiced should the relevant threatening or future conduct not be interdicted. The importance of the judgment in *Juspoin Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)*⁵²⁴ is that it rejects the mechanical application of the judgment in *Porteus v Kelly*⁵²⁵ to the wording of section 163 of the Act.⁵²⁶ While *Juspoin Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)*⁵²⁷ opens the possibility for obtaining relief against future and threatening conduct, it must be noted that such relief will only be available in very specific circumstances, in order to prevent unjustified interference with the ordinary running of the affairs of a company.

⁵²³ 2016 JDR 0773 (ECP).

⁵²⁴ 2016 JDR 0773 (ECP).

⁵²⁵ 1975 (1) SA 219 (W).

⁵²⁶ See 5.9.2.4 (b) below.

⁵²⁷ 2016 JDR 0773 (ECP).

(b) The differences between the judgments in *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)*⁵²⁸ and *Porteus v Kelly*⁵²⁹

Although the court in *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)*⁵³⁰ distinguished the case from *Porteus v Kelly*⁵³¹ based on the applicable law,⁵³² it must also be noted that the facts in *Porteus v Kelly*⁵³³ and *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)*⁵³⁴ differ in very important respects. The court in *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)*⁵³⁵ took into consideration the fact that once a shareholder exercised his or her rights in terms of section 164, such a shareholder loses his or her shareholder rights save for the right to demand the acquisition of the shareholder's shares at a fair value.⁵³⁶ One of the rights which is lost by a shareholder in terms of section 164 is the right to attend and vote at meetings of

⁵²⁸ 2016 JDR 0773 (ECP).

⁵²⁹ *Porteus v Kelly* 1975 (1) SA 219 (W).

⁵³⁰ 2016 JDR 0773 (ECP).

⁵³¹ *Porteus v Kelly* 1975 (1) SA 219 (W).

⁵³² See 5.9.2.3 above.

⁵³³ *Porteus v Kelly* 1975 (1) SA 219 (W).

⁵³⁴ 2016 JDR 0773 (ECP).

⁵³⁵ 2016 JDR 0773 (ECP).

⁵³⁶ *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)* 2016 JDR 0773 (ECP) [61]-[63].

shareholders.⁵³⁷ According to the court the provisions of section 164 of the Act cannot be allowed to be applied in such a manner as to isolate shareholders by holding a shareholder to the exercise of his or her appraisal rights, in circumstances where the last mentioned decision or resolution is revisited.⁵³⁸ The dissenting shareholders in *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)*⁵³⁹ were captured between two extreme alternatives, namely, to withdraw their demands and be entitled to vote on the proposed resolution or to keep their rights intact and be excluded from voting on the proposed revocation of the resolution in terms of which they exercised their appraisal rights and the subsequent proposed resolutions that would serve at the same meeting.⁵⁴⁰

*Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)*⁵⁴¹ dealt with the constructive exclusion of the informed participation of shareholders from a meeting where a proposed resolution or

⁵³⁷ *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)* 2016 JDR 0773 (ECP) [63] where the court specifically held that the applicant was excluded from the fair participation in the business of the company.

⁵³⁸ *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)* 2016 JDR 0773 (ECP) [63]-[64] and [77].

⁵³⁹ 2016 JDR 0773 (ECP).

⁵⁴⁰ *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)* 2016 JDR 0773 (ECP) [64].

⁵⁴¹ 2016 JDR 0773 (ECP).

decision would be taken while *Porteus*⁵⁴² was concerned with the potential impact of a proposed resolution to be adopted a meeting to be convened. The application in *Juspoint*⁵⁴³ was not aimed at the prevention of the majority adopting a decision but was rather based on a procedural irregularity that may affect the proper and informed consideration of the proposed decision or resolution leading up to the meeting where the proposed resolution would be adopted.

5.9.3 Appointment of liquidator

A court may also order the appointment of a liquidator in circumstances where it appears that the company is insolvent.⁵⁴⁴ It is interesting that the wording of the provision limits this particular form of relief to circumstances where a company is insolvent. It may have been the objective of the legislature to limit this form of relief to circumstances of insolvency only, in light of the fact that section 163 should provide for alternative forms of relief to the winding-up and liquidation of a company.⁵⁴⁵ However, there are a number of circumstances one can think of where it would be appropriate to wind-up a company in circumstances where the company is not necessarily insolvent. It is submitted that the test for granting this relief should rather be whether the relief is able to rectify the unfair prejudicial conduct complained of instead of whether the company is solvent or insolvent. For purposes of section 163(2)(b) a shareholder or director must in effect not only prove the unfair prejudicial conduct and but also that the company is insolvent. It is submitted that

⁵⁴² *Porteus v Kelly* 1975 (1) SA 219 (W).

⁵⁴³ *Juspoint Nominees (Pty) Ltd v Sovereignfoods Investments Limited (BNS Nominees (Pty) Ltd, Trustees for the Time Being of the Cilliers Family Trust, Cilliers, Cilliers Intervening Parties)* 2016 JDR 0773 (ECP).

⁵⁴⁴ Companies Act 71 of 2008, s 163(2)(b).

⁵⁴⁵ See 5.8 above.

solvency or insolvency should rather be a factor a court should take into consideration in exercising its wide discretion to make an appropriate order.⁵⁴⁶

5.9.4 Business rescue

A court has a discretion to grant relief in the form of supervision and the commencement of business rescue proceedings.⁵⁴⁷ This relief may only be granted when the provisions of section 131(4)(a) apply.⁵⁴⁸ The requirements of section 131(4)(a)⁵⁴⁹ stand independently from the grounds in section 163.⁵⁵⁰

One of the criticisms against the business rescue regime contained in Chapter 6 of the Act is that a single director may not initiate or commence with business rescue proceedings in circumstances where the company is in financial distress.⁵⁵¹ In terms of section 131 only an affected person may apply to a court for an order placing a company under business rescue. A director is not included in the definition of an affected person in section 128(1)(a).⁵⁵² This exposes a director to

⁵⁴⁶ See the recommendation made in this regard in 6.3.5.2 below.

⁵⁴⁷ Companies Act 71 of 2008, s 163(2)(c).

⁵⁴⁸ Companies Act 71 of 2008, s 163(2)(c). See also *Dolphin Management AS v Belmont Development Company (Pty) Limited* 2015 JDR 2620 (ECG) [17].

⁵⁴⁹ Section 131 of the Act provides:

- ‘(4) After considering an application in terms of subsection (1), the court may –
- (a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that –
 - (i) the company is financially distressed;
 - (ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or
 - (iii) it is otherwise just and equitable to do so for financial reasons;
- and there is a reasonable prospect for rescuing the company.’

⁵⁵⁰ *Dolphin Management AS v Belmont Development Company (Pty) Limited* 2015 JDR 2620 (ECG) [19].

⁵⁵¹ Anneli Loubser ‘The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions (part 1)’ (2010) 3 *TSAR* 501, 509.

⁵⁵² An affected person is defined in section 128(1) as follows: -

personal liability when the provisions of Chapter 6 have not been complied with and a party suffers losses due to the fact that the company has not commenced with business rescue proceedings in circumstances where the company was financially distressed and a reasonable prospect existed for rescuing the company.⁵⁵³ The alleged unfair prejudicial conduct, in the form of the board not adopting a resolution to commence with business rescue proceedings, must be evaluated against the written reasons provided for such failure in terms of section 129(7).

Section 163(2)(c) opens the possibility that a single director can approach the court with the relevant information demonstrating that the company is in financial distress and thereby require relief in the form of the commencement of business rescue proceedings. Section 163 therefore supplements and remedies the provisions of Chapter 6 of the Act.⁵⁵⁴ However, one would rather have preferred that this issued to be adequately addressed in Chapter 6.

-
- (a) **“affected person”**, in relation to a company, means –
- (i) a shareholder or creditor of the company;
 - (ii) any registered trade union representing employees of the company; and
 - (iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives.’

⁵⁵³ Anneli Loubser ‘The Business Rescue Proceedings in the Companies Act of 2008: Concerns and Questions (part 1) (2010) 3 *TSAR* 501, 509.

⁵⁵⁴ However, it is uncertain how the courts would receive such a submission as the court in *Dolphin Management AS v Belmont Development Company (Pty) Limited* 2015 JDR 2620 (ECG) [19] clearly stated that the application was disposed of in terms of the grounds in section 131(4)(a) and not section 163. The court further stated that these two grounds stood separately from each other. The application was brought by a shareholder who has standing for purposes of section 163(1) and is defined as an ‘affected person’ in section 128(1)(a)(i) of the Act.

5.9.5 Regulation of a company's affairs

5.9.5.1 Introduction

One of the more contentious forms of relief a court may grant is an order in terms of which the affairs of a company are regulated by an amendment to the company's Memorandum of Incorporation or the creation or amendment of a unanimous shareholder agreement.⁵⁵⁵ The relationship between parties to a Memorandum of Incorporation is supplemented by the provisions of the Act. In some instances, the parties choose to conclude an additional shareholders' agreement.

5.9.5.2 Court intervention in the private affairs of parties

Generally, courts demonstrate a reluctance to interfere with the arrangements and agreements of parties. This approach is justified on the basis that effect should be given to the agreements between parties concluded on a free and voluntary basis.⁵⁵⁶ Viewing the provisions of section 163(2)(d) in light of the traditional approach not to interfere with the private arrangements between parties, dismissed any doubts that courts do have the power to make appropriate orders under section 163 that may affect the private understandings or arrangements exchanged between parties.

⁵⁵⁵ Companies Act 71 of 2008, s 163(2)(d).

⁵⁵⁶ GB Bradfield *Christie's The law of contract in South Africa* (7th ed, 2016) 518-19. See also 5.6.2.1 above.

5.9.5.3 The amendment of agreements

(a) ***Consensus and unanimous shareholder agreement***⁵⁵⁷

Shareholder agreements are normal commercial agreements between some or all of the shareholders of a company. Therefore, the default principles of the law of contract apply to shareholder agreements. The parties to a shareholder agreement are bound to an agreement based on consensus. This also entails that an agreement can only be amended by way of mutual agreement between the parties thereto. Contracts between parties can be formal or informal, unless the law prescribes specific formalities. The same principles apply to variations or amendments to contracts or agreements between parties.

(b) ***The differences in the amendment of a Memorandum of Incorporation and a unanimous shareholder agreement***

Although a Memorandum of Incorporation has contractual force between the parties listed in section 15(6), it cannot be fully equated to that of a unanimous shareholder agreement. In contrast with a unanimous shareholder agreement, a Memorandum of Incorporation can be amended by the adoption of a special resolution. With regard to the Memorandum of Incorporation of a company it should be noted that the Act contains a prescribed procedure for the amendment thereof.⁵⁵⁸

⁵⁵⁷ The use of the word 'unanimous' is unnecessary because of the fact that agreements between parties are reached based upon consensus. It is further important to note that the term 'unanimous shareholder agreement' is not defined in the Act. It appears that the term 'unanimous shareholder agreement' originates from the Canada Business Corporations Act (RSC 1985 c C-44). See Chapter 4 above for a discussion of the term unanimous shareholder agreement.

⁵⁵⁸ Companies Act 71 of 2008, s 16. If the Memorandum of Incorporation contains restrictions, limitations additional to the procedure contained in the Act, the name and Memorandum of

(c) Section 163 and the enforcement of legitimate expectations

The legitimate expectations of parties play an important role in the application of the statutory unfair prejudice remedy.⁵⁵⁹ This provision underscores the power of a court to intervene in such agreements or arrangements. This particular provision includes the power of a court to enforce understandings and agreements that do not expressly form part of a Memorandum of Incorporation or a shareholder agreement. This is justified on the basis that commercial fairness requires that parties to agreements should be held to their promises.⁵⁶⁰

(d) Section 163 and ‘non-variation clauses’

(i) Introduction

To avoid uncertainty and subsequent disputes, parties must clearly describe their relationship and mutual understandings or arrangements in the Memorandum of Incorporation. In some instances the parties choose to conclude a shareholder agreement in addition to the company’s Memorandum of Incorporation. It is important to understand the effect of section 163 of the Act on the application of the common law principles of the law of contract within a company law perspective. The effect of section 163 on non-variation clauses and on the enforcement of agreements or understandings between parties to a Memorandum of Incorporation and/or shareholder agreements, which are not necessarily incorporated, is considered.

Incorporation should comply with formalities prescribed by the Act. See in this regard section 11(3)(b) of the Companies Act 71 of 2008.

⁵⁵⁹ See also 5.7.6 above for a discussion of the protection of legitimate expectations by the oppression or unfair prejudice remedy.

⁵⁶⁰ *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [61]. See 5.6.2.1 above.

(ii) The validity and enforcement of subsequent agreements

Unless the law prescribes specific formalities, contracts between parties can be formal or informal. The same principles apply to variations or amendments to contracts or agreements between parties. It often occurs that parties for a variety of reasons, for example, the lapse of time and/or to accommodate changing circumstances, informally conclude new agreements or vary existing agreements. Such new agreements or amendments are not necessarily contained or incorporated into the Memorandum of Incorporation and/or the shareholders' agreement but, for example, may be deduced from their conduct. From a law of contract perspective these informal arrangements are still enforceable between the parties.

To ensure legal certainty and in an attempt to avoid disputes that may arise between the parties, shareholder agreements and Memorandum of Incorporation may contain clauses which may restrict the variation of a shareholder agreement and/or the Memorandum of Incorporation. Usually, these clauses provide that a variation or amendment to the Memorandum of Incorporation or shareholder agreement will not have any force unless it is formally recorded in writing and signed by the parties to the contract. Such a clause is often referred to as a non-variation clause. For a non-variation clause to be effective the non-variation of the clause self should itself be entrenched.⁵⁶¹ The entrenchment of a variation clause is enforceable, but will be restrictively interpreted.⁵⁶² The reason for the restrictive

⁵⁶¹ GB Bradfield *Christie's The law of contract in South Africa* (7th ed, 2016) 518-21; S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* (5th ed, 2016) 148.

⁵⁶² S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* (5th ed, 2016) 151 and 153.

interpretation of such clauses is based on the restriction or limitation that such a clause places on the freedom of contract of the parties.⁵⁶³ The effect of a non-variation clause is that any agreement reached after the formal conclusion of an agreement will be ignored.⁵⁶⁴ The court will only enforce the clauses contained in the original contract between the parties.

(iii) The enforcement of agreements or understandings not contained in a company's Memorandum of Incorporation and/or in a shareholder agreement

From a practical perspective a situation may arise where the understandings or arrangements between shareholders differ from the written understandings and arrangements contained in the Memorandum of Incorporation of a company or any applicable shareholder agreement. This form of relief can be used to enforce unwritten and/or informal understandings or arrangements between shareholders on the basis that parties must honour undertakings that they have given freely and voluntarily.⁵⁶⁵ This approach will then be based on the need and the objective to achieve commercial fairness as envisaged in section 163 of the Act.⁵⁶⁶

(iv) Conclusion

From a law of contract perspective agreements and subsequent amendments to such agreements are subject to the normal legal requirements for a valid contract. To avoid confusion or uncertainty parties opt to reduce the agreements between

⁵⁶³ GB Bradfield *Christie's The law of contract in South Africa* (7th ed, 2016) 518-19.

⁵⁶⁴ *SA Sentrale Ko-op Graanmaatskappy Beperk v Shifren en Andere* 1964 (4) SA 740 (A); *Brisley v Drotsky* 2002 (4) SA 1 (SCA) [6]-[10].

⁵⁶⁵ See 5.6.2.1 above for a discussion of the principle of *pacta sunt servanda*.

⁵⁶⁶ See 5.6.6.4 above for a discussion of the need for fairness within the company structure and 5.7.3.6 above for a discussion of the concept commercial fairness.

themselves to writing. Often the parties further agree that the document is the only source of the agreement and that any subsequent agreements and amendments will not be valid and enforceable unless they have been reduced to writing. Such agreements, known as non-variation clauses, are enforceable provided that such agreements or clauses do not offend public policy.⁵⁶⁷ Section 163 of the Act has important consequences for the enforcement of non-variation agreements and the enforcement of agreements that are not incorporated formally in written agreements and which may have been reached even prior to the conclusion of the written agreement. In *De Villiers v Kapela Holdings (Pty) Ltd and Others*⁵⁶⁸ the court held that '[i]t seems plain then that agreements and understandings of the non-formal kind may, depending on the circumstances, found justification for relief under section 163'.⁵⁶⁹

5.9.6 Issue or exchange of shares

Section 163(2)(e) further provides for an order in terms of which a company issues shares or whereby the exchange of shares can be ordered. There is authority which suggests that an order in terms of this particular section includes an order for the buy-out or purchase of the shares of a member.⁵⁷⁰ Aspects of relief in the form of a

⁵⁶⁷ GB Bradfield *Christie's The law of contract in South Africa* (7th ed, 2016) 519-20; S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* (5th ed, 2016) 148-49.

⁵⁶⁸ 2016 JDR 1942 (GJ) [60], [61] and [68].

⁵⁶⁹ *De Villiers v Kapela Holdings (Pty) Ltd* 2016 JDR 1942 (GJ) [68]. See also Leon van Rooyen 'Die Statutêre Beskerming van Minderheidsbelange in die Maatskappyreg – Belangrike Ontwikkelings in die Engelse Regspraak' (1988) 2 *TSAR* 268, 275 regarding section 252 of the previous Act for a similar approach. See further 5.7.6 above regarding the protection of legitimate expectations.

⁵⁷⁰ See *Gushman NO and Another v Traut NO and Others* [2013] JOL 30862 (FB) [29] where the court alluded to the possibility that '[a]lthough not specifically mentioned in section 163(2), a court could, for example, order that the majority purchase the shares of the minority or that the majority sell their shares to the minority'. See also *Muller v Lilly Valley (Pty) Ltd* [2012] 1 All SA 187 (GSJ)

buy-out order are discussed below.⁵⁷¹

5.9.7 The appointment of directors and the declaration of persons as delinquent

5.9.7.1 Appointment of directors

Relief may also be granted in the form of the appointment of directors in addition to and/or to replace of other directors.⁵⁷² This power of a court has important implications from the perspective of viewing a company as a democracy.⁵⁷³ Section 163 therefore creates an additional avenue for the possible removal and/or appointment of directors.⁵⁷⁴

5.9.7.2 Delinquent persons

Section 163(2)(f)(ii) provides that a court may declare a person a delinquent or place a person under probation as envisaged in section 162. It is important to note that

[41] where the court distinguished between the formulation of relief in terms of section 252(3) of the previous Act and section 163(2) of the Act by stating that '[t]here are various other powers which a court has under section 163(2), but the specific power under section 252(3) to order the "*purchase of the shares of any members of the company by other members thereof or by the company*" is not contained within section 163. It might be that in terms of section 163(2)(e), the court can order an exchange of shares for cash on a value determined in terms of the articles'.

⁵⁷¹ See 5.9.14 below.

⁵⁷² Companies Act 71 of 2008, s 163(2)(f)(i).

⁵⁷³ *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ) [61].

⁵⁷⁴ See *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ) for an example where the court had to grant relief to appoint a board to attend to the business and affairs of a company, while the legal status of the original appointed directors were being resolved in other pending legal proceedings. See also *Jenkins v Davison* 2017 JDR 1380 (GP) where the court granted interim relief in the form of an order where a director of whose conduct was complained of in terms of section 163, was removed and a person was appointed for the purpose to investigate the financial transactions entered and conducted by the particular director.

although section 162 is mentioned in section 163(2)(f) as a form of relief, section 162 stands separate and independent from section 163. An order in terms of section 162 further serves a different purpose and function than an order in terms of section 163(2).⁵⁷⁵

(a) The purpose of the provisions of section 162

In *Gihwala and Others v Grancy Property Ltd and Others*⁵⁷⁶ the purpose of section 162 was described as ‘to protect the investing public, whether sophisticated or unsophisticated, against the type of conduct that leads to an order of delinquency, and to protect those who deal with companies against the misconduct of delinquent directors’.⁵⁷⁷ Therefore, the provisions of section 162 serve a public interest objective.⁵⁷⁸ The purpose and effect of section 162 have to be compared with the objective of relief in terms of section 163(2) where the aim of such relief is to end

⁵⁷⁵ See 5.9.7.2 (a) below for a discussion of the purpose of court orders in terms of section 162.

⁵⁷⁶ [2016] 2 All SA 649 (SCA).

⁵⁷⁷ See *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) [142] (footnote omitted) and [144] where the court reiterated that ‘[i]ts aim is to ensure that those who invest in companies, big or small, are protected against directors who engage in serious misconduct’. The court further explained [144] that ‘it is required in the public interest that those who enjoy the benefits of incorporation and limited liability should not abuse their position’. The court also explained [145] that the provisions of section 162 are ‘an appropriate and proportionate response by the legislature to the problem of delinquent directors and the harm they may cause to the public who place their trust in them’.

⁵⁷⁸ *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC) [39] and [40]. See also the comment of the court [41] that ‘[t]he remedy bears on the public law status of the allegedly delinquent person rather than the assertion of a company’s individual rights, and the purpose, as Wallis JA observed in *Gihwala*, is the protection, in the public interest, of those who deal with companies’ and ‘[t]hat the remedy goes to the affected director’s status’. See further R Cassim ‘The Launching of Delinquency Proceedings under the Companies Act 71 of 2008 by Means of the Derivative Action *Lewis Group Limited v Woollam* 2017 (2) SA 547 (WCC)’ (2017) 38:3 *Obiter* 673, 675 and R Cassim ‘Delinquent Directors under the Companies Act 71 of 2008: *Gihwala v Grancy Property Limited* 2016 ZASCA 35’ (2016) 19 *PER/PELJ* 1, 7-9.

and rectify the conduct complained of.⁵⁷⁹ An order in terms of section 162 may have a penal effect as the entrepreneurial freedom of the person who is declared a delinquent or under probation is restricted.⁵⁸⁰

(b) The nature of the conduct that justifies orders in terms of section 162

The circumstances in which reliance may be placed on obtaining an order for declaring a person a delinquent or placing such a person under probation are stipulated in section 162(5) and section 162(7)-(8).⁵⁸¹

(c) Interpretational aspects of sections 162(5) and 162(7)

In terms of this section 162 a court must make an order declaring a person a delinquent director if the circumstances set out in section 162(5) are proven. What is important to note is that this section describes circumstances and misconduct of a serious nature, which are met with the most severe consequences in terms of section 162(5), namely, that a court *must* declare the directors involved as *delinquents*.⁵⁸²

It is interesting to compare the wording of section 162(5) with section 162(7) in terms of which a court *may* make an order for placing a person under *probation*.

⁵⁷⁹ See 5.9 above.

⁵⁸⁰ R Cassim 'The Launching of Delinquency Proceedings under the Companies Act 71 of 2008 by Means of the Derivative Action *Lewis Group Limited v Woollam* 2017 (2) SA 547 (WCC)' (2017) 38:3 *Obiter* 673, 675-76.

⁵⁸¹ See 5.9.7.2 (c) below for a discussion of the interpretation of section 162(5) and (7). See also section 162(3) and 163(4) where the Commission, Panel and certain organs of state may apply for orders for delinquency and/or probation under certain circumstances.

⁵⁸² See also the court's discussion of section 162(5)(c) in *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA).

This is significant as section 162(7)(a)(iii) provides that a court *may* place a person under *probation* when such a person 'acted in, or supported a decision of the company to act in, a manner contemplated in section 163(1)'. Section 162(7)(a)(iii) must be read with section 162(8) which provides that a person may only be placed under probation in terms of the former section 'only if the court is satisfied that the declaration is justified having regard to the circumstances of the company's or close corporation's conduct, if applicable, and the person's conduct in relation to the management, business or property of the company or close corporation at the time'.

For a proper interpretation of the provisions of section 162(7) regard must be had to section 162(7)(a)(ii). In terms of this provision a director may be placed under probation where a person has acted materially inconsistently with the duties of a director.⁵⁸³ This means that trivial transgressions by a director will not justify an order in terms of the particular section. This provides the context in which the provisions in section 162(7)(a)(iii) should be read. The section must not be interpreted and applied in a manner which will have the effect that a particular conduct of a director will be met with an order placing a director under probation while such relief would not have been justified in terms of section 167(2)(a)(ii). Although section 162(2)(a)(iii) may justify an order for placing a director under probation on the basis of conduct that has been oppressive or unfairly prejudicial to, or unfairly disregard the interests of a shareholder or director as applicant for purposes of section 163, it is submitted that not all conduct that can be regarded as oppressive or unfairly prejudicial to, or unfairly disregarding the interests of a

⁵⁸³ Companies Act 71 of 2008, s 162(7)(a)(ii).

shareholder or director would justify an order for the probation of a director.⁵⁸⁴

5.9.8 Return of consideration

In terms of section 163(2)(g) a company or any other person can be ordered to repay, in part or in total, any consideration that a shareholder paid for the shares in question. Such repayment may be ordered with or without conditions. The provision also refers to the payment of the equivalent value paid for the shares. Some authors point out that it is not certain whether a return of consideration should be regarded as a repurchase of securities for purposes of section 48 and whether the solvency and liquidity test in section 4 finds application in such circumstances.⁵⁸⁵

5.9.9 Setting aside of transactions and agreements

The court is also entrusted with the power to set aside a transaction or agreement to which the company is a party.⁵⁸⁶ When this form of relief is granted, compensation can be awarded to the company or any other party to the transaction that has been set aside.⁵⁸⁷ This form of relief is also a very invasive remedy as it involves the interference with or intervention in legal relationships between private parties such

⁵⁸⁴ See *Motale v Abahlobo Transport Services (Pty) Ltd and others* [2015] JOL 34696 (WCC) where the court found that the refusal of a co-director of the applicant and the company secretary to provide the applicant with certain company records is materially inconsistent with the duties of a director for purposes of section 163(7)(a)(ii) but made the *obiter* remark that such conduct does not necessarily constitute oppressive or unfair prejudicial conduct for purposes of relief in terms of section 162(7)(a)(iii). See also section 162(8)(a) of the Act.

⁵⁸⁵ See the commentary on section 163 by PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018).

⁵⁸⁶ Companies Act 71 of 2008, s 163(2)(h). In this regard K van der Linde 'Share Repurchases and the Protection of Shareholders' (2010) 2 *TSAR* 288, 303 explains that relief in the form of section 163(2)(h) may be appropriate to set aside repurchase transactions where shareholders are unfairly treated unequally or where a selective repurchase is attempted.

⁵⁸⁷ Companies Act 71 of 2008, s 163(2)(h).

as consensual agreements, creditor/debtor relationships and shareholder agreements.⁵⁸⁸

5.9.10 Access to financial statements

Financial statements contain information which plays a substantial role in the financial decision-making of a shareholder. Directors of a company also rely on the information in financial statements to make informed decisions relating to the business and affairs of a company. The production of financial statements or access thereto also forms part of the duties of directors to account. In some instances creditors also rely on the financial statements of the company to decide whether, for example, loan facilities to a particular company should be expanded.⁵⁸⁹

Section 163(2)(i) is a remedy in terms of which an applicant can request that a company be ordered to produce financial statements within a time frame and/or in a format required by the Act or in a form determined by the court. Companies are under a legal duty to keep proper accounting records and to compile financial statements.⁵⁹⁰

5.9.11 Compensation

Section 163(2)(j) provides that a court may order the payment of compensation to 'an aggrieved person, subject to any other law entitling that person to compensation'. The application and need of this provision is uncertain for a number of reasons. Firstly, the provision is 'subject to any other law entitling that person to

⁵⁸⁸ See the commentary on section 163 by PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018).

⁵⁸⁹ However, it should be noted that a creditor does not have standing for purposes of section 163.

⁵⁹⁰ Companies Act 71 of 2008, ss 28 to 30.

compensation'. Further 'an aggrieved person' will usually rely on the law of delict and/or the law of contract to claim damages based on a breach of the rights of the 'aggrieved person'. The only possible explanation for this provision is to allow an award based fairness in terms of section 163 which is a *sui generis* remedy. This may entail that the prejudice suffered will be assessed in light of what is fair in light of the facts and circumstances of a case. This compensation will not necessarily have a bearing on the damages a person may have suffered, although the damages a person may have suffered will be taken into account as a factor. However, such an explanation does not provide adequate guidance on the legal basis and the circumstances in which 'an aggrieved party' will need to rely on section 163(2)(j) for relief.

From reading section 163(2)(j) it appears that 'an aggrieved party' may include a person who does not necessarily enjoy standing in terms of section 163(1). Thus, the question remains whether a person may rely on section 163(2) to obtain damages or 'compensation' where such a person, especially when he or she is not a shareholder or director for purposes of section 163(1), cannot rely on the ordinary principles of the law of delict. Alternatively, section 163(2)(j) may also be interpreted as merely confirming the current legal position without creating any additional or alternative remedies. This must further be viewed in light of the fact that the objective of relief in terms of section 162(2) is to end the oppressive or unfair prejudicial conduct complained of and not necessarily to 'compensate' a shareholder or director.⁵⁹¹

In light of the uncertainty in this regard it is important to understand the

⁵⁹¹ See 5.9 above.

developments relating to the award of damages to a shareholder who suffered a loss in the form of a diminution of the value of his or her shares and/or in the form of a diminution in dividends. This form of loss usually results from conduct committed against the company; or conduct committed against a shareholder or shareholders, or instances where the same conduct may affect both the company and all or some of its shareholders.⁵⁹² To determine whether a cause of action exists and by whom such a cause of action is actionable, the applicable principles of the law of delict and company law have to be considered. In light of section 163(2)(j) it is especially relevant to determine whether a shareholder may personally recover loss in the form of a diminution of the value of his or her shares when the relevant principles of the law of delict are considered.

In accordance with the ordinary principles of the law of delict a plaintiff must prove that he or she suffered a loss as a result of the wrongful conduct and fault of the defendant.⁵⁹³ Case law is available that a shareholder may rely on the law of delict personally to recover loss suffered in the form of a diminution of the value of shares as a result of a wrong committed against the company.⁵⁹⁴ However, this approach is not supported by academic commentators.⁵⁹⁵ Their criticism is based on the fact that in the commission of the wrongful conduct a legal duty towards the

⁵⁹² BA van der Merwe 'Die Beskerming van Minderheidsaandeelhouders: Die Toepassingsveld van die Reël in *Foss v Harbottle* Uitgebrei?' (1993) 5 *SA Merc LJ* 216, 219.

⁵⁹³ Johan Scott 'An Unsuccessful Long Shot Aimed at Effecting Liability for Causing Pure Economic Loss *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA)' (2017) 80 *THRHR* 483, 484.

⁵⁹⁴ See *McLelland v Hullet* 1992 (1) SA 456 (D); *Kalinko v Nisbet* 2002 (5) SA 766 (W); *McCrae v Absa Bank Ltd* 2009 JDR 0782 (GSJ). *Contra Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) and *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA).

⁵⁹⁵ BA van der Merwe 'Die Beskerming van Minderheidsaandeelhouders: Die Toepassingsveld van die Reël in *Foss v Harbottle* Uitgebrei?' (1993) 5 *SA Merc LJ* 216.

company and the shareholder is breached. Unless a legal duty towards the shareholder is breached the loss suffered by the shareholder in the form of a diminution of the value of his or her shares is only a reflection of the loss suffered by the company as a result of wrongful conduct committed against it.⁵⁹⁶ Based on the principles in *Foss v Harbottle*⁵⁹⁷ the company and not the shareholder is the proper plaintiff to recover the loss suffered by a company.⁵⁹⁸ By allowing a shareholder personally to recover a loss suffered by a company will negate the separate legal personality of a company, and cannot be justified on the remoteness of the possibility of double recovery against the wrongdoer or wrongdoers.⁵⁹⁹ A

⁵⁹⁶ See BA van der Merwe 'Die Beskerming van Minderheidsaandeelhouders: Die Toepassingsveld van die Reël in *Foss v Harbottle* Uitgebrei?' (1993) 5 SA Merc LJ 216, 219 where the author pointed out that the personal action should only be available for protection against the direct infringement on personal or individual rights. See further *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) [109] where the court confirmed that loss suffered by a shareholder in the form of a diminution of value or deprivation of a dividend is often only a reflection of a loss suffered by a company. See also the principles in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204 as discussed in 2.10.6 above. The *Prudential Assurance* case was recently considered in *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) [108] and *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) [10]-[12]. See 2.10.6.4 above for a discussion of the criticism of the reflective loss principle in England.

⁵⁹⁷ (1843) 2 Hare 461, 67 ER 189.

⁵⁹⁸ See *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) [107] and [109].

⁵⁹⁹ See *McLelland v Hullet* 1992 (1) SA 456 (D); *Kalinko v Nisbet* 2002 (5) SA 766 (W); *McCrae v Absa Bank Ltd* 2009 JDR 0782 (GSJ) where the judgment in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 was interpreted to prevent a double recovery from a wrongdoer. In *McLelland v Hullet* 1992 (1) SA 456 (D) 467 the court held that the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 is not absolute. The approach of these courts left the door open for shareholders to institute legal proceedings to personally recover damages in the form of the diminution of the value of their shares, which resulted from a wrong committed against a company in circumstances where the possibility of a double recovery against the wrongdoer was unlikely. See specifically *McLelland v Hullet* 1992 (1) SA 456 (D) 467; *Kalinko v Nisbet* 2002 (5) SA 766 (W) 778-79; *McCrae v Absa Bank Ltd* 2009 JDR 0782 (GSJ) [36]. This approach was also criticised by BA van der Merwe 'Die Beskerming van Minderheidsaandeelhouders: Die Toepassingsveld van die Reël in *Foss v Harbottle*

shareholder may recovery loss suffered in the form of a diminution in the value of his or her shares when this loss is separate and distinct from the loss suffered by the company.⁶⁰⁰

More recently the Supreme Court of Appeal had to consider whether a shareholder may rely on the principles of the law of delict for the recovery of loss in the form of diminution of the value of shares as pure economic loss.⁶⁰¹ A loss

Uitgebrei?’ (1993) 5 SA Merc LJ 216, 227-28 who holds the view that the court in *McLelland v Hullet* 1992 (1) SA 456 (D) overemphasised the possibility of ‘double recovery’ and failed to take other equitable considerations into account, such as the view that the rejection of a shareholder’s individual claim as a mechanism to ensure that the relief granted benefits all shareholder proportionally; to avoid that the interests of creditors are bypassed by orders for payment directly to a shareholder; the availability of alternative remedies; the fact that a duplication of multiple actions is undesirable; and the possibility of the ratification of the wrong committed. See further the approach taken by the Supreme Court of Appeal in *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) and *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA). In *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) [16] and [17] where the court found that the proper plaintiff rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 is not aimed at the protection of wrongdoers against the double recovery of damages, but rather the upholding the separate legal personality of a company.⁶⁰⁰ *Gihwala and Others v Grancy Property Ltd and Others* [2016] 2 All SA 649 (SCA) [114]. The court held ([109] and [111]) that when a shareholder has a claim based on the breach of a legal duty or obligation towards the shareholder that is separate and distinct from the duty towards the company, a shareholder may recover losses suffered in the form of a diminution in the value of shares. The court in *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) [11] held that provided that a shareholder has a cause of action against a wrongdoer, a shareholder will also be entitled to institute a claim in circumstances where the company has suffered harm but does not have a cause of action to recover the loss suffered. The court further held [11] that in such circumstances a shareholder may rely on a diminution of value of his or her shares in the relevant company.

⁶⁰¹ Johan Scott ‘An Unsuccessful Long Shot Aimed at Effecting Liability for Causing Pure Economic Loss *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA)’ (2017) 80 *THRHR* 483, 484 summarises the categories within which one may possibly claim damages for pure economic loss based on the *lex Aquilia* as follows ‘namely, (i) loss not emanating from damage to property or infringement of personality, or, (ii) if it does flow from property or personality infringements, does not involve the plaintiff’s property or personality, or finally, (iii) if it does involve the plaintiff’s person or property, it was caused by someone other than the defendant’.

suffered as a form of pure economic loss is generally not actionable as the conduct which caused the loss is not *prima facie* regarded as wrongful.⁶⁰² The wrongfulness of such conduct must be established in light of the legal convictions of the community in terms of which the interests of the various parties are weighed and balanced, the relationship between the parties is considered as well as the social consequences that may flow from the imposition of liability in a particular situation.⁶⁰³ The principles in *Foss v Harbottle*⁶⁰⁴ and other company law principles⁶⁰⁵ form part of the legal convictions of the community.⁶⁰⁶ The Supreme Court of Appeal found that a shareholder cannot rely the law of delict to recover losses suffered in the form of a diminution of value as a pure economic loss.⁶⁰⁷

A further stumbling block for a shareholder to claim for losses in the form of a diminution of the value of his or her shares or in the form a diminution of dividends, is that a shareholder in a company only has a right to participate in the business and affairs of a company in accordance with the Memorandum of Incorporation,

⁶⁰² *Itzikowitz v Absa Bank Ltd* 2016 (3) SA 432 (SCA) [8]; *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2006 (3) SA 151 (SCA) [1].

⁶⁰³ *Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd* 1982 (4) SA 371 (D) 384. See *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) [23]. See also *Loureiro v Invula Quality Protection (Pty) Ltd* 2014 (3) SA 394 (CC) 410. See specifically Johan Scott 'An Unsuccessful Long Shot Aimed at Effecting Liability for Causing Pure Economic Loss *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA)' (2017) 80 *THRHR* 483, 486-87 on the use of the *boni mores* criterion for establishing wrongfulness for purposes of determining liability for pure economic loss.

⁶⁰⁴ (1843) 2 Hare 461, 67 ER 189.

⁶⁰⁵ More specifically the separate legal personality of a company as entrenched in section 19(1) of the Act.

⁶⁰⁶ Johan Scott 'An Unsuccessful Long Shot Aimed at Effecting Liability for Causing Pure Economic Loss *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA)' (2017) 80 *THRHR* 483, 488-93 and 498.

⁶⁰⁷ *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA).

which is unaffected by a diminution of the value of shares.⁶⁰⁸

5.9.12 Rectification of records

5.9.12.1 Introduction

Section 115 of the previous Act provided for a summary remedy for the rectification of a company's share register.⁶⁰⁹ The legislature omitted to incorporate a similar remedy in the Act.⁶¹⁰ However, section 163(2)(k) of the Act provides for relief in the form of 'an order directing rectification of the registers or other records of a company'. Although section 163(2)(k) provides for the rectification of the registers or other records of the company, such form of relief is significantly restricted when compared to section 115 of the previous Act.⁶¹¹

⁶⁰⁸ *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA) [10]. See also Johan Scott 'An Unsuccessful Long Shot Aimed at Effecting Liability for Causing Pure Economic Loss *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA)' (2017) 80 *THRHR* 483 for a critical evaluation of the legal principles relating to the law of delict and company law that was applied. In *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC) [23] the court held that the question whether a shareholder can institute legal proceedings based on a wrong committed to the company, can be answered on the basis that a share in a company provides the shareholder with the right to participate in the company in terms of the Memorandum of Incorporation. The implication of this is that should a wrong be committed against the company the rights of a shareholder remain unaffected.

⁶⁰⁹ Section 115 of the Companies Act 61 of 1973 read as follows:

'115. Rectification or register of members.
(1) If –
(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or
(b) default is made or unnecessary delay takes place in entering in the register that fact of any person having ceased to be a member,
the person concerned or the company or any member of the company, may apply to the Court for rectification of the register.'

⁶¹⁰ JS (Schoeman) Oosthuizen and PA Delpont 'Rectification of the Securities Register of a Company and the Oppression Remedy' (2017) 80 *THRHR* 228, 246.

⁶¹¹ See 5.9.12.2 below.

5.9.12.2 The availability of relief

Only a shareholder or director may rely on the provisions of section 163 of the Act.⁶¹² For purposes of section 163 the term shareholder carries a very specific meaning.⁶¹³ Because of the definition of a shareholder for purposes of section 163, the application of the remedy contained 163(2)(k) is limited.⁶¹⁴ The definition excludes a shareholder whose name does not appear on the register of securities of the company.⁶¹⁵ Section 115 of the previous Act was available to a much wider range of applicants in comparison to section 163 of the Act. Oosthuizen and Delpoort⁶¹⁶ point out that standing for purposes of the summary remedy for the rectification of the share register of a company in terms of section 115 of the previous Act extended to any person who alleged to have the right to have his or her name entered into the share register of a company.⁶¹⁷ When the right of a shareholder to have his or her name included in the register of securities is in dispute, section 163 would not be available to such a shareholder, as the shareholder's name would not appear on the register of securities of a company.⁶¹⁸ The remedy in section 163(2)(k) of the

⁶¹² See 5.7 above.

⁶¹³ See 5.7.1.1 above.

⁶¹⁴ JS (Schoeman) Oosthuizen and PA Delpoort 'Rectification of the Securities Register of a Company and the Oppression Remedy' (2017) 80 *THRHR* 228, 246.

⁶¹⁵ See 5.7.1.1 above. JS (Schoeman) Oosthuizen and PA Delpoort 'Rectification of the Securities Register of a Company and the Oppression Remedy' (2017) 80 *THRHR* 228, 246 point out that standing for purposes of the summary remedy for the rectification of the share register in terms of section 115 of the Companies Act 61 of 1973 was extended to any person who alleges to have the right to have his or her name entered into the share register of a company.

⁶¹⁶ JS (Schoeman) Oosthuizen and PA Delpoort 'Rectification of the Securities Register of a Company and the Oppression Remedy' (2017) 80 *THRHR* 228.

⁶¹⁷ JS (Schoeman) Oosthuizen and PA Delpoort 'Rectification of the Securities Register of a Company and the Oppression Remedy' (2017) 80 *THRHR* 228, 246.

⁶¹⁸ JS (Schoeman) Oosthuizen and PA Delpoort 'Rectification of the Securities Register of a Company and the Oppression Remedy' (2017) 80 *THRHR* 228, 247.

Act serves as another example of a disconnect between the remedies available under section 163(2) and the persons who enjoy standing in section 163(1) read with section 1 of the Act.

5.9.12.3 Alternative relief

(a) Introduction

The consideration of alternative remedies available to a person claiming that he or she is entitled to have his or her name noted in the register of securities of a company, may further aid comprehension of the implications of the limitations on the relief that may be obtained in terms of section 163.

(b) Common law

It is significant to note that in contrast with section 165(1) of the Act, section 163 does not abolish the common law rights of a shareholder.⁶¹⁹ Thus, when a shareholder is unable to rely on section 163, such a shareholder could alternatively rely on his or her common law remedies such as specific performance to obtain relief compelling the company to include the name of the shareholder in the company's register of securities.⁶²⁰

(c) Section 161

One other alternative remedy that can be considered in circumstances where a shareholder alleges that he or she has a right to have his or her name included in

⁶¹⁹ JS (Schoeman) Oosthuizen and PA Delpont 'Rectification of the Securities Register of a Company and the Oppression Remedy' (2017) 80 *THRHR* 228, 252.

⁶²⁰ JS (Schoeman) Oosthuizen and PA Delpont 'Rectification of the Securities Register of a Company and the Oppression Remedy' (2017) 80 *THRHR* 228, 243 and 246.

company's register of securities is section 161.⁶²¹ One of the benefits of section 161 is that an applicant does not have to prove that he or she is a shareholder whose name is recorded in the company's register of securities.⁶²² It is only required that the applicant is the holder of issued securities of a company.⁶²³

Section 161 is available to the holder of issued securities of a company.⁶²⁴ The standing requirements for purposes of section 161 of the Act are therefore wider than the standing requirements for purposes of section 163 as a shareholder would only have to prove that he or she is the holder of securities and it is not required to prove that his or her name appears on the company's register of securities.⁶²⁵ Oosthuizen and Delpont are critical regarding the use of section 161 by an unregistered claimant when the section is analysed with reference to section 115 of the previous Act.⁶²⁶ Although the standing requirements of section 161 of the Act include a wider variety persons compared to section 163, the authors remain critical of section 161 as a form of relief to a shareholder whose name has been

⁶²¹ JS (Schoeman) Oosthuizen and PA Delpont 'Rectification of the Securities Register of a Company and the Oppression Remedy' (2017) 80 *THRHR* 228, 248 argue that for purposes of the standing requirements in terms of section 161, an applicant does not have to prove that his or her holding of issued securities is recorded in the company's register of securities.

⁶²² It should be noted that section 161 does not only protect shareholders but also the holders of securities. Section 1 of the Act defines 'securities' as meaning 'any shares, debentures or other instruments, irrespective of their form of title, issued or authorised to be issued by a profit company'.

⁶²³ Companies Act 71 of 2008, s 161(1). See also JS (Schoeman) Oosthuizen and PA Delpont 'Rectification of the Securities Register of a Company and the Oppression Remedy' (2017) 80 *THRHR* 228, 248.

⁶²⁴ JS (Schoeman) Oosthuizen and PA Delpont 'Rectification of the Securities Register of a Company and the Oppression Remedy' (2017) 80 *THRHR* 228, 248.

⁶²⁵ JS (Schoeman) Oosthuizen and PA Delpont 'Rectification of the Securities Register of a Company and the Oppression Remedy' (2017) 80 *THRHR* 228, 248.

⁶²⁶ JS (Schoeman) Oosthuizen and PA Delpont 'Rectification of the Securities Register of a Company and the Oppression Remedy' (2017) 80 *THRHR* 228, 248.

unjustifiably omitted from a company's register of securities.⁶²⁷ When the standing requirements of section 161 are compared to that of section 115 of the previous Act, it is clear that the section 115 was available to a wide variety of persons compared to the narrow band of persons, namely the holders of securities, who may rely on section 161 of the Act.⁶²⁸

The omission of a shareholder's name from a company's register of securities automatically disqualifies a shareholder from reliance on section 163. Such a shareholder's position is further eroded in comparison with the previous Act as the Act does not contain a similar remedy to section 115 of the previous Act. According to Oosthuizen and Delpport⁶²⁹ statutory provisions such as section 161 of the Act serve as unsatisfactory alternatives to relief in terms of section 163 and section 115 of the previous Act.

5.9.13 Referral for trial

5.9.13.1 Introduction

It is trite that legal proceedings can commence by way of either action procedure or motion proceedings. It is interesting to note that section 163(1) provides that '[a] shareholder or a director of a company may *apply* (my emphasis) to a court for

⁶²⁷ JS (Schoeman) Oosthuizen and PA Delpport 'Rectification of the Securities Register of a Company and the Oppression Remedy' (2017) 80 *THRHR* 228, 248.

⁶²⁸ JS (Schoeman) Oosthuizen and PA Delpport 'Rectification of the Securities Register of a Company and the Oppression Remedy' (2017) 80 *THRHR* 228, 248. The authors (248-49) further argue that while section 115 specifically dealt 'with the title to be on the register of members' section 161 is rather aimed at the enforcement of the rights of a security holder in terms of the Act, Memorandum of Incorporation, applicable rules or any debt instrument.

⁶²⁹ JS (Schoeman) Oosthuizen and PA Delpport 'Rectification of the Securities Register of a Company and the Oppression Remedy' (2017) 80 *THRHR* 228.

relief'. The wording of the provision implies that relief in terms of the section should be sought by way of motion proceedings.⁶³⁰ Further, section 163(2)(l) provides that a court can refer to trial, matters or issues that arise from an application based on section 163.⁶³¹

5.9.13.2 Action procedure and motion proceedings

(a) Section 163 and motion proceedings

Relief in the form of referring a matter for trial must be considered in light of the established principles relating to motion proceedings. Legal proceedings in terms of section 163 by way of motion proceedings is 'permissible when there are no anticipated disputes of fact or these disputes can easily be determined by referral to trial'.⁶³² Thus section 163(1) does not compel a shareholder or director to commence with legal proceedings in the form of motion proceedings.⁶³³ The section should rather be read to permit the commencement of legal proceedings in terms of section 163 by way of motion proceedings.

(b) The referral to trial as an alternative remedy in the event of a factual dispute

A court may only grant the relief sought in motion proceedings when the facts contained in the papers of the respondent or respondents considered with the

⁶³⁰ See 5.9.13.2 (a) below for a discussion of whether it is mandatory to commence with legal proceedings based on section 163 by way of motion proceedings.

⁶³¹ See 5.9.13.2 (b) below for a discussion of the function of section 163(2)(l) of the Act.

⁶³² *Harilal v Rajman and Others* [2017] 2 All SA 188 (KZD) [93].

⁶³³ According to the court in *Harilal v Rajman and Others* [2017] 2 All SA 188 (KZD) [93] it could not have been the intention of the legislature to limit the procedural rights by excluding the availability of the commencement of legal proceedings by way of action proceedings.

admissions contained in the papers of the applicant justify such relief.⁶³⁴ In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*⁶³⁵ the court articulated the test as follow:-

‘Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such as to raise a real, genuine or *bona fide* dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.’

A fact is not regarded as in dispute merely because it is denied by a party.⁶³⁶ A court will not conclude that a reasonable dispute exists on the papers when the allegations made by the opponent or opponents of the application is ‘far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers’.⁶³⁷ The party raising the dispute must ‘seriously and unambiguously’ deal with the fact in dispute in his or her papers.⁶³⁸ The existence of a dispute on the facts in motion

⁶³⁴ *Harilal v Rajman and Others* [2017] 2 All SA 188 (KZD) [93]; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634.

⁶³⁵ 2008 (3) SA 371 (SCA) [12].

⁶³⁶ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) [13]. The court ([13]) noted that there may be some instances where a party can only answer to factual allegation by way of a bare denial. In those instances, a denial will suffice to find that a *bona fide* or real dispute is present on the papers. In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 1162-63 the court held that ‘[t]he crucial question is always whether there is a real dispute of fact. That being so, and the applicant being entitled in the absence of such dispute to secure relief by means of affidavit evidence, it does not appear that a respondent is entitled to defeat the applicant merely by bare denials such as he might employ in the pleadings of a trial action, for the sole purpose of forcing his opponent in the witness box to undergo cross-examination. Nor is the respondent’s mere allegation of the existence of the dispute of fact conclusive of such existence’.

⁶³⁷ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) [12]. See also *Harilal v Rajman and Others* [2017] 2 All SA 188 (KZD) [100]; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634-35.

⁶³⁸ *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) [13].

proceedings justifies a court to dismiss the application with costs.⁶³⁹ This will especially be the case when the version of the applicant is placed in doubt.⁶⁴⁰

Thus, an applicant is not entitled to relief in terms of section 163(2)(l) or the referral of the matter for oral evidence, merely because a factual dispute is raised on the papers before a court. Although a court can refer a dispute on the facts for trial, it will not do so in circumstances where the applicant commenced with motion proceedings with knowledge of the fact that the facts on which the applicant's application for relief is based will probably be placed in dispute, requiring a detailed consideration of the available evidence to establish the facts in the matter.⁶⁴¹ A court can also make an order in the form of a declaratory order in respect of the disputes in question to be referred for trial.⁶⁴² In *Harilal v Rajman and Others*⁶⁴³ the court explained that when an applicant knows that a dispute cannot be resolved by motion proceedings, the applicant can approach the court for relief in terms of section 163(2)(l). The applicant must clearly set out the issues that should be determined by a trial court.⁶⁴⁴ Despite the provisions of section 163(1) a party retains the right to institute action proceedings in the event of an anticipated factual dispute.⁶⁴⁵

⁶³⁹ *Harilal v Rajman and Others* [2017] 2 All SA 188 (KZD) [95] and [104].

⁶⁴⁰ *Harilal v Rajman and Others* [2017] 2 All SA 188 (KZD) [95].

⁶⁴¹ *Harilal v Rajman and Others* [2017] 2 All SA 188 (KZD) [96]. See also *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) 1162.

⁶⁴² *Harilal v Rajman and Others* [2017] 2 All SA 188 (KZD) [101].

⁶⁴³ [2017] 2 All SA 188 (KZD).

⁶⁴⁴ *Harilal v Rajman and Others* [2017] 2 All SA 188 (KZD) [101].

⁶⁴⁵ The court in *Harilal v Rajman and Others* [2017] 2 All SA 188 (KZD) [102] held that factual disputes cannot be resolved by way of motion proceedings and in the event of serious factual disputes action proceedings are more appropriate. The fact that proceedings in terms of section 163 of the Act may, in appropriate circumstances, be commenced with by way of action proceedings does not hold any prejudice for the party against whom proceedings are instituted.

(c) Summary

Section 163(1) is not prescriptive of the form of proceedings a party must use in relying on the statutory unfair prejudice remedy. Section 163(2)(l) does not provide a safety net for an applicant who elected to rely on motion proceedings where the applicant knew or should have foreseen a *bona fide* factual dispute that would have caused the dispute to be referred to trial. When a party approaches a court by motion proceedings with the knowledge or the reasonable foreseeability of a *bona fide* factual dispute, the applicant runs the risk of his application being dismissed as it is not the function of section 163(2)(l) to entitle such an applicant to rather have the matter referred to trial. When a party wishes to seek some sort of relief by way of motion proceedings, the applicant must clearly describe the specific issues that are required to be referred to trial.

5.9.14 Buy-out orders in terms of section 163(2)

5.9.14.1 Introduction

Relief in the form of a buy-out of a shareholder is only available when unfair prejudicial conduct is proven and when the court is of the view that it is appropriate in the context of the facts and circumstances of a case.⁶⁴⁶ Relief in the form of a buy-out order does not entitle a shareholder to exit from and divest its investment in the company at will. It is, however, strange that the legislature did not expressly

⁶⁴⁶ Usually a majority shareholder will be ordered to buy the shares of the minority shareholder at fair value. In exceptional circumstances it will be ordered that the shares of the majority be bought by the minority. See *Bayly and Others v Knowles* 2010 (4) SA 548 (SCA) [26] and [27]. See also in the context of section 252 of the previous Act Leon van Rooyen 'Die Statute Beskerming van Minderheidsbelange in die Maatskappyreg – Belangrike Ontwikkelings in die Engelse Regspraak' (1988) 2 *TSAR* 268, 291.

provide for this form of relief in section 163(2).⁶⁴⁷ It can, however, be argued that section 163(2)(e) incorporates relief in the form of a buy-out order.⁶⁴⁸ Although there is some merit in this argument, the legislature missed the opportunity to clarify some aspects relating to relief in the form of buy-out orders. These aspects include who may be compelled to buy the shares subject to a buy-out order and, in the event of a company being compelled to acquire the shares of a shareholder, whether the requirements relating to the solvency and liquidity of a company apply to the making and enforcement of such an order.⁶⁴⁹ The valuation of shares subject to a buy-out order is also a complex matter. Factors that may influence the value of such shares include the date on which the valuation is made and the adjustments that have to be made to the value of the shares to counter the effect of the unfair prejudicial conduct complained of.⁶⁵⁰

5.9.14.2 The practical value of buy-out orders

Purchase or buy-out orders are the most frequent form of relief granted by courts on the grounds of unfair prejudicial conduct. This is because relief in this form is regarded as the most efficient and practical one to resolve unfair prejudice disputes, as the relationship between the parties to the dispute is terminated.⁶⁵¹ A further advantage of a buy-out order is that the termination of the relationship between the

⁶⁴⁷ Compare to the position under section 252 of the previous Act where express provision was made for relief in the form of a buy-out order. This is especially significant because section 252 was criticised for not adequately describing the available forms of relief. See 5.2.4.3 (f) above in this regard.

⁶⁴⁸ See 5.9.9 above.

⁶⁴⁹ See also the commentary on section 163 by PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018).

⁶⁵⁰ See 5.9.14.4 below.

⁶⁵¹ See *Bayly and Others v Knowles* 2010 (4) SA 548 (SCA) [15].

parties does not affect the existence and sustainability of a company as the case would have been in the event of the winding-up and liquidation of such a company.⁶⁵² Oosthuizen argues that it is important for a shareholder to obtain relief in the form of a buy-out order when the company's controllers committed a wrong against the company, as the normal derivative action has the disadvantage of placing the damages received by the company again under the control of the wrongdoers.⁶⁵³ Providing a shareholder with relief in the form of a buy-out order in circumstances where the controllers of the company have committed a wrong against the company will also have a more deterrent effect and protect a shareholder against future or re-occurring conduct.⁶⁵⁴

5.9.14.3 Persons against whom a buy-out order can be made

A court enjoys a wide discretion in the relief that it may grant.⁶⁵⁵ This discretion includes a discretion to tailor the relief to suit the facts and circumstances of a case. It is submitted that nothing in section 163 prevents a court to order that the shares subject to a buy-out order must be bought by the company and/or other shareholders of the company.⁶⁵⁶ When it considers the making of a purchase order the court will take into account the interests and rights of parties and stakeholders

⁶⁵² See *Bayly and Others v Knowles* 2010 (4) SA 548 (SCA) [15]. See also 5.8 above.

⁶⁵³ MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg' (1981) *TSAR* 105, 115 and 117. See also 5.9.15.2 above.

⁶⁵⁴ MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg' (1981) *TSAR* 105, 115 and 117.

⁶⁵⁵ See 5.9 above.

⁶⁵⁶ This was also the position under section 252(3) of the previous Act where a buy-out order could be made against the company or shareholders. See also the buy-out order made in *Omar v Inhouse Venue Technical Management (Pty) Ltd and Others* 2015 (3) SA 146 (WCC) in terms of section 163(2) of the Act.

who are not a party to the dispute before the court.⁶⁵⁷

5.9.14.4 The valuation of shares

Although the granting of a buy-out order is often a very useful mechanism in resolving unfair prejudice disputes it does have its drawbacks. Generally, a buy-out order requires that the shares in question be bought at fair value.⁶⁵⁸ Although courts have a wide discretion in fixing the value of shares subject to a buy-out order, judges are not businesspersons or experts in commerce.⁶⁵⁹ Judges are experts of law. One of the ways in which the fair value of shares can be determined is with the assistance of experts such as chartered accountants.⁶⁶⁰ Buy-out orders often contain instructions to the experts relating to issues and considerations that need to be taken into account during the valuation of the shares.⁶⁶¹ Factors that may influence the valuation of the said shares may include discounts based on the fact that the

⁶⁵⁷ See regarding section 252 of the previous Act *Bayly and Others v Knowles* 2010 (4) SA 548 (SCA) [25] where the court stated that '[i]n any exercise of a discretion under s 252(3) the court is bound to consider not only the interests of the warring shareholders but also those of shareholders who have stood apart, and the best interests of the company itself'.

⁶⁵⁸ See *Omar v Inhouse Venue Technical Management (Pty) Ltd and Others* 2015 (3) SA 146 (WCC) [78]. See also *Knipe and Others v Kameelhoek (Pty) Ltd and Another* 2014 (1) SA 52 (FB) [33] where the court held that a court should determine a price for the shares that is subject to a buy-out order that is that is objectively 'a fair price'. See also in the context of section 252 of the previous Act Leon van Rooyen 'Die Statute Beskerming van Minderheidsbelange in die Maatskappyreg – Belangrike Ontwikkelings in die Engelse Regspraak' (1988) 2 *TSAR* 268, 290. See further MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyreg' (1981) *TSAR* 223, 237.

⁶⁵⁹ See the commentary on section 163 by PA Delpont *Henocheberg on the Companies Act 71 of 2008* (Service issue 17, 2018).

⁶⁶⁰ See, for example, *Omar v Inhouse Venue Technical Management (Pty) Ltd and Others* 2015 (3) SA 146 (WCC) [78].

⁶⁶¹ See also *Omar v Inhouse Venue Technical Management (Pty) Ltd and Others* 2015 (3) SA 146 (WCC) [78].

shares are a minority holding in the company,⁶⁶² the date of the valuation of shares⁶⁶³ and the adjustments to be made to the value of the shares to provide for the unfair prejudicial conduct.⁶⁶⁴

⁶⁶² See *Omar v Inhouse Venue Technical Management (Pty) Ltd and Others* 2015 (3) SA 146 (WCC) [78] where the court held that the shareholding of a minority shareholder is to be valued on a pro rata basis. For a similar order see *Engelbrecht v Coleman* 2017 JDR 0415 (GJ) [12]. See further *McMillan NO v Pott* 2011 (1) SA 511 (WCC) [47] where the valuation of the particular company was done on a going-concern basis. See also in the context of section 252 of the previous Act Leon van Rooyen 'Die Statute Beskerming van Minderheidsbelange in die Maatskappyreg – Belangrike Ontwikkelings in die Engelse Regspraak' (1988) 2 TSAR 268, 291 who is of the view that different considerations may apply in circumstances where a shareholder did not receive his shares at the incorporation of a company, but bought the shares in the company by means of a sale agreement where the fact that the relevant shares are a minority share was known. See also MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyreg' (1981) TSAR 223, 237.

⁶⁶³ See *Omar v Inhouse Venue Technical Management (Pty) Ltd and Others* 2015 (3) SA 146 (WCC) [37] and [78] where the court ordered that the shares of the applicant must be valued as of his exclusion as a director from the board of the company. This approach is in line with the principle that the shares subject to a buy-out order should be valued on a date immediately preceding the unfair prejudicial conduct. See PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018). See further *McMillan NO v Pott* 2011 (1) SA 511 (WCC) [50] where the court held that the date that is to be used as the basis for the valuation of shares subject to a buy-out order must be 'fair to both sides'. See also in the context of section 252 of the previous Act Leon van Rooyen 'Die Statute Beskerming van Minderheidsbelange in die Maatskappyreg – Belangrike Ontwikkelings in die Engelse Regspraak' (1988) 2 TSAR 268, 291 who points out that there is no absolute principle as to whether the date on which the conduct complained of took place, the date of the application for relief, or the date of judgment or valuation should be used for purposes of the valuation of shares for purposes of a buy-out order. The principle is that a date should be chosen that reflects a fair valuation of the relevant shares (291).

⁶⁶⁴ See also in the context of section 252 of the previous Act Leon van Rooyen 'Die Statute Beskerming van Minderheidsbelange in die Maatskappyreg – Belangrike Ontwikkelings in die Engelse Regspraak' (1988) 2 TSAR 268, 290. See further MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyreg' (1981) TSAR 223, 237.

5.9.14.5 Buy-out orders and the interests of creditors

(a) Introduction

Creditors rely on the solvency and liquidity of a company for the satisfaction of their claims against the company. When a buy-out order is made and especially when the company is ordered to purchase the shares of the applicant or other shareholder, the interests of the applicant may come into conflict with the interests of a creditor. This is particularly the case when the company is financially distressed⁶⁶⁵ or where there is doubt about the solvency and liquidity of a company. Therefore, it is submitted that a buy-out order against a company should be subject to the solvency and liquidity requirements in section 4 of the Act. Because the company does not finance the buy-out of shares when such an order is made against shareholders of a company, there is no reason why the solvency and liquidity requirements have to apply in such circumstances as it is not the resources of the company that will be used to satisfy the buy-out order. However, adjustments to the value of shares to compensate for the effect of the relevant unfair prejudicial conduct raise interesting theoretical questions particularly in relation to the interests of creditors, especially if such adjustments to the value of shares are seen as the award of compensation directly to a shareholder.⁶⁶⁶

(b) Buy-out orders and the award of compensation

When a buy-order provides for adjustments to compensate for unfair prejudicial conduct, it can be argued that a shareholder receives a portion of compensation to

⁶⁶⁵ Companies Act 71 of 2008, s 128(1)(f).

⁶⁶⁶ See also 5.9.11 above for a discussion of the award of compensation to a shareholder or shareholders in instances where the company suffered damages or loss due to wrongful conduct.

which the company is actually entitled. That is specifically the case when a legal duty owed to the company is breached.⁶⁶⁷ The prejudice suffered by a shareholder is only reflective of the loss suffered by the company.⁶⁶⁸ The effect of this argument becomes apparent in the event of the winding-up of a company. For purposes of liquidation the free residue of the assets of a company which may include the compensation awarded to the company for a breach of duty will first be utilised to cover the expenses of the liquidation and other similar claims, thereafter the balance of the assets would be used to satisfy the claims of creditors as far as possible.⁶⁶⁹ Only after the satisfaction of the claims of creditors will the balance of the assets be used to repay shareholders for their capital invested in the company.⁶⁷⁰ This highlights the possibility that a shareholder would enjoy a preference over other interested parties such as creditors, when a shareholder is awarded compensation for unfair prejudice suffered.⁶⁷¹

5.9.15 The interrelationship between sections 163 and 165 of the Act

5.9.15.1 Introduction

The Act provides for both a statutory personal action (the oppression or unfair prejudice remedy) in the form of section 163 and a statutory derivative action in section 165. Both these remedies are aimed at the protection of the shareholders of the company, as the legislature recognised that the strict application of the proper

⁶⁶⁷ See 5.9.11 above.

⁶⁶⁸ See 5.9.11 above.

⁶⁶⁹ Companies Act 61 of 1973, s 391 read with s 342(1).

⁶⁷⁰ Companies Act 61 of 1973, s 391 read with s 342(1).

⁶⁷¹ See also BA van der Merwe 'Die Beskerming van Minderheidsaandeelhouders: Die Toepassingsveld van die Reël in *Foss v Harbottle* Uitgebrei?' (1993) 5 SA Merc LJ 216, 228.

plaintiff rule and the principle of majority rule may in some circumstances lead to injustices.⁶⁷² The difference between the two remedies is that section 163 is aimed at the direct protection of the interests of a shareholder (and/or a director) while section 165 is aimed at the protection of the rights and interests of the company resulting in the consequential indirect protection of shareholders.⁶⁷³ Currently, the South African legislature maintains a strict distinction between the personal remedy and the derivative action in the form of section 163 and section 165 of the Act.⁶⁷⁴ The merits of the strict maintenance of the difference between section 163 and 165 are considered below in light of criticism raised in this respect against the previous Act and current developments in other jurisdictions considered.⁶⁷⁵

5.9.15.2 An overview of section 165 – the basic procedure

(a) *The service of a letter of demand as the commencement of the procedure in section 165 of the Act*

Section 165 of the Act outlines the procedure that must be followed for the appointment of a person to institute legal proceedings on behalf of the company to

⁶⁷² See 5.2.2 above.

⁶⁷³ MF Cassim *The New Derivative Action under the Companies Act Guidelines for Judicial Discretion* (1st ed, 2016) 5 and 7-8.

⁶⁷⁴ See 5.9.15.4 below where it is pointed out that this distinction is confirmed by judicial interpretation of section 163 of the Act. Compare with the position in England as discussed in 2.10.3 above. See also 3.9.6 above for the position in Australia. These jurisdictions make statutory provision in their respective statutory personal actions for the authorisation of legal proceedings on behalf of a company. The South African position is in line with the Canadian position where no provision is made for the authorisation for the institution of the legal proceedings for and on behalf of the company in terms of the statutory personal action.

⁶⁷⁵ See 5.9.15.3 – 5.9.15.6 below.

enforce or protect the legal interests of the company.⁶⁷⁶ The process commences with the service of a demand on the company by a person mentioned in section 165(2) of the Act.⁶⁷⁷

(b) *The company's options after receiving a demand*

Upon receipt of a demand in terms of section 165(2) of the Act, a company has 15 business days within which to approach the court to set aside the demand on the grounds that it is frivolous, vexatious or without merit.⁶⁷⁸ If the company does not approach the court in terms of section 165(3) to set aside a demand, the company must proceed to appoint a person or committee for purposes of investigating the demand.⁶⁷⁹ Such a person or committee must be independent and impartial.⁶⁸⁰

(c) *The investigation of the demand by a person or committee appointed by the company*

After the investigation of the demand by the person or committee appointed by the

⁶⁷⁶ For a detailed analysis of the provisions of section 165 see MF Cassim *The Statutory Derivative Action under the Companies Act of 2008: Guidelines for the Exercise of the Judicial Discretion* (2014) (unpublished PHD thesis; University of Cape Town). See also CT Chokuda *The Protection of Shareholders' Rights versus Flexibility in the Management of Companies: A Critical Analysis of the Implications of Corporate Law Reform on Corporate Governance in South Africa with specific reference to protection of shareholders* (2017) (unpublished Phd thesis; University of Cape Town) 115-28.

⁶⁷⁷ The court in *Mouritzen v Greystones Enterprises (Pty) Ltd and Another* 2012 (5) SA 74 (KZD) [34] held that the word 'may' in section 165 must be understood to mean 'must'. See, however, section 165(6) where it is acknowledged that a person may in 'exceptional circumstances' apply for leave without delivering a demand to the company and/or affording the company an opportunity to respond to the demand.

⁶⁷⁸ Companies Act 71 of 2008, s 165(3).

⁶⁷⁹ Companies Act 71 of 2008, s 165(4).

⁶⁸⁰ Companies Act 71 of 2008, s 165(4)(a).

company, such a person or committee must report to the board.⁶⁸¹ This report must cover the facts and circumstances that gave rise to or are related to the demand;⁶⁸² the costs implications of pursuing the demanded legal action or proceedings;⁶⁸³ and express an opinion as to whether the institution or continuation of legal proceedings will be in the best interests of the company.⁶⁸⁴

(d) *The obligations of the company after the consideration of the report of the person or committee tasked with investigating the demand served on the company*

Unless a company has succeeded in setting aside a demand in terms of section 165(2) of Act, a company has 60 business days after being served with a demand to either commence or continue with the legal proceedings demanded⁶⁸⁵ or serve a notice upon the person who made the demand in which it is stated that the company refuses to comply with the demand.⁶⁸⁶

(e) *Leave to bring or continue proceedings in the name and on behalf of the company*

If the company notified the person who made the demand for legal proceedings that it refuses to comply with the demand, the person who has made the demand may approach the court for leave to bring or continue proceedings in the name and on behalf of the company.⁶⁸⁷

⁶⁸¹ Companies Act 71 of 2008, s 165(4)(a).

⁶⁸² Companies Act 71 of 2008, s 165(4)(a)(i).

⁶⁸³ Companies Act 71 of 2008, s 165(4)(a)(i)(bb)(ii).

⁶⁸⁴ Companies Act 71 of 2008, s 165(4)(a)(i)(bb)(ii).

⁶⁸⁵ Companies Act 71 of 2008, s 165(4)(b)(i).

⁶⁸⁶ Companies Act 71 of 2008, s 165(4)(b)(ii).

⁶⁸⁷ Section 165(4)(b)(ii) read with section 165(5)(a)(v) and section 165(5)(b) of the Act. It must be noted that a person who made a demand for legal proceedings may also apply for relief to bring or

(f) A court's discretion in terms of section 165(5)(b) to grant leave to bring or continue proceedings in the name and on behalf of the company

A court may grant leave to bring or continue legal proceedings in the name and on behalf of the company, if the applicant can convince the court on a balance of probabilities that he or she is acting in good faith,⁶⁸⁸ the proposed legal proceedings to be instituted or continued address a serious question of material consequences to the company⁶⁸⁹ and that the institution of the legal proceedings or the continuation thereof is in the best interests of the company.⁶⁹⁰

(g) The rebuttable presumption in section 165(7) and the best interests of a company

One of the requirements that an applicant has to prove is that the proposed proceedings will in the best interests of a company if the applicant is granted such leave.⁶⁹¹ To satisfy a court that the leave in terms of section 165(5) is in the best interests of a company is especially difficult when the rebuttable presumption in section 165(7) applies. This presumption provides that it will not be in the best interests of the company to institute or continue with legal proceedings if those proceedings are by or against a third-party;⁶⁹² the company decided not to institute

continue legal proceedings in the name and on behalf of the company based on the conduct of the company described in section 165(5)(a)(i)-(iv).

⁶⁸⁸ Companies Act 71 of 2008, s 165(5)(b)(i).

⁶⁸⁹ Companies Act 71 of 2008, s 165(5)(b)(ii).

⁶⁹⁰ Companies Act 71 of 2008, s 165(5)(b)(iii).

⁶⁹¹ Companies Act 71 of 2008, s 165(5)(b)(iii).

⁶⁹² Companies Act 71 of 2008, s 165(7)(a). See the criticism of MF Cassim 'When Companies are harmed by their Own Directors: The Defects in the Statutory Derivative Action and the Cures (part 1)' (2013) 25 SA Merc LJ 168, 180 of the inclusion of a director as a 'third-party' for purposes of the application of the rebuttable presumption in section 165(7). See also AG Binns-Ward 'Lost in

or defend legal proceedings;⁶⁹³ and all the directors that participated in that particular position acted with good faith for a proper purpose.⁶⁹⁴ These directors must have had no personal financial interest in the matter;⁶⁹⁵ had properly informed themselves to an extent that they reasonably believed to be appropriate;⁶⁹⁶ and took the decision while the director or directors reasonably believed that was in the interests of the company.⁶⁹⁷

(h) Summary

In short, an applicant who wishes to rely on section 165 will have to overcome a number of procedural hurdles to institute or defend legal proceedings on behalf of the company.⁶⁹⁸ An applicant will, for example, have great difficulty in proving that the authorisation (leave) for the institution of legal proceedings on behalf of the

Translation: The need for the Judicious Use of Comparative Law' (2017) 2 *JCCL&P* 1, 12-13 who is of the view that because the directors of a company are regarded as 'a third party' for purposes of section 165(8) and because of the rebuttable presumption in section 165(7)(a), it is not in the best interest of the company to pursue litigation against a director or directors of the company who decided not to institute legal proceedings on behalf of the company, is one of the glaring weaknesses of the statutory derivative action in section 165 of the Act. This is especially problematic in light of the fact that reliance is usually placed on the statutory derivative action to protect that company against the wrongful and/or abusive conduct of its own directors.

⁶⁹³ Companies Act 71 of 2008, s 165(7)(b).

⁶⁹⁴ Companies Act 71 of 2008, s 165(7)(c)(i).

⁶⁹⁵ Companies Act 71 of 2008, s 165(7)(c)(ii).

⁶⁹⁶ Companies Act 71 of 2008, s 165(7)(c)(iii).

⁶⁹⁷ Companies Act 71 of 2008, s 165(7)(c)(iv).

⁶⁹⁸ For a critical analysis of section 165 of the Act see MF Cassim 'When Companies are harmed by their Own Directors: The Defects in the Statutory Derivative Action and the Cures (part 1)' (2013) 25 *SA Merc LJ* 168; MF Cassim 'When Companies are harmed by their Own Directors: The Defects in the Statutory Derivative Action and the Cures (part 1)' (2013) 25 *SA Merc LJ* 301; MF Cassim 'Costs Orders, Obstacles and Barriers to the Derivative Action under Section 165 of the Companies Act 71 of 2008 (part 1)' (2014) 26 *SA Merc LJ* 1; MF Cassim 'The Statutory Derivative Action under the Companies Act 2008: The Role of Good Faith' (2013) 130 *SALJ* 496; MF Cassim 'Judicial Discretion in the Derivative Actions under the Companies Act of 2008' (2013) 130 *SALJ* 778.

company will be in the best interests of the company, when the directors of the company have already taken the view that the institution or defence of legal proceedings is not in the best interests of the company. Because of the strict and difficult requirements in section 165, applicants would be inclined to seek alternative remedies to obtain the same or similar forms of relief. Section 163 has previously been raised as such alternative.⁶⁹⁹

5.9.15.3 A theoretical perspective on the potential overlap between sections 163 and 165 of the Act

The historical development of section 163 and the express wording of section 165 reveal an objective of the legislature to overcome the injustices and uncertainties created by the rule in *Foss v Harbottle*.⁷⁰⁰ A potential overlap or relationship between section 163 and section 165 is created when wrongs are committed to a

⁶⁹⁹ See 5.9.15.3 below for a discussion of the potential overlap between section 163 and section 165 of the Act.

⁷⁰⁰ (1843) 2 Hare 461, 67 ER 189. See also 5.2 above for the statutory development of the unfair prejudice remedy prior to the introduction of section 163 of the Act. With regard to the derivative remedy or claim, section 165 expressly abolished the common law position. See further see MF Cassim *The Statutory Derivative Action under the Companies Act of 2008: Guidelines for the Exercise of the Judicial Discretion* (2014) (unpublished PHD thesis; University of Cape Town) 8.

company by its directors⁷⁰¹ or other parties owing a legal duty to a company.⁷⁰² Such wrongs indirectly affect the interests of shareholders. Because the company is a separate legal personality only the company has standing to institute legal proceedings to obtain relief for the company.⁷⁰³ Further, the decision to institute legal proceedings to obtain redress for wrongs committed against a company resides with the company's board and not the shareholders.⁷⁰⁴ These two company

⁷⁰¹ For example, a breach of a director's duty. Directors owe fiduciary duties and a duty of care, skill and diligence towards a company. These duties are owed to the company and not to individual shareholders. However, when a director is in breach of his or her duty towards the company, it is not only the company that is prejudiced but it may also infringe upon the rights of shareholders. See Companies Act 71 of 2008, s 76. See also the commentary on section 76 by PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018). See also *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W) [16.6]. *Contra Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC) [49] where the court held that 'the duty of company directors to act honestly and in accordance with their fiduciary duties to the company is owed not only to the company, but also to the shareholders personally'. A director owes fiduciary duties and the duty to act with care, skill and diligence to the company. As the shareholders of a company do not owe fiduciary duties towards the company they may act in their own interests. See in this regard *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [89] and *Rentekor (Pty) Ltd v Rheeder & Berman* 1988 (4) SA 469 (T) 479.

⁷⁰² For example, a breach of a director's duty. Directors owe fiduciary duties and a duty of care, skill and diligence towards a company. These duties are owed to the company and not individual shareholders. However, when a director is in breach of his or her duty towards the company, it is not only the company that is prejudiced but the effect of the wrong committed towards the company may also infringe upon the rights of shareholders. See Companies Act 71 of 2008, s 76. See also the commentary on section 76 by PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018). See also *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd* 2006 (5) SA 333 (W) [16.6]. *Contra Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC). The fiduciary duties and the duty to act with care, skill and diligence of a director are owed the company, in contrast with shareholders who do not owe any such duties towards the company and may act in their own interests. See in this regard *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 (5) SA 179 (WCC) [89] and *Rentekor (Pty) Ltd v Rheeder & Berman* 1988 (4) SA 469 (T) 479. For an English law perspective on the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 see 2.3.1 above.

⁷⁰³ See 5.4.3 above.

⁷⁰⁴ Companies Act 71 of 2008, s 66(1).

law principles preclude a shareholder from seeking redress for indirect prejudice suffered as a consequence of a wrong committed against a company.⁷⁰⁵ The fact

⁷⁰⁵ See MJ Oosthuizen 'Statutêre Minderheidsbeskerming in die Maatskappyereg' (1981) *TSAR* 105, 117-18 who argues that an extension of the personal action to instances where a wrong is committed against the company should only be granted in exceptional circumstances where the indirect prejudice suffered by the shareholder is of an exceptional nature. The author further warned (115 and 117) that the inclusion of relief on such basis may lead to the involvement of companies in unnecessary litigation in circumstances where companies have not decided to pursue legal action against the wrongdoers on acceptable grounds. The advantages of relying on section 163 in appropriate circumstances instead of section 165 include the open and flexible concepts within which section 163 is formulated, making section 163 applicable to a variety of facts and circumstances. Also, section 163 provides the court with a wide discretion to tailor relief that it considers fit in the circumstances of each case. Further, in contrast with section 165, section 163 has a less cumbersome procedure to follow. Practitioners may be tempted to advise potential applicants to rely, where possible, on section 163 rather than section 165, as section 163 is not plagued by similar procedural requirements as section 165. Other than the normal rules of civil procedure, section 163 is a much simpler and faster method of approaching a court. Section 163 also does not have prerequisites which are linked to timeframes that have to be adhered to before a person may approach the court for the necessary relief. Based on the judgment of the Constitutional Court in *Off-Beat Holiday Club and Another v Sanbonani Holiday SPA Shareblock Ltd and Others* 2017 (5) SA 9 (CC) dealing with section 252 of the previous Act, a claim based in section 163 of the Act is not a 'debt' which can prescribe in terms of the Prescription Act 68 of 1969. In overturning the judgment of the Supreme Court of Appeal in *Off-Beat Holiday Club and Another v Sanbonani Holiday SPA Shareblock Ltd and Others* 2016 (6) SA 181 (SCA) the Constitutional Court found [31] that a claim based on section 252 of the previous Act does not constitute a debt as defined in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC). The Constitutional Court [32] further explained that section 252 of the previous Act 'concerns an entitlement to the making of an equitable judicial determination, which in any event considers the delay. The outcome of an equitable determination is not certain in advance. A court has to decide what is just and equitable based on the unique facts of the case. The declaratory order would clearly spell out the rights and duties of a party going forward and whether the applicants' claim should be absolutely barred or not'. Although prescription may not run against a claim in terms of section 163 of the Act, a court would probably take into account the time delay between the commission of the alleged oppressive or unfair prejudicial conduct and the institution of legal proceedings to obtain relief in terms of section 163 to determine the commercial fairness or unfairness of the conduct complained of. A long delay may be indicative of the shareholder or director's willingness to endure the conduct complained of, which will make it difficult for a court to hold without a reasonable explanation that the same conduct must suddenly be regarded as unfair. One of the disadvantages in obtaining an order to institute legal proceedings on behalf of a company

that the directors may decide on whether to pursue legal proceedings is problematic in circumstances where the wrong was committed by the directors themselves. Based on the separate legal personality of a company and the fact that the directors of a company have the power to manage the affairs and management the company, the chances of the company seeking redress are fairly slim. Due to the cumbersome procedure in section 165, it is unlikely that this statutory form of the derivative action would be relied upon to institute legal proceeding on behalf of the company against the relevant directors.⁷⁰⁶ An argument can be made that a decision of the board not to institute legal proceedings against directors who committed a wrong against the company may constitute oppressive unfair prejudice. Although it may be argued that the prejudice suffered by a shareholder in such circumstances is indirect it must be noted that section 163 protects the *interests* of a shareholder or director in addition

in terms of section 163, if possible, is that the position regarding the costs and indemnification of costs relating to such subsequent proceedings is uncertain. Section 165 of Act has also been subjected to criticisms for not adequately regulating the position in respect of costs in the application for and the subsequent institution of derivative proceedings. Traditionally personal actions such as section 163 is aimed at the protection of shareholders' own interests. Therefore, the normal principles relating to costs orders apply. MF Cassim 'Costs Orders, Obstacles and Barriers to the Derivative Action under section 165 of the Companies Act 71 of 2008 (part 1)' (2014) 26 *SA Merc LJ* 1, 12 is of the view that in the context of the derivative action one would expect different considerations to apply in relation to costs, because derivative proceedings are for the benefit of the company, and not directly for the benefit of the applicant in terms of section 165. Although section 165(10) does provide for the making of costs orders, these provisions are vague and leave the issue relating to costs within the discretion of the courts. MF Cassim 'Costs Orders, Obstacles and Barriers to the Derivative Action under section 165 of the Companies Act 71 of 2008 (part 1)' (2014) 26 *SA Merc LJ* 1, 13 states that section 165(10) fails 'to shift the burden of the costs back to the company, which is the real plaintiff, this provision dismally fails to overcome the shareholder's disincentive to litigate stemming from the normal "loser pays" rule'. The uncertainties embedded in this approach fail to incentivise the use of the derivative action in section 165, as section 165 does not provide for clear advantages regarding costs in comparison with section 163.

⁷⁰⁶ See 5.9.15.2 above.

to rights.⁷⁰⁷ This opens the possibility to obtain relief based on indirect prejudice suffered as a result of a direct wrong committed against the company.⁷⁰⁸

5.9.15.4 The judicial maintenance of a strict distinction between section 163 and section 165

The court in *Larret v Coega Development Corporation (Pty) Ltd*⁷⁰⁹ held that a clear distinction must be maintained between section 163 and section 165 of the Act. This is in light of the fact that section 163(2) does not expressly provide for the authorisation to institute legal proceedings on behalf of a company in terms of section 165.⁷¹⁰ Although this does not mean that the possibility is excluded, as the relief listed in section 163(2) is not exhaustive, the legislature did not follow the approach of the wording of similar provisions in other comparable jurisdictions.⁷¹¹ In light of the provisions and procedures in section 165 the court found that the legislature could not have intended to provide for the authorisation of legal proceedings on behalf of the company against third parties of a company in terms of section 163.⁷¹² Section 165 contains a procedure which takes into account the interests and rights of shareholders, the company and third parties.⁷¹³ It is interesting to note that the court indicated that it arrived at its conclusion

⁷⁰⁷ See 5.9.11 above.

⁷⁰⁸ See 5.9.11 above for a discussion of the right of a shareholder to recover damages based on an indirect harm suffered in the form of a diminution in the value of his or her shares.

⁷⁰⁹ 2015 (6) SA 16 (ECG).

⁷¹⁰ See *Larret v Coega Development Corporation (Pty) Ltd* 2015 (6) SA 16 (ECG) [12] where this question was specifically raised.

⁷¹¹ Companies Act 71 of 2008, s 5(2). For the position in England see 2.10.3 above.

⁷¹² *Larret v Coega Development Corporation (Pty) Ltd* 2015 (6) SA 16 (ECG) [14]. See also 5.9.15.4 above.

⁷¹³ *Larret v Coega Development Corporation (Pty) Ltd* 2015 (6) SA 16 (ECG) [14].

'reluctantly'.⁷¹⁴

5.9.15.5 The merits of the maintenance of a distinction between section 163 and section 165 – a practical perspective

The stance of the legislature and judiciary that the remedies provided for in section 163 and 165 are separate and independent of each other does not solve the practicalities with which applicants are faced when deciding whether section 163 or section 165 applies to a particular set of facts.⁷¹⁵ Such an approach is also not in keeping with the fact that conduct may in certain circumstances infringe upon the interests of a shareholder or a director and the interests and rights of the company on the other hand. This approach is also to an extent not in keeping with developments in other similar jurisdictions.⁷¹⁶

Taking into consideration the facts and circumstances in *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others*⁷¹⁷ and the nature of the relief sought by the applicant I am of the view that for

⁷¹⁴ *Larret v Coega Development Corporation (Pty) Ltd* 2015 (6) SA 16 (ECG) [16]. See also E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 53-58 pointed out the reluctance of courts to acknowledge the overlap between the personal remedy and the derivative action.

⁷¹⁵ This difficulty is well illustrated in the case of *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others* [2012] 4 All SA 203 (GSJ). In this case the applicant relied on section 163 to appoint directors to the board of the company and for a temporary amendment of a shareholder agreement. During the application it was argued that due to the uncertainty surrounding the legal appointment of directors to the board of the company, the company could not with legal certainty conclude transactions and agreements. The applicant, *Kudumane*, who was a minority shareholder of the company applied to court for an order relating to the appointment of certain directors and the amendment of a shareholder agreement. The court granted the relief prayed for.

⁷¹⁶ See the position in England as discussed in Chapter 2 above. For the position in Australia in Chapter 3 above.

⁷¹⁷ [2012] 4 All SA 203 (GSJ).

the reasons provided above, the applicant was well within its rights to base the application either on section 163 or section 165.⁷¹⁸ In *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others*⁷¹⁹ the applicant relied on section 163 for relief. It is submitted that section 165 might well have found application to the facts of the case as well.⁷²⁰ The manner with which section 163 was applied by the court in *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others*⁷²¹ cannot be faulted on the basis that it offended the principles of *Foss v Harbottle*⁷²² or circumvented the provisions of section 165. It is equally in the interests of a company and its shareholder to have or exercise the right to demand a properly constituted board. This case clearly illustrates how difficult it can be to differentiate between the application of section 163 and section 165 to the same set of facts. Although the personal remedy and the derivative action may be differentiated on a theoretical basis, the practical application of such an approach does provide it is challenges. For example, a shareholder or director cannot be punished by the dismissal of their claim or application for relying on section 163 instead of section 165 in circumstances where both these remedies may apply to the facts of a case. The development of principles and guidelines for the separate and distinct application of section 163 and section 165 would be exceptionally difficult due to the overlap between these statutory provisions.

⁷¹⁸ See also HGJ Beukes & WJC Swart 'Blurring the Dividing Line between the Oppression Remedy and the Derivative Action: *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others*' (2012) 24 SA Merc LJ 467.

⁷¹⁹ [2012] 4 All SA 203 (GSJ).

⁷²⁰ See HGJ Beukes & WJC Swart 'Blurring the Dividing Line between the Oppression Remedy and the Derivative Action: *Kudumane Investment Holding Ltd v Northern Cape Manganese Company (Pty) Ltd and Others*' (2012) 24 SA Merc LJ 467, 471.

⁷²¹ [2012] 4 All SA 203 (GSJ).

⁷²² (1843) 2 Hare 461, 67 ER 189.

5.9.15.6 Conclusion

The above discussion highlights that traditionally a strict distinction has been kept between the personal remedy of a shareholder and the derivative action. The maintenance of this strict distinction continues to apply to section 163 and section 165 of the Act. This approach seems to be out of sync with current developments in other jurisdictions considered in this thesis. Although the approach adopted in these jurisdictions does present a practical solution, the incorporation of such an approach does raise issues in relation to the recognition of indirect prejudice and the wide ambit of the wording of section 163 of the Act in the context of established principles of the law of delict, law of damages, company law and interpretational principles. It is submitted that this aspect deserves and justifies a further comprehensive study. Recommendations will be made based on the criticism raised in relation to this aspect in terms of section 252 of the Act and the developments in other jurisdictions evaluated in this thesis.

5.10 Relationship with section 164

5.10.1 Introduction

One of the innovations in the Act is the introduction of a shareholder's dissenting rights in section 164.⁷²³ In terms of section 164 a shareholder can compel a company to acquire his or her shares at fair value. This appraisal remedy only applies in specific circumstances and provided that the shareholder has complied

⁷²³ See Jacqueline Yeats *The Proper and Effective Exercise of Appraisal Rights under the South African Companies Act, 2008: Developing a Strategic Approach through a Study of Comparable Foreign Law* (2015) (unpublished PhD thesis; University of Cape Town) for an in-depth analysis of section 164 of the Act.

with certain requirements.⁷²⁴

5.10.2 Application

The application of section 164 is triggered when the shareholders of a company adopt a resolution to 'alter the preferences, rights, limitations or other terms of any class of its shares in any manner that materially adverse to the rights or interests of holders of that class of shares, as contemplated in section 37(8)⁷²⁵ or to enter into a fundamental transaction.⁷²⁶ Section 163 covered conduct that is oppressive, unfairly prejudicial or that unfairly disregards the interests of a shareholder or director.⁷²⁷

5.10.3 Action required by the shareholder

For a shareholder to exercise his or her rights in terms of section 164, the shareholder must provide the company with his or her written objection to the resolution prior to the voting on the relevant resolution.⁷²⁸ Once the relevant resolutions to which the shareholder objected and voted against is adopted, the shareholder may demand the company to pay the fair value of the shares in the

⁷²⁴ Companies Act 71 of 2008, s 164(2) read with section 164(5). See the commentary on section 164 of the Act by PA Delpont *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018) who states that the purpose of the remedy is to deter the company from pursuing a particular course of action and if the company proceeds to follow the course of action it provides the shareholder with the ability to exit a company.

⁷²⁵ Companies Act 71 of 2008, s 164(2)(a).

⁷²⁶ Companies Act 71 of 2008, s 164(2)(b).

⁷²⁷ See 5.6.2.2 above of a discussion of the jurisdictional requirements of section 163 of the Act.

⁷²⁸ Companies Act 71 of 2008, s 164(3). See also section 164(6) for when the written notice of objection to the proposed resolution is not required.

company held by the specific shareholder.⁷²⁹

5.10.4 The effect of serving a demand

The delivery of a demand for fair value has very specific consequences for the rights of the relevant shareholder. The effect of the delivery of such a demand is that the shareholder has no further rights in the company other than to demand the payment of fair value.⁷³⁰ The rights of a shareholder are only reinstated under very specific circumstances.⁷³¹

⁷²⁹ Companies Act 71 of 2008, s 164(5). In terms of section 164(5) a shareholder may only make a demand for the fair value of the shares held by him or her when the shareholder provided the company with his or her written objection to the relevant resolution, the company adopted the resolution, the shareholder voted against the resolution and in the event of an amendment of a Memorandum of Incorporation that the class rights of the shareholder were materially and adversely affected. See also section 164(4) in relation to the company's obligations to notify a dissenting shareholder within 10 business days after the adoption of the resolution triggering the shareholder's appraisal rights. In terms of section 164(7) of the Act a demand for fair value must be made by the shareholder within 20 business days after receiving notice of the adoption of the resolution or when the company failed to provide the required notice, within 20 business days after learning that the resolution has been adopted.

⁷³⁰ Companies Act 71 of 2008, s 164(9). See MF Cassim 'The Appraisal Remedy and the Oppression Remedy under the Companies Act 71 of 2008, and the Overlap between them' (2017) 2 *SA Merc LJ* 305, 320 where the author is of the opinion that section 164(9) does not deprive a shareholder of the right to rely on section 163. The author (320) explains that a distinction must be drawn between a shareholder's rights and his or her standing or status in terms of the Act. According to the author the effect of section 164(9) is to only sever the rights of a shareholder but it does not terminate a shareholder's status or standing in terms of the Act. Therefore, the dissenting shareholder remains entitled to rely on the provisions of section 163 in appropriate circumstances.

⁷³¹ Companies Act 71 of 2008, s 164(10). In terms of section 164(9) read with (10) the rights of a dissenting shareholder are reinstated in circumstances that include the shareholder's withdrawal of the demand; the lapse of a company's offer for fair value; the failure of a company to make an offer for value and the subsequent withdrawal of the demand for value by the shareholder; and the adoption of a special resolution that gave rise to the shareholder's appraisal rights.

5.10.5 The timing of the offer for demand

Section 164 provides that a company against whom a shareholder exercised his or her appraisal rights has to make an offer for fair value to a dissenting shareholder.⁷³² Such a company must make an offer for fair value within 5 business days after the latest date of when the action approved by the relevant resolution is effective;⁷³³ the last day on which a shareholder may make a demand for fair value after receiving notice of the adoption of a resolution triggering his or her appraisal rights;⁷³⁴ or in the event of a failure by the company to issue a notice informing dissenting shareholders of the adoption of the resolution triggering a shareholder's appraisal rights, the day after the company received a demand from a shareholder when a shareholder made a demand for such fair value.⁷³⁵

5.10.6 Section 163 and section 164 of the Act

After making a demand for an offer for the fair value of his or her shares, a shareholder does not have any further rights in the company save for the receipt of such an offer. Therefore it is in the interests of a dissenting shareholder that the offer for the fair value of the shares be made as soon as possible. Based on the wording of the provisions of section 164 relating to when a company is obliged to make an offer for fair value, it is possible for a company to structure a transaction in such a manner that a substantial period of time may lapse between the demand by a shareholder and the making of an offer by the company. During this period a shareholder may be prejudiced because he or she does not have any rights in the

⁷³² Companies Act 71 of 2008, s 164(11).

⁷³³ Companies Act 71 of 2008, s 164(11)(a).

⁷³⁴ Companies Act 71 of 2008, s 164(11)(b).

⁷³⁵ Companies Act 71 of 2008, s 164(11)(c).

company except for receiving an offer for the fair value for his or her shares in the company. In such circumstances section 163 may assist a shareholder who exercised his or her rights of dissent in terms of section 164 to avoid being captured within a locked-in situation created by the way in which a transaction triggering the provisions of section 164 is structured.⁷³⁶

The remedies in section 163 and section 164 share some similarities, which makes the consideration of the practical issues relating to these remedies significant. Both remedies are aimed at the protection of shareholders, more specifically minority shareholders.⁷³⁷ In terms of section 164 this is achieved by providing a shareholder with relief in the form of the right to withdraw his or her capital in a company at fair value.⁷³⁸ The same objective may also be achieved by obtaining relief in the form of a buy-out order in terms of section 163. However, it must be noted that a court has a wide discretion in terms of section 163(2) and the relief a court can grant will not always necessarily take the form of a buy-out order.⁷³⁹ Relief in terms of section 163 and section 164 may only be provided if the

⁷³⁶ MF Cassim 'The Appraisal Remedy and the Oppression Remedy under the Companies Act 71 of 2008, and the Overlap between them' (2017) 2 *SA Merc LJ* 305, 324.

⁷³⁷ See MF Cassim 'The Appraisal Remedy and the Oppression Remedy under the Companies Act 71 of 2008, and the Overlap between them' (2017) 2 *SA Merc LJ* 305, 319-20 who argues that the purpose of section 163 is to test the substantive fairness of a transaction while section 164 provides a shareholder with the right to withdraw from a company and to receive fair value for his or her shares.

⁷³⁸ See MF Cassim 'The Appraisal Remedy and the Oppression Remedy under the Companies Act 71 of 2008, and the Overlap between them' (2017) 2 *SA Merc LJ* 305, 314 who argues that section 164 provides for a mechanism for a dissenting shareholder to exit a company in order to avoid a situation where such a shareholder is locked into a company that is 'drastically changed or restructured' in the context of the expectations of the shareholder.

⁷³⁹ See 5.6 above read with 5.9.14 above. See also MF Cassim 'The Appraisal Remedy and the Oppression Remedy under the Companies Act 71 of 2008, and the Overlap between them' (2017) 2 *SA Merc LJ* 305, 320.

applicable jurisdictional requirements of the sections are met. The jurisdictional requirements in section 164 refer to the amendments to the Memorandum of Incorporation that have a specific effect on the class rights of a shareholder or the entering into a fundamental transaction, while relief in terms of section 163 may be granted when oppressive, unfair prejudicial conduct or an unfair disregard of interests is proven.⁷⁴⁰

In contrast with section 163, section 164 contains very specific provisions as to when a shareholder is entitled to receive an offer for fair value. In terms of section 163 the court enjoys a wide discretion pertaining to the terms and condition upon which a buy-out of the shares of a shareholder of a company will be executed.⁷⁴¹ During the period between demanding an offer for value from a company and the time when a company is obliged to make such an offer, a dissenting shareholder is exposed to potential prejudice. When a shareholder suffers prejudice during this period he or she may be required to rely on section 163 for relief.⁷⁴² The effect of section 164 is that a shareholder will exit the company at fair value without

⁷⁴⁰ See also the commentary on section 164 of the Act by PA Delport *Henochsberg on the Companies Act 71 of 2008* (Service issue 17, 2018) who points out that the amendments to the Memorandum of Incorporation may be challenged on the basis of section 163. See also MF Cassim 'The Appraisal Remedy and the Oppression Remedy under the Companies Act 71 of 2008, and the Overlap between them' (2017) 2 *SA Merc LJ* 305, 319 who argues that the application of section 163 and section 164 is not mutually exclusive. Depending on the circumstances the remedies may apply simultaneously. The appraisal remedy does not provide for the effect that oppressive conduct had on the value of the shares of a company (321 and 323). In such circumstances a shareholder will have to rely on section 163 to seek compensation for the effect that oppressive conduct had on the value of the shareholder's shares in a company (321 and 323).

⁷⁴¹ See 5.9 and more specifically 5.9.14 above.

⁷⁴² See MF Cassim 'The Appraisal Remedy and the Oppression Remedy under the Companies Act 71 of 2008, and the Overlap between them' (2017) 2 *SA Merc LJ* 305, 317-18 who argues that an imbalance exists between the interests of the dissenting shareholder and the company during this period.

necessarily approaching the court. Although section 163 does provide for a buy-order, section 163(2) provides for a wide range of relief that does not necessarily have effect that the shareholder leaves or withdraws from the company. The form of relief in terms of section 163(2) must be considered by a court as fit in light of the facts and circumstances of a particular case.⁷⁴³ From a practical perspective section 163 differs from section 164 in that in terms of section 163(2) a buy-out of a shareholder cannot be achieved without court intervention while this is possible in terms of section 164.⁷⁴⁴ A further aspect that has to be considered is that section 164 does not provide for the award of compensation or the making of adjustments for oppression or unfair prejudicial conduct that occurred prior the exercise of a shareholder's appraisal rights in terms of section 164. To obtain relief to compensate for oppressive or unfair prejudicial conduct that causes a decrease or fall in the value of the shares held by the shareholder in the company, it would be more appropriate to institute legal proceedings based on section 163 rather than on section 164.⁷⁴⁵ This makes it clear that the remedies contained in section 163 and section 164 must not be regarded as mutually exclusive. Such an approach promotes the spirit and purpose of the Act by ensuring the enjoyment of the rights and remedies contained in the Act.⁷⁴⁶

⁷⁴³ See 5.9 above.

⁷⁴⁴ The exit of a shareholder from a company at fair value in terms of section 164 does not require court intervention save for when the fairness of the offer by the company is challenged. See in this regard MF Cassim 'The Appraisal Remedy and the Oppression Remedy under the Companies Act 71 of 2008, and the Overlap between them' (2017) 2 *SA Merc LJ* 305, 323.

⁷⁴⁵ MF Cassim 'The Appraisal Remedy and the Oppression Remedy under the Companies Act 71 of 2008, and the Overlap between them' (2017) 2 *SA Merc LJ* 305, 321.

⁷⁴⁶ MF Cassim 'The Appraisal Remedy and the Oppression Remedy under the Companies Act 71 of 2008, and the Overlap between them' (2017) 2 *SA Merc LJ* 305, 320.

5.11 Dispute Resolution

5.11.1 Unfair prejudicial conduct and the role of reasonable offers

5.11.1.1 Introduction

The making of offers to settle plays an important role in resolving any disputes or litigation. The rejection of an offer for settlement in the context of unfair prejudice proceedings is a significant factor to consider in the application of section 163.⁷⁴⁷

The rejection of a reasonable offer⁷⁴⁸ is 'strong evidence of a willingness to endure treatment which is prima facie inequitable despite the choice of a viable alternative'.⁷⁴⁹

5.11.1.2 The effect of the rejection of a reasonable offer

A court may find that a party who has complained of unfair prejudicial conduct and has rejected a reasonable offer for settlement of such a dispute, did not successfully prove that he or she has suffered unfair prejudice for purpose of section 163.⁷⁵⁰ Approaching a court for relief in terms of section 163 after the rejection of a

⁷⁴⁷ The receipt of an offer to buy-out the shares of an applicant is such an important factor in determining unfair prejudicial conduct that such an offer should in some circumstances be disclosed in the founding affidavit of the applicant. That is especially the case when the offer to buy the shares of an applicant in the relevant company was accompanied by supporting documentation demonstrating how the basis of the valuation of the relevant company's shares was established. See *Geffen and others v Martin and others* [2018] 1 All SA 21 (WCC) [80]-[81].

⁷⁴⁸ In *Geffen and others v Martin and others* [2018] 1 All SA 21 (WCC) [34] the court extracted the criteria to be used to establish whether an offer constitutes a reasonable offer from the English case of *O'Neill and another v Phillips and others* [1999] 2 All ER 961 (HL). For a discussion of *O'Neill* in this context see 2.11.2 above.

⁷⁴⁹ See *Bayly and Others v Knowles* 2010 (4) SA 548 (SCA) [24] where the court also held that this principle is not absolute.

⁷⁵⁰ See *Bayly and Others v Knowles* 2010 (4) SA 548 (SCA) [23]-[24].

reasonable offer is regarded by the courts as an abuse of the court process.⁷⁵¹

5.11.1.3 Onus of proving a reasonable offer

The Supreme Court of Appeal under section 252 of the previous Act held in *Bayly and Others v Knowles*⁷⁵² that when an offer is made to an applicant for purposes of section 252, such an offer should be taken to be fair.⁷⁵³ It is for the applicant who rejected such an offer to prove that the offer was unfair.⁷⁵⁴ A mere rejection of the offer is not sufficient.⁷⁵⁵ The applicant must provide a basis for the rejection of the offer.⁷⁵⁶

⁷⁵¹ *Bayly and Others v Knowles* 2010 (4) SA 548 (SCA) [24].

⁷⁵² 2010 (4) SA 548 (SCA).

⁷⁵³ *Bayly and Others v Knowles* 2010 (4) SA 548 (SCA) [21]-[22]. See, however, *Omar v Inhouse Venue Technical Management (Pty) Ltd and Others* 2015 (3) SA 146 (WCC) [45] read with [49] where the court held that the party who made the offer should allege and prove that the offer is 'fair and reasonable'. See also M Lombard and WJC Swart 'Relief under Section 163 of the Companies Act 71 of 2008 – Unscrambling the Omelette *Omar v Inhouse Venue Technical Management (Pty) Ltd* 2015 (3) SA 146 (WCC)' (2016) 79 *THRHR* 133, 143 for criticism of the court's decision that the offeror should plead or aver that he or she made a reasonable offer to the applicant and where the authors point out that an applicant carries the onus to prove that the requirements of section 163 are met.

⁷⁵⁴ *Bayly and Others v Knowles* 2010 (4) SA 548 (SCA) [21]. This appears to be aligned with the approach in *Feni v Gxothiwe* 2014 (1) SA 594 (ECG) where the court held that the applicant bears the onus to prove unfair prejudicial, unjust or inequitable conduct for purposes of section 49 of the Close Corporations Act 69 of 1984. This burden of proof includes ([28]) placing evidence before a court 'as to a fair value of the member's interest of the member who will be forced to dispose thereof'. This is the position unless the unfair prejudicial conduct complained of denied the applicant access to the information necessary to place the relevant evidence before the court. For a similar approach see *Oosthuizen v Oosthuizen and Others* [2017] JOL 39213 (WCC) [59]-[60] which was also decided in terms of section 49 of the Close Corporations Act 69 of 1984.

⁷⁵⁵ See *Bayly and Others v Knowles* 2010 (4) SA 548 (SCA) [24] where 'a reasoned opposition to the acceptance' of an offer was not tendered. See *Geffen and Others v Martin and others* [2018] 1 All SA 21 (WCC) [67].

⁷⁵⁶ *Bayly and Others v Knowles* 2010 (4) SA 548 (SCA) [21]. The court [24] stated that a reasonable offer may be rejected when there is 'not a reasonable prospect that the offeror would be able to meet

5.11.2 Arbitration of unfair prejudice disputes

5.11.2.1 Introduction

The expeditious resolving of disputes forms one of the cornerstones of an effective commercial world. One manner in which this can be achieved is to subject disputes to arbitration instead of approaching the courts. This approach often holds the advantage that a dispute can be resolved in a timely and cost effective manner by an arbitrator having the necessary knowledge and experience relating to the nature of the dispute. It is not uncommon to find clauses in shareholder agreements or in some instances in a company's Memorandum of Incorporation that deal with alternative dispute resolution in the form of an arbitration clause or agreement.

5.11.2.2 The legislative framework relating to arbitration proceedings

In the context of company law, the Constitution,⁷⁵⁷ the Act⁷⁵⁸ and the Arbitration Act⁷⁵⁹ form the legislative framework which applies to arbitration proceedings involving disputes in terms of section 163 of the Act.⁷⁶⁰ Although alternative dispute

the financial commitment involved'. A reasonable offer may also be rejected on the basis that it is 'so tainted by bad faith or ulterior motive as to excuse non-acceptance'. See also *Geffen and others v Martin and others* [2018] 1 All SA 21 (WCC) [66] where the court required the first applicant to provide expert evidence on why information provided to the first applicant is inadequate for purposes of calculating the fair value of the applicant's shares. The court [67] further rejected certain allegations that had a bearing on the value of the relevant shares as these allegations were not substantiated by expert opinion. See also [81]-[82] where the court found that the applicant failed to provide a factual foundation for the valuation of the relevant shares.

⁷⁵⁷ Constitution of the Republic of South Africa, 1996.

⁷⁵⁸ Companies Act 71 of 2008, s 166(1).

⁷⁵⁹ 42 of 1965.

⁷⁶⁰ See also the International Arbitration Act 15 of 2017 that applies to international arbitration agreements. The main focus is on arbitration agreements covered by the Act and the Arbitration Act 42 of 1965. Occasional reference is made to the International Arbitration 15 of 2017 to illustrate that

resolution is encouraged, it must fall squarely within the framework of the Constitution.⁷⁶¹ Section 34 of the Constitution⁷⁶² contains a person's right of access to courts. Courts must adjudicate disputes impartially without fear or favour.⁷⁶³ Arbitration agreements read with the Arbitration Act⁷⁶⁴ limit or restrict a party's fundamental right to have a dispute adjudicated by a court.⁷⁶⁵

5.11.2.3 Alternative dispute resolution and the Companies Act 71 of 2008

Part C of Chapter 7 of the Act contains the provisions relating to the voluntary resolution of disputes. In terms of section 166 a person who is entitled to apply for relief in terms of the Act could refer the underlying dispute for mediation, conciliation or arbitration.⁷⁶⁶ This is subject to the voluntary submission of the other party to alternative dispute resolution.⁷⁶⁷

the adoption of the provisions thereof may enhance the application of the Act or the Arbitration Act 42 of 1965.

⁷⁶¹ Constitution of the Republic of South Africa, 1996.

⁷⁶² Constitution of the Republic of South Africa, 1996.

⁷⁶³ Section 165(1) of the Constitution of the Republic of South Africa, 1996 entrusts the courts with judicial authority.

⁷⁶⁴ 42 of 1965.

⁷⁶⁵ Section 34 of the Constitution of the Republic of South Africa, 1996 provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. See also *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) [65] where the court held that an arbitration clause does not necessarily oust the jurisdiction of a court.

⁷⁶⁶ Companies Act 71 of 2008, s 166(1).

⁷⁶⁷ See *Omar v Inhouse Venue Technical Management (Pty) Ltd and Others* 2015 (3) SA 146 (WCC) [75] where the court stated that '[r]eference was made to s 166 of the Act which provides a mechanism for parties to voluntarily agree to resolve a dispute, which would otherwise serve before a court of law, by way of arbitration. Given the reference to voluntarism, it is clear, in my view, that a party confronted with such a dispute is given the discretion to consider going to arbitration'. See further the commentary on section 166 by PA Delpont *Henochsberg on the Companies Act 71 of*

5.11.2.4 Arbitration in terms of the Arbitration Act 42 of 1965

(a) Arbitration and the freedom to contract

As discussed above, the freedom of contract includes the freedom to bind oneself voluntarily and freely to contractual arrangements provided that such arrangements do not offend public policy or are against the legal convictions of the community as found in the Constitution.⁷⁶⁸ The Arbitration Act⁷⁶⁹ can be seen as giving effect to the freedom of contract as a constitutional freedom and balancing this freedom against the right of access to courts in section 34 of the Constitution.⁷⁷⁰

(b) The law of contract as basis for arbitration proceedings

Parties may subject disputes that may arise among them to arbitration.⁷⁷¹ This is done contractually in the form of an arbitration agreement or clause.⁷⁷² Unless good cause is shown why a dispute must not be referred to arbitration, an arbitration agreement is enforceable between the parties.⁷⁷³ When a party institutes legal proceedings in a court pertaining to a dispute that is subject to an arbitration clause

2008 (Service issue 17, 2018) who is of the view that the court in *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) [68] could possibly be understood to mean that arbitration in terms of section 166 may be enforced in the absence of an agreement between parties.

⁷⁶⁸ Constitution of the Republic of South Africa, 1996.

⁷⁶⁹ 42 of 1965.

⁷⁷⁰ Constitution of the Republic of South Africa, 1996, s 36.

⁷⁷¹ It should be noted that in terms of section 2 of the Arbitration Act 42 of 1965 disputes relating to matrimonial causes and matters relating to status are precluded from being submitted to arbitration.

⁷⁷² In section 1 of the Arbitration Act 42 of 1965 an 'arbitration agreement' is defined as 'a written agreement providing for the reference to arbitration of any existing dispute or any future dispute relating to a matter specified in the agreement, whether an arbitrator is named or designated therein or not'.

⁷⁷³ Arbitration Act 42 of 1965, s 3(2)(b).

or agreement, any party to the arbitration clause or agreement may apply to the court for relief in the form a stay of proceedings and a referral of the dispute for arbitration as agreed by the parties.⁷⁷⁴ Unless sufficient reasons can be submitted why a dispute should not be referred for arbitration, the court will order a stay of proceedings.⁷⁷⁵ A party who wishes to rely on an arbitration agreement must firstly prove that the dispute falls within the ambit of the arbitration agreement or clause.⁷⁷⁶ The court's approach in *Peel*⁷⁷⁷ to arbitration of disputes in terms of section 163 is open to criticism.⁷⁷⁸

5.11.2.5 The approach in *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others*⁷⁷⁹

(a) Introduction

In *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others*⁷⁸⁰ the respondents unsuccessfully relied on the enforcement of an arbitration agreement against the applicant.⁷⁸¹ The court held that because the arbitration proceedings were to be conducted by the Arbitration Foundation of South Africa (AFSA) in terms of the arbitration agreement, the dispute could not be referred to arbitration.⁷⁸² More

⁷⁷⁴ Arbitration Act 42 of 1965, s 6(1).

⁷⁷⁵ Arbitration Act 42 of 1965, s 6(2).

⁷⁷⁶ *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) [66], [72]-[73].

⁷⁷⁷ *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ).

⁷⁷⁸ See 5.11.2.5 below for a discussion of the court's approach in *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) to the enforcement of arbitration agreements relating to disputes in terms of section 163 of the Act.

⁷⁷⁹ 2013 (2) SA 331 (GSJ).

⁷⁸⁰ 2013 (2) SA 331 (GSJ).

⁷⁸¹ See *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) [64] for the relevant part of the agreement on which the respondents relied on.

⁷⁸² *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) [68].

importantly the court further held that AFSA did not have the powers to grant relief in terms of section 163 because such a power is only vested in the courts.⁷⁸³ The court further refused to enforce the arbitration clause because AFSA was not an accredited entity for purposes of section 166.⁷⁸⁴ The court was also of the view that serious allegations of or matters related to fraudulent conduct cannot be properly dealt with during arbitration proceedings.⁷⁸⁵

(b) *Alternative dispute resolution as a voluntary process*

The Companies Act⁷⁸⁶ provides an additional alternative to resolving disputes by way of a court process and the party initiating the process has the option of approaching a court or the Companies and Intellectual Property Commission ('the CIPC'), the Companies Tribunal, an accredited entity or any other person.⁷⁸⁷

Alternative dispute resolution in South African law is either voluntary or prescribed by statute or other law. Both the Companies Act⁷⁸⁸ and Arbitration Act⁷⁸⁹

⁷⁸³ *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) [68].

⁷⁸⁴ *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) [68]. It is interesting that clause 22 of the Companies Amendment Bill 2018 published in GG 41913 of 21 September 2018 proposes an amendment to section 166(1) of the Act in terms of which applications or complaints in terms of the Act may only be referred to the Companies Tribunal to be resolved by means of 'mediation, conciliation or arbitration'. In terms of a proposed amendment to subsection to section 166 of the Act, a matter may only be referred to arbitration once the Companies Tribunal has issued a certificate that the mediation process in terms of the Act failed. It is significant to notice that in terms of the proposed amendments to section 166 of the Act references to 'an accredited entity' will be removed from its provisions. See also the proposed amendments to section 167 of the Act as contained in clause 23.

⁷⁸⁵ *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) [69].

⁷⁸⁶ 71 of 2008.

⁷⁸⁷ Companies Act 71 of 2008, s 166(1).

⁷⁸⁸ 71 of 2008.

⁷⁸⁹ 42 of 1965.

that may apply to company disputes require the free and voluntary submission of the parties to alternative dispute resolution mechanisms contained in the two statutes. It is submitted that the alternative dispute resolution provisions in the Act do not exclude other forms of alternative dispute resolution such as that in terms of the Arbitration Act.⁷⁹⁰ It is suggested that the alternative dispute resolution mechanisms in the Act provide an alternative option to dispute resolution for those parties who have not pre-empted possible disputes by regulating the resolving of disputes contractually in a shareholders' agreement or the Memorandum of Incorporation.

(c) A 'court' grants relief in terms of section 163 of the Act

Besides the wording of the section, the court did not elaborate on why only a court could grant relief in terms of section 163.⁷⁹¹ Although section 163 makes specific reference to 'a court', it does not necessarily mean that disputes to be adjudicated in terms with the provisions of section 163 cannot be subjected to arbitration on the basis that an arbitrator's jurisdiction is excluded by the wording of section 163. When an arbitration agreement applies to the dispute between parties, it is the arbitration agreement that forms the basis of the jurisdiction of the arbitrator. Based on the arbitration agreement between the parties an arbitrator may then exercise the same discretion as a court in terms of legislation. To provide the necessary clarity it is submitted that the Arbitration Act⁷⁹² may benefit from a similar provision as found in in section 7(2) of the International Arbitration Act⁷⁹³ which provides that an

⁷⁹⁰ 42 of 1965.

⁷⁹¹ *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ) [68].

⁷⁹² 42 of 1965.

⁷⁹³ 15 of 2017.

'[a]rbitration agreement may not be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement'.⁷⁹⁴

(d) The exclusion of disputes relating to allegations of fraud from arbitration

The court's reluctance to refer a dispute to arbitration on the basis that the subject of the dispute contains serious allegations of fraud must also be approached with some circumspect. One of the advantages of arbitration is that the parties may nominate and agree on arbitrators who may possess the necessary expertise regarding the subject of the dispute. This will provide all parties to the dispute with an opportunity properly to present his or her case. The converse is also true as some disputes may be so complex or of such a nature that they fall beyond the expertise of a particular judge or court.

The reliance of the court on *Rawstorne and Another v Hodgen and Another*⁷⁹⁵ to refuse the enforcement of an arbitration agreement based on a dispute involving fraudulent conduct is also problematic.⁷⁹⁶ The case in *Peel*⁷⁹⁷ should be clearly

⁷⁹⁴ See also GN 1183 in GG 26493 of 23 June 2004 para 4.7.3 where the intention was expressed that consideration must be given to 'existing mechanisms' to settle disputes outside the courts.

⁷⁹⁵ 2002 (3) SA 433 (W).

⁷⁹⁶ In *Rawstorne and Another v Hodgen and Another* 2002 (3) SA 433 (W) the respondents made allegations of fraud against the applicant. The respondents relied on an arbitration agreement in an attempt to ventilate the issues before an arbitrator. The applicant brought an application with the purpose of avoiding the arbitration so that the matter can be considered in an open court. The application was based on section 3(2)(b) of the Arbitration Act 42 of 1965 in terms of which a court has a discretion to order that a dispute should not be referred for arbitration when good cause is shown.

⁷⁹⁷ *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ).

distinguished from the matter in *Rawstorne and Another v Hodgen and Another*.⁷⁹⁸ In *Rawstorne*⁷⁹⁹ the applicants made allegations of fraudulent conduct on the part of the respondents while it was the applicant who wished to enforce the arbitration agreement against the respondents to ventilate the allegations. The court in *Rawstorne*⁸⁰⁰ held that the respondent must be allowed to defend these allegations in an open court of law, despite the provisions of an arbitration agreement, if they wished to do so. The respondents in *Peel*⁸⁰¹ who were also accused of fraudulent conduct were the parties who wished to enforce the arbitration agreement. The court in *Rawstorne* dealt with the question whether party against whom the allegations of fraud is made should be kept to an arbitration agreement, while in *Peel*⁸⁰² the respondents wanted to enforce the agreement so that the matter would not be ventilated in an open court. In these two cases different considerations apply. In *Rawstorne and Another v Hodgen and Another*⁸⁰³ the court stated that:

‘Although not referred to by the applicant’s counsel, there is, however, more direct authority for the proposition relied upon by him and that is that disputed averments of fraud should be ventilated, not in the privacy of arbitration, but in open Court. In this regard a distinction has been drawn between the situation where the person against whom the fraudulent conduct is alleged seeks a hearing in open Court, rather than through the arbitration process, and the situation where the person who alleges fraudulent conduct on the part of the other contracting party desires the matter to be heard in open Court. In the former it has been held that the claim for a hearing in open Court will generally granted.’

⁷⁹⁸ 2002 (3) SA 433 (W).

⁷⁹⁹ *Rawstorne and Another v Hodgen and Another* 2002 (3) SA 433 (W).

⁸⁰⁰ *Rawstorne and Another v Hodgen and Another* 2002 (3) SA 433 (W).

⁸⁰¹ *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ).

⁸⁰² *Peel and Others v Hamon J&C Engineering (Pty) Ltd and Others* 2013 (2) SA 331 (GSJ).

⁸⁰³ 2002 (3) SA 433 (W) [21].

5.12 Conclusion

5.12.1 The Constitution and section 163

Section 163 of the Act creates an interesting interrelationship between company law and the law of contract.⁸⁰⁴ The standard against which conduct should be measured in terms of section 163 is the fairness or unfairness of the relevant conduct in the corporate law context.⁸⁰⁵ Delpont noted that the result of section 163 of the Act is that contracts should be tested against 'oppressive or unfairly prejudicial conduct'.⁸⁰⁶ Some courts have described the standard as 'commercial fairness'.⁸⁰⁷ Such an approach requires a review of traditional views, approaches to contracts and the role that courts play in the protection of shareholders.⁸⁰⁸ Firstly, tension is created between the principle of *pacta sunt servanda*⁸⁰⁹ and the intervention by a court in contractual relationships when it is justified based on the concept of fairness.⁸¹⁰ Secondly, the application of the law of contract in the context of companies should be carefully considered as different policy considerations apply within the company structure.⁸¹¹

The developments in the law of contract are important, as the Act clearly states that one of its purposes is to align South African company law with the Bill of

⁸⁰⁴ See 5.9.5.3 above.

⁸⁰⁵ See 5.7.3 and more specifically 5.7.3.5 above.

⁸⁰⁶ See 5.6.6.3 and 5.7.3.5 above.

⁸⁰⁷ See 5.7.3.5 read with 5.6 above where the role of *bona fides*, reasonableness and fairness in the context of the law of contract is discussed.

⁸⁰⁸ See 5.9.5.3 above.

⁸⁰⁹ See 5.6.2.1 above.

⁸¹⁰ See 5.6.1 and 5.6.2 above read with 5.9.5.3 above.

⁸¹¹ See 5.5.3 above.

Rights.⁸¹² Secondly, an assessment should be done on the role of fairness in the formation and enforcement of contracts.⁸¹³ For a contract to be valid and enforceable it has to comply with the requirement of legality.⁸¹⁴ Legality consists of public policy.⁸¹⁵ Public policy is found in the legal convictions of the community as defined by the values of human dignity, freedom and equality in the Constitution.⁸¹⁶ On a number of occasions our courts had to consider whether the principles of *bona fides*, reasonableness and fairness are requirements for the validity and enforcement of contracts or contractual clauses.⁸¹⁷

The notion that contracts should comply with the requirement of *bona fides*, reasonableness and fairness has been rejected by various courts including the Supreme Court of Appeal.⁸¹⁸ In most of these cases the rejection was based on the ground that the adjudication of disputes between parties to a contract on *bona fides*, reasonableness and fairness will lead to legal uncertainty.⁸¹⁹ In arriving at this conclusion the courts referred to the legal convictions of the community based on human dignity, freedom and equality. Principles such as *pacta sunt servanda* were evaluated against the Constitution and its values. It was concluded that fairness and reasonableness were already embedded in the traditional principles of the law of contract and that the application of these principles complies with the provisions and

⁸¹² See 5.6.1 above.

⁸¹³ See 5.6.2-5.6.6 below.

⁸¹⁴ See 5.6.1 above.

⁸¹⁵ See 5.6.1 above.

⁸¹⁶ See 5.6.1 above.

⁸¹⁷ See 5.6.4 above.

⁸¹⁸ See 5.6.2.2 above.

⁸¹⁹ See 5.6.2.2 above.

values entrenched in the Constitution.⁸²⁰

The Constitutional Court judgment in *Botha and Another v Rich NO and Others*⁸²¹ is being interpreted as authority for the notion that a court will only enforce a contract when it is fair to do so.⁸²² However, there is uncertainty as the court was not clear on the principles on which the case was decided.⁸²³ Further, the court failed to consider and discuss the body of case law developed by the Supreme Court of Appeal, creating uncertainty of the status of these cases.⁸²⁴

Unlike the position in England, the *exceptio doli generalis* does not form part of the South African law.⁸²⁵ The *exceptio doli generalis* is a defence which can be used when the enforcement of a contract will be unfair, unreasonable or oppressive.⁸²⁶ This defence is often raised when unforeseen circumstances developed after the conclusion of the contract.⁸²⁷ Although the *exceptio doli generalis* was rejected, South African courts do recognise the need to do simple justice between parties to a contract.⁸²⁸

⁸²⁰ See 5.6.2.2 above.

⁸²¹ 2014 (4) SA 124 (CC).

⁸²² See 5.6.4 above.

⁸²³ See 5.6.5.1 above.

⁸²⁴ See 5.6.5.2 above.

⁸²⁵ See 5.6.3 above.

⁸²⁶ See 5.6.3 above. See also Jacques du Plessis 'Giving practical effect to good faith in the law of contract' (2018) 3 *Stell LR* 379, 397.

⁸²⁷ See 5.6.3 above.

⁸²⁸ See 5.6.3 above.

5.12.2 The development and reform of the statutory unfair prejudice remedy

5.12.2.1 The proper plaintiff and internal management rule

The development of the statutory unfair prejudice remedy in South Africa shares many similarities with the developments in its equivalents in other jurisdictions evaluated in this thesis.⁸²⁹ These developments recognised the unsatisfactory position created by the strict application of the principles in *Foss v Harbottle*.⁸³⁰

5.12.2.2 The use of the ‘oppressive’ concept

(a) The use of the ‘oppressive’ concept in section 111bis of the Companies Act 46 of 1926 and section 252 of the Companies Act 61 of 1973

To expand the application of the unfair prejudice remedy legislatures in other jurisdictions introduced concepts to avoid the restrictive meaning given by the courts to the ‘oppressive’ concept.⁸³¹ This tendency was also followed in South Africa when section 111*bis* of the Companies Act 46 of 1926 and section 252 of the Companies Act 61 of 1973 is compared.⁸³² The concept was initially used in section 111*bis* of

⁸²⁹ See 2.3 above for a discussion of the development of the unfair prejudice remedy in England. See also 3.3 for the development of the remedy in Australia. See further 4.2 above for the development of the remedy in Canada.

⁸³⁰ (1843) 2 Hare 461; 67 ER 189. See 5.2.2 above. For a discussion of the approach in England to the principles in *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189 see 2.3.1, and more specifically 2.3.1.4 above. See 3.9.6.3 above for the application of the proper plaintiff rule and the internal management rule in Australia regarding the relationship between the statutory personal action and the statutory derivative action. For a similar discussion in the context of Canada see 4.12 above.

⁸³¹ See 5.2.3 read with 5.2.4.1 above. For a discussion of the use of the terms ‘oppressive’ in England see 2.6.3.2 above. See also for 3.3.5 for the problems associated with the use of the ‘oppressive’ concept in Australia. See further 4.7.6.2 above for a discussion of the ‘oppressive’ concept in the development of the remedy in the Canada.

⁸³² See 5.2.3 read with 5.2.4.1 above.

the Companies Act 46 of 1926 but it was recommended by the Van Wyk De Vries Commission that the concept should be removed and replaced by concepts that would be of a wider ambit than the ‘oppressive’ concept.⁸³³ Section 252 of the previous Act removed the use of the concept ‘oppressive’ from the body of the remedy, but retained the concept in the heading of the provision.⁸³⁴

(b) *The use of the ‘oppressive’ concept in section 163 of the Act in light of development in England, Australia and Canada*

It is interesting to note that while English company law has moved away from the use of the concept ‘oppressive’ by omitting the concept from the provisions of the remedy,⁸³⁵ other jurisdictions have retained the concept but introduced additional concepts to expand the scope of application of the remedy.⁸³⁶ It is interesting that section 163 of the Act reintroduced the ‘oppressive’ concept to the substantive provisions of the remedy. This approach aligns the reforms to the current form of the statutory personal remedy to the developments in relation to the remedy in Australia and Canada.

5.12.3 The grounds for relief in section 163(1)(a)-(c)

5.12.3.1 The relationship between the grounds for relief in terms of section 163 and the winding-up of a company on ‘just and equitable’ grounds

It does not have to be proven that the facts and circumstances on which a person

⁸³³ See 5.2.3 read with 5.2.4.1 above.

⁸³⁴ See 5.2.4.1 above.

⁸³⁵ See 2.4 above.

⁸³⁶ See 3.4 and 4.5, respectively, for a discussion of the developments and reforms of the Australian and Canadian equivalents of the statutory personal remedy, where the concept ‘oppressive’ has been retained.

relies for relief must justify relief in the form of a winding-up order on 'just and equitable' grounds for such as person to be entitled to obtain relief in terms of the statutory unfair prejudice remedy.⁸³⁷ Although to some degree there may be an overlap between the grounds for a winding-up order on 'just and equitable' grounds and the grounds stated in section 163(1), these grounds differ in that the grounds for an order for liquidation on 'just and equitable' circumstances cover a broader range of circumstances than that covered by the grounds in section 163(1).⁸³⁸ This position is aligned with the approaches in other jurisdictions covered in this thesis.⁸³⁹

5.12.3.2 The interpretational problems associated with section 163(1)(a)-(c)

(a) Section 163(1)(a)-(c)

It has been demonstrated above that the manner in which section 163 is formulated and how the provisions in section 163(1) are applied by the courts have the potential for creating some interpretational difficulties.⁸⁴⁰ On the one hand it can be argued that the provisions of section 163(1)(a)-(c) should be read as forming separate and distinct grounds for relief.⁸⁴¹ Others argue that these provisions should be read as a whole.⁸⁴² However, there are some important differences between sections 163(1)(a)-(c). One of these differences is that only section 163(1)(a)⁸⁴³ refers to the

⁸³⁷ See 5.2.4 and 5.8 above

⁸³⁸ See 5.8 above.

⁸³⁹ See 2.9 above for the position in England. See also 3.9.1 above for the position in Australia. See further 4.9 above for the position in Canada.

⁸⁴⁰ See 5.7.2 and 5.7.3.5 above.

⁸⁴¹ See 5.7.2.2 (a)(ii) read with 5.7.3.5 above.

⁸⁴² See 5.7.2.2 (a)(ii) read with 5.7.3.5 above.

⁸⁴³ See 5.7.2.2 (a)(ii) above.

result of the conduct complained of, while section 163(1)(b)⁸⁴⁴ and (c)⁸⁴⁵ refer to the manner in which the affairs of a company are conducted. This creates the question whether the conduct or the consequences/effect or result flowing from the conduct must objectively be evaluated against the concept of commercial unfairness.⁸⁴⁶ There are also differences in the tenses in which the grounds in section 163(1)(a)-(c) are formulated.⁸⁴⁷ In chapter 6 it is recommended that the jurisdictional grounds in section 163(1)(a)-(c) be amended to facilitate a clearly understanding as to the type of conduct to which section 163 applies and the time when the conduct occurred.⁸⁴⁸

(b) *The concept of commercial unfairness*

It is clear from the judgments dealing with section 163 that the concepts oppressive, unfairly prejudicial and an unfair disregard of interests have been described as forming elements of commercial unfairness. To determine the commercial unfairness or fairness of conduct in terms of section 163 a court has to consider the facts and circumstances of each case in light of established corporate principles.⁸⁴⁹ The conduct complained of must not be prejudicial⁸⁵⁰ but also unfair.⁸⁵¹ The conduct complained of will be evaluated with reference to the result flowing from the conduct complained of using an objective test.⁸⁵² The application of an objective test holds

⁸⁴⁴ See 5.7.2.2 (b) above.

⁸⁴⁵ See 5.7.2.2 (c) above.

⁸⁴⁶ See also 5.7.2.1 above.

⁸⁴⁷ See 5.7.2.2 (a)(i) and 5.7.2.2 (b)(i).

⁸⁴⁸ See 5.7.6 above.

⁸⁴⁹ See 5.4.3 above.

⁸⁵⁰ See 5.7.1.4 above.

⁸⁵¹ See 5.7.3.5 above.

⁸⁵² See 5.7.3.6 above.

certain important implications in relation to the evaluation of the conduct complained of.⁸⁵³ Firstly, the test for relief is fairness, more specifically commercial fairness, and not unlawfulness.⁸⁵⁴ This makes the remedy in section 163 *sui generis*. Secondly, the motive of the person whose conduct is complained of is generally irrelevant.⁸⁵⁵ When considering the commercial unfairness of the conduct a court may also consider the conduct of the applicant,⁸⁵⁶ any reasonable offers an applicant received to exit the company at fair value,⁸⁵⁷ and the breach of any legitimate expectations of an applicant.

5.12.3.3 Commercial unfairness and reasonable offers

A reasonable offer to buy the shares of a person complaining of unfair prejudicial conduct plays a significant role in the consideration of the unfairness of the conduct complained of. The rejection of such an offer may place the complaining shareholder at risk of the court finding that the conduct complained of is not unfair.⁸⁵⁸ From a practical point of view an applicant must disclose such an offer in his or her court papers.⁸⁵⁹ When the offeree has rejected the offer he or she must clearly state his or her grounds for doing so.⁸⁶⁰

5.12.3.4 Commercial unfairness and the conduct of the applicant

One of the differences between relief in terms of section 163 and relief in the form

⁸⁵³ See 5.7.3.5 above.

⁸⁵⁴ See 5.7.3.5 above.

⁸⁵⁵ See 5.7.3.5 above.

⁸⁵⁶ See 5.7.5 above.

⁸⁵⁷ See 5.11.1 above.

⁸⁵⁸ See 5.11.1.2 above.

⁸⁵⁹ See 5.11.1.3 above.

⁸⁶⁰ See 5.11.1.2 above.

of a winding-up order based on 'just and equitable' grounds is that an applicant does have to approach the court with clean hands in terms of section 163.⁸⁶¹ However, this does not mean that the conduct of the applicant is irrelevant. Depending on the seriousness of and the context in which the conduct of the applicant took place, the conduct may render the conduct complained of not to be commercially unfair.⁸⁶² The conduct of the applicant may further be taken into account in determining the appropriate relief.⁸⁶³

5.12.4 Prejudice and the capacity in which prejudice is suffered

The requirement that a shareholder or director has suffered prejudice in his capacity as such, is problematic as such an interpretation artificially restricts the scope of application of the remedy and further neutralises the efforts of the legislature to expand the availability of the remedy to other persons such as directors.⁸⁶⁴ Recommendations for legislative intervention are made in the following chapter.

5.12.5 Prejudice to all shareholders

It is uncertain whether relief in terms of section 163 is available in circumstances where all shareholders are affected by the same commercially unfair conduct.⁸⁶⁵ There are jurisdictions where it is recognised that conduct may be unfairly prejudicial despite the fact that all shareholders are equally affected by the same unfair prejudicial (commercially unfair) conduct. Van Rooyen also advances compelling reasons why the statutory unfair prejudice remedy must be available to a

⁸⁶¹ See 5.7.5 above.

⁸⁶² See 5.7.5 above.

⁸⁶³ See 5.7.5 above.

⁸⁶⁴ See 5.7.1.4 above.

⁸⁶⁵ See 5.7.1.4 (b)(ii) above.

shareholder in circumstance where all shareholders are affected by the same conduct.⁸⁶⁶

5.12.6 Related persons

The fact that section 163 provides that an applicant can rely on the conduct of a person related to a company is a welcomed expansion of the application of the statutory unfair prejudice remedy.⁸⁶⁷ This provides protection to shareholders and directors in the context of a group of companies. The statutory unfair prejudice remedies, prior to section 163, did not specifically make provision for the application of the remedy to a group of companies. It should, however, be noted that the fact a person is a shareholder or director of a company does not make such a person a related person.⁸⁶⁸ In this regard South African company law takes a leading role when compared to the approach taken in the other jurisdictions discussed.⁸⁶⁹

5.12.7 Standing

Standing for purposes of section 163 is extended to a shareholder and a director.⁸⁷⁰ The definition of a 'shareholder' in section 1 of the Act carries a similar meaning to the definition of a member in section 103 of the previous Act. One may recall that only a member could rely on the provisions of section 252 of the previous Act. The current provisions relating to the standing of an applicant are deficient in a number of respects. Firstly, no provision is made for persons to whom shares were transferred by operation of law such as liquidators, curators, executors and

⁸⁶⁶ See 5.7.1.4 (b)(ii) above.

⁸⁶⁷ See 5.7.7 above

⁸⁶⁸ See 5.7.7 above

⁸⁶⁹ See 5.7.7 above

⁸⁷⁰ See 5.7.1.3 above.

trustees.⁸⁷¹ Secondly, some courts still require an applicant (shareholder or director) to prove that he or she has suffered prejudice in his capacity as such.⁸⁷² Such an approach significantly restricts the application of the statutory unfair prejudice remedy that was designed to find application in a variety of facts and circumstances. The provisions relating to standing is extremely problematic as the legislature provides for important forms of relief such as the rectification of company records and registers, but because the persons who need these forms of relief are not recognised as having standing due to the provisions of the Act and/or the requirement set by the courts that a person must prove that he or she has been prejudiced in his or her capacity as such, they are excluded from obtaining much-needed relief and are also left without any other alternative forms of relief.⁸⁷³ The courts have also contributed to the uncertainty in respect of the application of the provisions relating to standing by acknowledging the standing of persons who clearly do not qualify for standing because of the definitions in the Act.⁸⁷⁴

The disconnect between the standing requirement of the unfair prejudice remedy and the available relief may have been created by transferring the substantive provisions of the Canadian equivalent of section 163 almost verbatim to the Act. However, the legislature for some reason used substantially different definitions for persons who are entitled to apply for relief in terms of section 163. Proposals and recommendations in this regard are made below.

⁸⁷¹ See 5.7.1.2 above.

⁸⁷² See 5.7.1.2 above.

⁸⁷³ See 5.7.1 above read with 5.7.1.4 (b) and 5.7.1.4 (c).

⁸⁷⁴ See 5.7.1.2 (b) above.

5.12.8 Relief

5.12.8.1 Buy-out orders

Although such relief is not expressly listed, relief in the form of buy-out orders is available in terms of section 163(2).⁸⁷⁵ For the sake of consistency, it would have been preferred that the legislature expressly recognised this form of relief and to clarify whether the solvency and liquidation requirements in section 4 of the Act apply to such orders.⁸⁷⁶ Proposals for legislative amendment are made in Chapter 6.

It is the duty of a court to determine the fair value of shares that are subject to a buy-out order.⁸⁷⁷ A number of factors may impact on the value of shares, namely, the application of a minority discount, the date that is used as the basis of the valuation of shares, the adjustments that have to be made to neutralise the effect that commercially unfair conduct had on the valuation of the relevant shares, and the parties against whom such an order will be enforced.⁸⁷⁸ As with the case in order jurisdictions evaluated in this study there is no fixed method how these principles and factors should be applied. The overriding principle remains that a court must determine a fair value for which the shares must be bought. It is important to note that the purpose of a buy-out order is to sever the relationship between the parties by allowing the party who has suffered unfair prejudice to withdraw his or her investment from the company.⁸⁷⁹ The purpose is not to award damages to such a party and this may be reason why the legislature opted for the terms ‘compensation’

⁸⁷⁵ See 5.9.14 above.

⁸⁷⁶ See 5.9.14.5 (a) above.

⁸⁷⁷ See 5.9.14.4 above.

⁸⁷⁸ See 5.9.14.1 above.

⁸⁷⁹ See 5.9.14.2 above.

in stead of damages in section 163(2), as the remedy is based on equity.

5.12.8.2 Threatening and future conduct

Earlier versions of the statutory unfair prejudice remedy were criticised for not protecting shareholders against future or threatening conduct.⁸⁸⁰ Judicial interpretation of section 252 of the previous Act also did not assist in this regard.⁸⁸¹ Some courts approached the grant of relief against future or threatening unfair prejudicial conduct as an unjustified interference in the internal affairs of a company while in other instances courts justified their reluctance to intervene by holding that future or threathening action is not conduct for purposes of the provisions of the statutory unfair prejudice remedy.⁸⁸² The fact that the predecessors of section 163 of the Act did not provide for protection against future or threatening conduct was subject to much criticism.⁸⁸³ The current formulation of section 163 also does not expressly provide for the protection against future and threatening conduct.⁸⁸⁴ This position is further exacerbated by the tenses in which the grounds in section 163(1) are formulated.⁸⁸⁵

5.12.8.3 Commencement of business rescue proceedings

The inclusion of relief in the form of the commencement of business rescue proceedings in section 163(2)(c) is welcomed. This provision creates an avenue for a director who cannot approach a court for the commencement of business rescue

⁸⁸⁰ See 5.2.4.3 (d) above.

⁸⁸¹ See 5.9.2.2 above.

⁸⁸² See 5.9.2.2 above.

⁸⁸³ See 5.9.2.2 above.

⁸⁸⁴ See 5.9.2.3 and 5.9.2.4 above.

⁸⁸⁵ See 5.7.2.2 (a)(ii) above.

proceedings when a company on whose board he or she serves is in financial distress and the board failed to commence with business rescue proceedings.⁸⁸⁶

5.12.8.4 Section 163(2)(f)(ii)

Relief may also be granted in the form of placing a director under probation or declaring a director a delinquent as provided for section 162 of the Act.⁸⁸⁷ The provisions of section 162 aim to provide the general public with protection against a particular director or director. Being placed under probation or being declared a delinquent holds drastic implications for a director. It is submitted that courts carefully consider the facts and circumstances in which this form of relief is granted. Because the criterion for relief in section 163(1) is commercial unfairness, a director may run the risk of being subjected to an order in terms of section 162 despite the fact that such a director has complied with his or her duties as director and/or acted *bona fide* and in the best interests of a company.⁸⁸⁸ A mechanical justification of an order in terms of section 162 based on commercially unfair conduct in terms of section 163 may yield unjust consequences for directors. As the test for commercial unfairness is objective a director can be exposed to a form of strict liability. Submissions in this regard are made in Chapter 6 where it will be pointed out that only commercially unfair conduct of a specific nature or character may justify a probation order or an order for delinquency of a director.

5.12.8.5 Section 163(2)(l)

Relief in the form of referring a dispute to trial is not a defence against the dismissal

⁸⁸⁶ See 5.9.4 above.

⁸⁸⁷ See 5.9.7.2 above.

⁸⁸⁸ See 5.9.7.2 above.

of an application based on the fact that a *bona fide* dispute exists between the parties.⁸⁸⁹ The fact section 163(1) states that a person may 'apply' for relief must not be interpreted to mean that relief may only be obtained by means of motion proceedings.⁸⁹⁰ If a *bona fide* dispute is foreseeable a party initiating legal proceedings must commence with proceedings by way of action proceedings.⁸⁹¹

5.12.8.6 The statutory unfair prejudice remedy and derivative proceedings

Section 163(2) of the Act does not provide for an order in terms of which a person is authorised to bring derivative proceedings for or on behalf of a company.⁸⁹² This is because section 165 of the Act specifically regulates the derivative proceedings.⁸⁹³ In South Africa a clear distinction is maintained between the statutory unfair prejudice remedy and the statutory derivative remedy.⁸⁹⁴ This approach is out of touch with developments in other jurisdictions and is also impractical.⁸⁹⁵ It is recommended that section 163 be amended to provide for relief in the form of derivative proceedings based on the provisions of section 163. Such an amendment will align the remedy with developments in other jurisdictions discussed in this thesis. Relief in the form of derivative proceedings based on the grounds of the statutory unfair prejudice remedy will only be available in very specific circumstances.

⁸⁸⁹ See 5.9.13 above.

⁸⁹⁰ See 5.9.13.2 (*b*) above.

⁸⁹¹ See 5.9.13.2 (*b*) above.

⁸⁹² See 5.9.15.4 above.

⁸⁹³ See 5.9.15.3 read with 5.9.15.4 above.

⁸⁹⁴ See 5.9.15.4 above.

⁸⁹⁵ See 5.9.15.4 above.

5.12.8.7 Relief for shareholder for wrongs committed to a company

Prima facie there is no reason why a shareholder must be able to rely on the statutory unfair prejudice remedy to obtain personal relief for a wrong committed against the company.⁸⁹⁶ Such a view is justified based on the separate juristic personality of a company and the availability of the derivative action.⁸⁹⁷ However, there are instances where the application of established corporate law principles fails to provide the redress required.

As a general rule a shareholder will not be entitled to any compensation or damages. This is because the diminution of value in the shares held by the shareholder is only reflective of the loss suffered by the company.⁸⁹⁸ Awarding damages to a shareholder will ignore the separate legal personality of a company and may put the interests of creditors at risk. A shareholder will only be allowed to recover a loss suffered in the form of a diminution in the value of shares when he or she has suffered a loss that is separate and distinct from the loss suffered by the company. However, it is interesting to note that courts seldom hesitate to adjust the value of shares subject to a buy-out order if the conduct complained of caused a depreciation in the value of those shares.⁸⁹⁹ The application of this principles is especially unique if the conduct complained of and which causes the diminution in the value of the shares is not necessarily unlawful but only commercially unfair.⁹⁰⁰

⁸⁹⁶ See 5.9.11 above.

⁸⁹⁷ See 5.9.11 above.

⁸⁹⁸ See 5.9.11 above.

⁸⁹⁹ See 5.9.14.5 (*b*) above.

⁹⁰⁰ See 5.9.11 above.

5.12.9 Section 163 and section 164

The effect of relief in the form of a buy-out order and the exercise of appraisal rights in terms of section 164 of the Act are substantially similar.⁹⁰¹ The appraisal remedy provides for the buy-out of a shareholder at a fair value of his or her shares.⁹⁰² Such a buy-out can be demanded from the company in specific circumstances.⁹⁰³ The provisions of section 164 are triggered in the event of a company giving notice of a proposed resolution in terms of which the Memorandum of Incorporation of a company will be amended to the effect of altering the preferences, rights, limitations or other terms of any class of its shares in such a manner that will be materially adverse to the rights or interests of the holders of a particular class of shares.⁹⁰⁴ The provisions of section 164 will also apply in circumstances where a company engages in a fundamental transaction (or affected transaction).⁹⁰⁵ The buy-out order in terms of section 163 may apply in circumstances where the provisions of section 164 are not applicable.⁹⁰⁶ The main difference between a buy-out order in terms of section 163 and the application of the provisions of section 164, is that in case of the latter in principle no court intervention is required which makes it a much faster and cost-effective remedy.⁹⁰⁷

5.12.10 Arbitration

Some courts have raised their concerns about the appropriateness of subjecting

⁹⁰¹ See 5.9.15.5 above.

⁹⁰² See 5.10.1 above.

⁹⁰³ See 5.10.2 above.

⁹⁰⁴ Companies Act 71 of 2008, s 164(2)(a).

⁹⁰⁵ Companies Act 71 of 2008, s 164(2)(b).

⁹⁰⁶ See 5.10.6 above.

⁹⁰⁷ See 5.10.6 above.

disputes in terms of section 163 to arbitration. These reservations are based on the wording of section 163 which refers to 'a court' and that the provisions of section 163 are often of a public interest nature.⁹⁰⁸ Due to the many benefits arbitration holds and the fact that the unfair prejudice remedy does not raise public interest or public policy matters, unless relief in the form of a winding-up order is sought, courts in other jurisdictions do not have any objections in enforcing arbitration agreements despite some of these statutory unfair prejudice remedies referring to relief that a court may grant. Proposals are made for legislative intervention in this regard.

⁹⁰⁸ See 5.11.2.5 (c) and 5.11.2.5 (d) above.

CHAPTER 6
CONCLUSIONS AND RECOMMENDATIONS

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6.1 Introduction

This chapter consists of three parts.¹ The alignment and position of section 163 in the context of the Constitution and other constitutional-related developments are provided in the first part.² In the second part recommendations are made regarding possible legislative amendments.³ The third part contains a framework for the legislative interpretation of the current provision.⁴ This framework is based on interpretational principles that were distilled from cases considered during the preparation of this thesis.

6.2 PART A: Section 163 of the Act in the context of the Constitution

6.2.1 The interpretation of section 163

The Constitution is the point of departure for purposes of the interpretation of section 163.⁵ The Constitution⁶ contains very specific provisions relating to the interpretation of statutory provisions.⁷ The Act also contains provisions relating to the interpretation of the Act.⁸ The Act also clearly states as one of its objectives the promotion of the Bill of Rights⁹ in the application of company law.¹⁰ It is therefore imperative that the provisions of section 163 be studied in the context of the

¹ See Part A–C.

² See Part A below.

³ See Part B below. Omissions from the current legislative provisions are marked in bold and [] while insertions are underlined.

⁴ See Part C below.

⁵ Constitution of the Republic of South Africa, 1996.

⁶ Constitution of the Republic of South Africa, 1996.

⁷ See 5.5.1 and 5.5.2 above.

⁸ See 5.4.1 – 5.4.2 and 5.4.4 above.

⁹ Chapter 2 of the Constitution of the Republic of South Africa, 1996.

¹⁰ See 5.4.2 above.

Constitution.¹¹

6.2.2 Company law and the law of contract

Company law does not function in a vacuum. Company law has an inseparable interrelationship with related branches of the law. It is therefore very important for the application of company law principles to note and recognise the developments and the influence of the Constitution¹² on other branches of the law.

6.2.2.1 The importance of the law of contract

The developments in the law of contract are of particular importance. This is because courts still approach the constitutive documents of a company such as the Memorandum of Incorporation as a contract between the parties.¹³ Secondly, section 163 introduced 'oppressive or unfair prejudicial' conduct as a standard against which contracts will be measured.¹⁴

6.2.2.2 Commercial fairness and fairness

Courts interpret the criteria in section 163(1) to mean commercial unfairness.¹⁵ The application of fairness or unfairness in South African law is not foreign. South African courts have considered the role that fairness, *bona fides* and reasonableness play in the law of contract in light of the Constitution.¹⁶ In the context of the law of contract, fairness may potentially influence the formation of a contract and secondly

¹¹ Constitution of the Republic of South Africa, 1996.

¹² Constitution of the Republic of South Africa, 1996.

¹³ See also 5.5.3 above.

¹⁴ See 5.6.6.3 above.

¹⁵ See 5.7.3.5 above.

¹⁶ See 5.6 above.

the enforcement of a contract. One of the requirements for the formation of a valid contract is legality.¹⁷ Legality is determined with reference to public policy.¹⁸ Public policy has to be established in terms of the provisions of the Constitution.¹⁹ It is notable that although fairness is not mentioned as a value of the Constitution,²⁰ it is one of the elements of the legal convictions of the community or public policy.²¹ Recently, the Constitutional Court further held that the enforcement of provisions of a contract must be fair and reasonable on the facts and circumstances of a particular case.²² There are important similarities in the application of fairness in the context of the law of contract and the application thereof to company law in terms of section 163 of the Act. Section 163 makes fairness directly applicable to conduct covered by its provisions. For purposes of section 163 the concept of fairness must be applied in a particular context.²³ Courts held fairness for purposes of section 163 to mean commercial fairness.²⁴ This means that the established principles of company law and the facts and circumstances of each of the matter must be considered to determine whether particular conduct triggers the provisions and relief of section 163.²⁵ Although commercial unfairness is a wide and flexible concept, it must be given content based on a principled approach to ensure that it is applied consistently. The fact that this concept is for purposes of section 163 always applied

¹⁷ See Chapter 7 in S van der Merwe, LF van Huyssteen, MFB Reinecke & GF Lubbe *Contract General Principles* (5 ed, 2016).

¹⁸ See 5.6.1 and more specifically 5.6.1.1 above.

¹⁹ See 5.6.1 above.

²⁰ Constitution of the Republic of South Africa, 1996.

²¹ See 5.6.3 above.

²² See 5.6.4 above.

²³ See 5.4 and more specifically 5.4.3 above.

²⁴ See 5.7.3.5 above.

²⁵ See 5.4 and more specifically 5.4.3 above.

within a company structure, makes the context and application of the concept commercial unfairness or fairness more predictable compared to the application of the concepts fairness and reasonableness in the law of contract. A number of factors have been identified to assist in the determination of the commercial unfairness or fairness of conduct.²⁶

6.2.2.3 Fairness and the *exceptio doli generalis*

A need has been identified in the context of the law of contract for a remedy to avoid the enforcement of contractual obligations in circumstances not foreseen by the parties to a contract that would make the enforcement thereof oppressive, unconscionable, unreasonable or unfair.²⁷ Although, the common law provided for such a remedy in the form of the *exceptio doli generalis*, it was found not be part of South African law of contract resulting in leaving a void in this area of the law of contract.²⁸ This void can be addressed by the application of the provisions of the Constitution²⁹ and the legal convictions of the community embedded in the Constitution.³⁰ However, a study of case law and the opinions of some commentators reveal that courts have not yet been able to establish a principled approach in this regard.³¹ Because of the provisions of section 163 it appears that this problem does not present itself as acutely as in the law of contract. This is because the provisions of section 163 that form the basis for the intervention in the enforcement and/or the refusal to enforce certain arrangements or understandings

²⁶ See 5.4 and 5.7.3.5 above.

²⁷ See 5.6.3 above.

²⁸ See 5.6.3 above.

²⁹ Constitution of the Republic of South Africa, 1996.

³⁰ Constitution of the Republic of South Africa, 1996. See 5.6.3 above.

³¹ See 5.6.5.1 above.

between parties are clear. Due to the nature and complexity of the relationships between various parties to and stakeholders of a company a similar remedy is required properly to balance the various rights and interests. The only challenge for the courts is the consistent and principled application of the concept commercial unfairness where the facts and circumstances of a particular case have certain unique features. In such instances the content and application of the remedy will be determined and done on a case-by-case basis.³²

In the application of the provisions of section 163 cognisance must be taken of the distinct features of its provisions. Firstly, the remedy is *sui generis* as it is not dependent on the lawfulness or unlawfulness of the conduct complained of.³³ A person having standing only has to prove 'commercial unfairness' in terms of section 163(1).³⁴ Secondly, it is the effect of the conduct that is complained of that has to be evaluated against the criteria in section 163.³⁵ This is especially important when the remedy is applied to the Memorandum of Incorporation of a company and/or a shareholder agreement. The remedy is not triggered by the mere presence of a particular article, clause or provision in a Memorandum of Incorporation and/or shareholder agreement. The commercial fairness of the conduct in terms of such an article, clause or provision is considered.

6.2.3 The balance of interests

It is submitted that the provisions of section 163 established a framework in which the interests of parties must be appropriately balanced by scrutinising the conduct

³² See 5.7.2.1 above.

³³ See 5.7.3.5 above.

³⁴ See 5.7.3.5 above.

³⁵ See 5.7.3.5 above.

of parties in light of commercial unfairness. This entails a conscious process whereby the interests of parties are carefully weighed and balanced in a particular context which includes the unique facts and circumstances of a particular case, the relevant common law principles, the provisions of the Act and the Constitution, and in particular the Bill of Rights.

6.3 PART B: Recommendations for legislative intervention

6.3.1 The heading of section 163

Because of an error in the heading of section 163 it is recommended that the heading be amended.³⁶ It suggested that the word ‘oppressive’ and the phrase ‘or from abuse of separate juristic personality of a company’ be removed, while it is further recommended that consideration should be given to inserting the word ‘unfairly’ before the word ‘prejudicial’.³⁷ This will align the heading of the requirement of section 163 that the conduct must be both prejudicial and unfair.³⁸ It would further emphasise that the section applies to conduct that is unfairly prejudicial which is of a wider ambit when compared to conduct that can be described as oppressive.³⁹ In light of the above it is recommended that the heading of section 163 be amended as follows:

163. Relief from [oppressive or prejudicial conduct or from abuse of separate juristic personality of a company] unfair prejudice or an unfair disregard of interests.

³⁶ See 5.7.8 above.

³⁷ See 5.7.8 above regarding the incorrect use of the phrase ‘or from abuse of separate juristic personality of a company’ in the heading to section 163 of the Act.

³⁸ See 5.7.1.4 (a) above.

³⁹ See also 6.3.2 below.

6.3.2 The use of the concept 'oppressive' in section 163

In light of the historical development of the unfair prejudice remedy in South Africa and other jurisdictions investigated in this thesis, it is recommended that the reference to the concept of 'oppressive' be removed or deleted from section 163.⁴⁰ This recommendation is based on the fact that the 'oppressive' concept played a fairly limited role in the development of the statutory unfair prejudice remedy in South Africa. Further the removal of the concept from section 111*bis* of the Companies Act 46 of 1926 has been recommended by the Van Wyk De Vries Commission based on the fact that it restricted the functioning and application of the remedy.⁴¹ Based on this recommendation the concept was removed from the substantive provisions of section 252 of the Companies Act 61 of 1973, but for unknown reasons was retained in the heading of the section. The case law generated under section 252 was mostly based on the concept 'unfairly prejudicial, unjust or inequitable' conduct in contrast with the case law handed down in terms of section 111*bis* of the Companies Act 46 of 1926 that used the much criticised 'oppressive' concept.⁴² Secondly, the reintroduction of the term in section 163 of the Act does not contribute any value to the interpretation and application of the remedy that outweighs the problems previously associated with the use of the term. The

⁴⁰ See 5.2 read with 5.7.3.2 above for the development of the remedy in South Africa. For the development of the statutory unfair prejudice remedy in England see 2.3 above. However, see Australia and Canada who have retained the concept 'oppressive' in their statutory unfair prejudice remedy. See 3.3 and in particular 3.3.5 and 3.5.5.2 above regarding the use of the oppressive concept in Australia. See 4.2 above for the development of the statutory personal remedy in Canada and 4.7.6.2 above regarding the use of the concept oppressive or oppression. See also recommendation in 6.3.1 above.

⁴¹ See 5.2.3 above and 5.2.4 above.

⁴² See 5.2.3 above and 5.2.4 above.

'oppressive' concept has also been abolished from the English equivalent of section 163.⁴³ This is significant as the development of the statutory personal remedy in South Africa has until recently followed the reforms in English law.

Although the oppressive concept is still used in Australia and Canada the development of the remedy in these jurisdictions must be distinguished from the development of the remedy in South Africa. This also has to be viewed in light of the fact that the legislatures in Australia and Canada incorporated concepts and terminology to counter the restrictive effect that the 'oppressive' concept had on the application of the remedy. Although the latter approach may have the desired practical effect, it does create some interpretational problems when these concepts have to be interpreted alongside the 'oppressive' concept.

6.3.3 Standing in terms of section 163(1)

6.3.3.1 Introduction

There are two pertinent issues relating to standing in terms of section 163(1) that deserve consideration. The first is the category of persons to whom standing must be extended. Secondly, consideration must be given to whether it would be required that a person to whom the remedy has been extended has to be prejudiced in a particular capacity.

6.3.3.2 The approach to standing followed in section 163(1) of the Act

(a) *A shareholder or a director*

Currently the remedy is available to a shareholder or director of a company. Two

⁴³ See Chapter 2 above and more specifically 2.4 for the provisions of section 994 of the Companies Act 2006.

important observations can be made in this regard. Firstly, only a shareholder whose name has been recorded in the company's register of securities can rely on the provisions of section 163. Secondly, the statutory personal remedy is now extended to a director of a company for the first time.

(b) *The registration requirement*

The requirement that a shareholder's name must appear on the register of securities has some problematic consequences. Firstly, a shareholder whose name was removed from a company's register of securities as a result of unfair prejudicial conduct is disqualified from obtaining relief, for example, in the form of the rectification of company records or registers.⁴⁴ A further consequence is that persons such as curators, executors and trustees are excluded from the definition of a shareholder for purposes of section 163(1).⁴⁵ Thirdly, a beneficial shareholder cannot rely on the provisions of section 163.⁴⁶

(c) *Capacity*

Section 163(1) is not specific on whether a shareholder or director must have suffered unfair prejudice in a particular capacity. Case law is available that requires that a shareholder must have suffered prejudice in his capacity as such to rely on section 163 of the Act.⁴⁷ This requirement restricts the application of the remedy by potentially disqualifying a shareholder from relief when he or she suffered prejudice in another or related capacity.

⁴⁴ See section 163(1) read with section 163(2)(k) of the Act.

⁴⁵ See 5.7.1.2 above.

⁴⁶ See 5.7.1.2 above.

⁴⁷ See 5.7.1.4 above.

Providing a director with standing for purposes of section 163 was supposed to expand the scope of application of the remedy and strengthen the position of a director. However, when the provisions of section 163 are critically analysed the section is of limited use to a director. This is because a director will be unable to make use of the remedy if he or she is removed from the board as a director. This is especially the case when the director does not hold shares in the company. Even though a director may have shares in a company, the provisions may be interpreted in such a manner that a director only has standing when he or she is prejudiced in his or her capacity as director.⁴⁸

6.3.3.3 The English approach to standing for purposes of the statutory unfair prejudice remedy

(a) *Persons with standing*

The English statutory unfair prejudice remedy is only available to a member (shareholder) whose name is recorded in the register of members.⁴⁹ A beneficial shareholder does not have standing for purposes of the remedy.⁵⁰ It is important that the provision extends standing to petitioners to whom shares have been transmitted by operation of law.⁵¹

(b) *Capacity*

Although it is required that a member (shareholder) must have suffered prejudice in his or her capacity as shareholder, it is open to a shareholder to demonstrate that

⁴⁸ See 5.7.1.3 and 5.7.1.4 above.

⁴⁹ See 2.6.1 above.

⁵⁰ See 2.6.1.1 above.

⁵¹ See 2.6.1 above.

he or she has been prejudiced in a capacity other than that of a shareholder, as long as the conduct also has been prejudicial to him or her as shareholder.⁵² The shareholder only has to prove a relationship between the capacity in which he or she suffered prejudice and his or her capacity as member (shareholder).⁵³ The remedy is further available to provide protection to a shareholder in circumstances where the shareholder, for example, has been removed from the board as a director contrary the legitimate expectations of the member.

6.3.3.4 The Australian approach to standing for purposes of the statutory unfair prejudice remedy

(a) *The default position*

The Australian remedy adopts a more flexible approach than the South African legislature to the standing requirements for purposes of the statutory unfair prejudice remedy. As a general rule the remedy is only available to a member (shareholder) whose name appears in the register of members of a company.⁵⁴

(b) *Capacity*

The provisions of the Australian remedy clearly state that reliance may be placed on the remedy irrespective of the fact that a member (shareholder) suffered prejudice in such capacity or not.⁵⁵

⁵² See 2.6.2.2 above.

⁵³ See 2.6.2.2 above.

⁵⁴ See 3.7.1 above.

⁵⁵ See 3.7.1 read with 3.7.4 above.

(c) *Extended standing*

Courts are further provided with the statutory power to extend standing to persons who are not registered members.⁵⁶ The court may grant standing to a specific class of persons.⁵⁷ This class of persons are all persons who were members of a company but whose names were removed from the register of members as a result of a selective reduction or whose membership was terminated as a result of the conduct that forms the basis of the petition in terms of the statutory personal action.⁵⁸ Provision is also made for persons to whom shares were transmitted by operation of law.⁵⁹

6.3.3.5 *The Canadian approach to standing for purposes of the statutory unfair prejudice remedy*

(a) *The default position*

The Canadian legislature's approach to standing is significant because the drafting of the South African statutory unfair prejudice remedy closely resembles the wording of its Canadian equivalent. However, the Canadian legislature makes the remedy available to a wider range of persons compared to South Africa. The remedy is amongst others⁶⁰ available to registered shareholders, directors and officers of a company.⁶¹ The remedy is also available to former registered shareholders, directors or officers.⁶² Beneficial owners are specifically included for purposes of standing in

⁵⁶ See 3.7.2 above.

⁵⁷ See 3.7.2 above.

⁵⁸ See 3.7.2 above.

⁵⁹ See 3.7.2 above.

⁶⁰ See 4.6.3 above.

⁶¹ See 4.6 above and in particular 4.6.1 and 4.6.2 above.

⁶² See 4.6.1 and 4.6.2 above.

terms of the remedy.⁶³ It is important that current or former registered shareholders or directors and officers of a corporation's affiliates also enjoy standing.

(b) A court's statutory discretion

A court is also provided with a statutory discretion to allow any other persons who do not enjoy standing in terms of the provisions of the remedy to rely on the remedy based on unfair prejudicial conduct.⁶⁴ However, a person who does not enjoy standing for purposes of the remedy may be granted standing if the person has direct and substantial interest in the affairs of a corporation, or holds a specific reasonable or legitimate expectation in relation to the affairs of a corporation.⁶⁵

(c) Capacity

There is no requirement in the provisions of the remedy that a person must be prejudiced in a particular capacity. The Canadian remedy does not only protect shareholders but also the holders of securities.

6.3.3.6 Recommendations for the amendment of the provisions relating to standing for purposes of section 163

(a) Introduction

To avoid technical disputes, it is important that the categories of persons who enjoy standing in terms of the statutory unfair prejudice remedy be established with relative ease and certainty.

⁶³ See 4.6.1 above.

⁶⁴ See 4.6.4 above.

⁶⁵ See, for example, the position of creditors as discussed in 4.6.4.2 above and the position of an employee as discussed in 4.6.4.3 above.

(b) *The English approach*

The English approach to standing in terms of the statutory unfair prejudice remedy has some practical aspects that should be considered. First, the remedy is only available to members whose names appear on the register of members.⁶⁶ Secondly, a member (shareholder) may rely on prejudice in a capacity other than that of a member (shareholder), provided that there is a relationship between the capacity in which a person complains of unfair prejudicial conduct and the person's capacity as member (shareholder) of a company.⁶⁷

In light of the analysis of the English position the South African position can benefit from not requiring that the prejudice should be suffered in a particular capacity as long as a nexus can be established between the capacity in which a shareholder suffered prejudice and his or her capacity as member. It is therefore recommended that that section 163 be amended to neutralise the self-introduced requirement by courts that prejudice must be suffered in a particular capacity.

(c) *The approach in Australia and Canada*

In terms of both the Australian and Canadian remedy a court enjoys a statutory discretion to extend standing for purposes of the remedy to persons who are not specifically afforded standing based on the provisions of the statutory remedy.⁶⁸

The provisions of the Australian remedy allow a court to grant standing to a very specific category of persons.⁶⁹ It is clear that it is intended that standing must

⁶⁶ See 2.6.1 above.

⁶⁷ See 2.6.2.2 above.

⁶⁸ See for the position in Canada see 4.6.4 above and for the position in Australia 3.7.2 above.

⁶⁹ See 3.7.2 above.

specifically be extended to persons whose names have been removed from the register of members as a result of unfair prejudicial conduct.⁷⁰

The provisions relating to standing in terms of the Canadian remedy is of a wider ambit than that of Australia. Firstly, standing is extended to the holders of securities whose names are recorded in the register of securities and to directors and officers of a corporation.⁷¹ Secondly, former registered security holders and former directors and officers may rely on the remedy.⁷² Thirdly, the remedy is available to current and former registered security holders and directors and officers of an affiliate of a corporation.⁷³ Fourthly, a current or former beneficial holder or owner of securities of a corporation or of its affiliates is specifically included as having standing for purposes of the remedy.⁷⁴ Fifthly, the court is given a statutory discretion to extend standing to 'any other person'.⁷⁵ It is important to note that this discretion is not limited to a particular category of persons as is done in the Australian equivalent of the remedy. It must be noted that the persons who enjoy standing for purposes of the Canadian remedy may utilise the remedy to obtain relief when the interests of a 'security holder, creditor, director or officer' are prejudiced in a manner that is unfair, oppressive or is an unfair disregard of interests.

⁷⁰ See 3.7.2 above.

⁷¹ See 4.6.1 and 4.6.2 above.

⁷² See 4.6.1 and 4.6.2 above.

⁷³ See 4.6.1 and 4.6.2 above.

⁷⁴ See 4.6.1 and 4.6.2 above.

⁷⁵ See 4.6.1 and 4.6.2 above.

(d) *Critical assessment of the provisions relating to standing for purposes of section 163*

The position of persons relying on the provision of section 163 will be improved significantly if the recommendations below are implemented. As demonstrated earlier some of the remedies listed in section 163(2) are not available to persons who often need it the most because of the current wording of the provisions dealing with the standing of persons for purposes of section 163.⁷⁶

(i) Section 163 and the definition of a 'shareholder'

The recommendations affect the definition of a 'shareholder' as defined in section 1 of the Act and the category of persons named in section 163(1). These recommendations are made in light of the view that section 163 is aimed at the protection of the shareholders of a company.

(ii) Security holders

Currently, no need has been identified for the extension of this remedy to the holders of securities, such as the position in Canada. This may be explained in light of the fact that the Act contains very specific provisions and remedies aimed at the protection of the holders of securities.⁷⁷

(iii) The ambit of the Canadian statutory unfair prejudice remedy

Of all the jurisdictions considered in this thesis it is submitted that the provisions relating to standing in terms of the Canadian statutory personal remedy are formulated in the widest terms. It is submitted that the recommendations made will

⁷⁶ See, for example, 5.9.12 above regarding the rectification of company records.

⁷⁷ See, for example, section 161 of the Companies Act 71 of 2008.

to a large extent achieve the same result. The Canadian remedy is also more comprehensive because it protects the holders of securities.

(e) *Recommendations for amending the requirements for standing for purposes of section 163*

The following recommendations are made pertaining to the provisions relating to standing in respect of section 163:

(i) Shares transferred by operation of law

Provision must be made for the inclusion of persons such as executors, administrators, curators, liquidators and trustees of a shareholder to whom shares were transferred by operation of law.⁷⁸

(ii) Beneficial holders or owners

A beneficial holder or owner of shares should be included in the category of persons who enjoy standing under section 163.

(iii) Former shareholders and directors

The remedy must also be extended to former shareholders and former directors. This will afford protection to persons whose names were removed from the company's register of securities or who were removed from the board as a director. As has been pointed out above, these persons are often left without redress in instances where such person's name is removed from a company's securities register or removed from the board under circumstances that are unfairly prejudicial.

⁷⁸ See 5.7.1.2 (b) above for criticism of the exclusion of curators and executors from relying on the provisions of section 252 of the previous Act.

In the interest of legal certainty, it is recommended that such former shareholder or director only be allowed to institute legal proceedings within a limited period of time calculated from the date of the removal of the shareholder's name from the register of securities or from the date a director has been removed from a company's board. Serious consideration should also be given to the proposals of Oosthuizen and Delport who suggest the adoption of a summary remedy aimed at the protection of shareholders whose names were removed from the company's register of securities.⁷⁹

(iv) The capacity in which prejudice is suffered

The requirement that a shareholder must have suffered prejudice in a particular capacity has been criticised repeatedly in the context of the predecessors of section 163.⁸⁰ It is also notable that legislatures in comparable jurisdictions expressly incorporated provisions which do not require a person who has standing in terms of the statutory personal remedy to prove that he or she has suffered prejudice in a particular capacity. The benefit of such an approach is that it provides protection to, for example, a shareholder-director who has been formally removed from the board of directors. Such a person can approach a court as a shareholder on the basis that his or her removal from the board is unfairly prejudicial not only in his or her capacity as director but also as a shareholder. A shareholder will also be protected in his or her capacity as a creditor of a company. This is essential for shareholders who amongst others hold loan accounts in a company. An amendment should also be introduced to the effect that a person who has standing in terms of section 163 must be able to

⁷⁹ See 5.9.1.2 above.

⁸⁰ See 5.7.1.2 (b) above.

rely on prejudice in any capacity provided that it is in connection with his or her capacity as shareholder or director of a company.

- i. The requirement that a shareholder or a director may rely on the provisions of section 163 must be retained.
- ii. The remedy should be extended to a former shareholder or former director.
- iii. A former shareholder or former director may only rely on the remedy within a specified period of time after his or her name has been removed from the company's register of securities or his or her removal from the board as director provided that such removal relates to the unfair prejudicial conduct on which the former shareholder or former director wishes to rely. It is recommended that such proceedings must be instituted within 6 months after such removal as shareholder or as director.
- iv. Standing should further be extended to beneficial holders or owners of shares.
- v. Persons such as executors, curators, liquidators or trustee must also be given the benefit of the remedy.
- vi. A person relying on section 163(1) does not need to have suffered prejudice in a particular capacity but has to demonstrate a rational link between the capacity in which legal proceedings are brought in terms of section 163 and the capacity in which a person has suffered prejudice.

In light of the considerations described above the following recommendations are made regarding the provisions dealing with the requirements for standing for

purposes of section 163. The recommendation takes the form of the insertion of a subsection into section 163 that will specifically deal with the persons who will have standing for purposes of section 163. This proposed subsection should read as follows:

- (4) For purposes of this section a person is defined as: -
- (a) A shareholder as defined in section 1 in his capacity as such or in any other capacity related to his or her shareholding;
 - (b) A person whose name has been removed from the register of securities, within six months immediately preceding the institution of legal proceedings in terms of (1), as a result of a selective reduction; or
 - (c) A person who has instituted legal proceedings in terms of (1) within six months after having ceased to be a shareholder of the company provided that the proceedings relate to the circumstances in which they ceased to be a member; or
 - (d) A beneficial shareholder; or
 - (e) A director or prescribed officer in his capacity as such; or
 - (f) A person to whom shares in the company have been transferred or transmitted by operation of law;

6.3.4 Section 163(1) – The jurisdictional requirements

6.3.4.1 Introduction and background

The grounds on which a person with standing may rely for relief are stated in section 163(1).⁸¹ The formulation of the provisions in section 163(1) creates some interpretational difficulties. Firstly, it is uncertain whether the provisions in sections 163(1)(a)-(c) should be interpreted as being separate grounds for relief or whether the provisions should be read to form a whole.⁸² Secondly, the persons stated in section 163(1)(a)-(c) whose conduct may form the basis for relief in section 163

⁸¹ See 5.7.2 above.

⁸² See 5.7.2.2 (a)(ii) and 5.7.2.2 (b)(i) above.

differ in each of the grounds.⁸³ Thirdly, only section 163(1)(a) requires that a *result* must be proven while sections 163(1)(b) and (c) refers to the *manner* in which the conduct complained of was carried out.⁸⁴ Fourthly, the tense in which the provisions in sections 163(1)(a)-(c) are formulated is inconsistent, creating doubt as to when the alleged unfair conduct had taken place before reliance may be placed on the remedy.

It is important to note that the tense in which section 163(1)(a) is formulated excludes the application of the provision from being applied to future or threatening conduct.⁸⁵ In light of this it is important to note that the predecessors of section 163 were criticised for not making provision for relief against future or threatening conduct.⁸⁶ Further section 163 does not expressly provide for relief against future or threatening conduct and therefore the same criticism may apply to it.⁸⁷ There are very compelling reasons for providing a person with standing in terms of section 163 to obtain relief against future or threatening conduct.⁸⁸ It is notable that both the English and Australian remedy expressly covers future or threatening conduct.⁸⁹ It is submitted that the grounds in section 163(1) should be amended to entitle a person with standing to obtain relief against future or threatening conduct.⁹⁰ Fifthly, it appears that courts are uncertain about the application of the *result* requirement

⁸³ See 5.7.2.1 and 5.7.2.2 above.

⁸⁴ See 5.7.2.2 (a)(ii) and 5.7.2.2 (b)(ii) above.

⁸⁵ See 5.7.2.2 (a)(i) and 5.7.2.2 (b)(i) above.

⁸⁶ See 5.2.4.3 (d) above.

⁸⁷ See 5.9.2.3 and 5.9.2.4 above.

⁸⁸ See 5.9.2.2 above.

⁸⁹ See section 994(1)(b) of the Companies Act 2006 for the position in England and 3.5, and in particular 3.5.2 and 3.5.3, above for the position in Australia.

⁹⁰ See 6.3.4.2 below.

and what constitutes a result.⁹¹ It is submitted that the purpose of the *result* requirement is to emphasise that it is the nature of the objectively determined result of the conduct that must be evaluated independent from the nature of the conduct.⁹²

6.3.4.2 Recommended amendments to section 163(1)

In light of the above it is submitted that the provisions of section 163(1) be amended in the following manner:

- i. To make express provision for protection against future and threatening conduct and to amend the general language in section 163(1) more appropriately.
- ii. To make it clear that the result of the conduct complained of must be evaluated against the commercial unfairness criterion and not the manner in which the conduct has taken place.
- iii. That the section is directed at the conduct of the company which may include the conduct of a shareholder, a director, prescribed officer and the board.
- iv. Legal proceedings in terms of section 163 may be commenced by way of action or motion proceedings depending of the existence of a *bona fide* dispute between the parties which cannot be resolved in motion proceedings.⁹³ In relation to the form of the proceedings in terms which a dispute must be brought before a court it is recommended that section 163 be amended to state clearly that the use of motion

⁹¹ See 5.7.2.2 (a)(ii) above.

⁹² and 5.7.3.6 above.

⁹³ See 5.9.12 above.

proceedings is not mandatory and further that the normal rules pertaining to the law of procedure apply.

In light of the above it is proposed that section 163(1) be amended to read as follows:

- (1) A person **[shareholder or a director of a company]** may **[apply to]** approach a court or, where appropriate, an arbitrator or other competent tribunal for relief if –
 - (a) **[any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;]** in relation to its affairs an act or omission of a company, shareholder, director or prescribed officer or related person to the company; or
 - (b) **[the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that]** an actual or proposed act or omission by or on behalf of a company; or
 - (c) **[the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.]** a resolution or a proposed resolution of shareholders or class of shareholders;
effects a result that is:
 - (d) contrary to the interests of the shareholders as a whole; or
 - (e) unfairly prejudicial to, or unfairly disregards the interests of a person
 - (i) in that person's capacity as a shareholder or in any other capacity related to that person's shareholding; or
 - (ii) in that person's capacity as director or prescribed officer.

6.3.5 Forms of relief

6.3.5.1 Section 163(2)

Some decisions of the South African courts expressed doubt on whether disputes based on section 163 may be referred for arbitration. In this regard it is suggested that this uncertainty be addressed by making it clear that such disputes may be

referred for arbitration where appropriate. Such an amendment will be in line with the legislative approach to introduce alternative dispute resolution mechanisms into South African company law and the approaches of other jurisdictions evaluated in this thesis. It is also proposed that the section make it clear that disputes based on section 163 may be referred to other tribunals such as the Companies Tribunal as far as it is appropriate to do so.⁹⁴

It is further recommended that this section be amended to make it clear that the purpose of the relief is to end the conduct complained of in the least intrusive manner possible. The discretion of the court must be exercised while taking into consideration the facts and circumstances of each case.

In light of the suggestions and recommendations discussed above it is proposed that section 163(2) be amended as follows:

- (2) Upon considering a matter in terms of subsection (1), **[the] a court, arbitrator or other tribunal has the discretion** to make any interim or final order it considers fit, with the **primarily purpose to end the matters complained of in the least intrusive manner possible unless any other form of relief appropriate in the context of the facts and circumstances of the case**, including –

6.3.5.2 Section 163(2)(b)

The current formulation of section 163(2)(b) is too restrictive. The wording of this section only allows a court to make an order for the appointment of a liquidator in the event of the company being insolvent. This approach can be criticised as one may think of circumstances where a company is solvent, but the unfair prejudicial conduct of one or more of the shareholders or directors may justify the liquidation

⁹⁴ See also 6.3.4.2 above.

of the company as other forms of relief will not be able practically to resolve the dispute between the parties. The test for relief in this regard is whether one of the grounds in section 163(1) has been proven and the ability of the relief to resolve the dispute. These requirements stand independently from whether a company is solvent or insolvent. Courts, however, will be more reluctant to order the winding-up of a solvent company based on section 163 in circumstances where alternative forms of relief are practical and available. In light of the above the following amendment is proposed to section 163(2)(b):

- (b) an order for the winding-up of a company **[appointing a liquidator, if the company appears to be insolvent];**

6.3.5.3 Section 163(2)(d)

Section 163(2)(d) refers to a 'unanimous shareholder agreement'. This term is foreign to the South African law of contract and company law. Indications are that this term originates from Canadian corporations law, where it has a very specific meaning.⁹⁵ The meaning of a 'unanimous shareholder agreement' in the context of Canadian corporations law has a much more restrictive meaning than the meaning of a shareholder agreement in the context of South African corporate law.⁹⁶ To eradicate any confusion it is recommended that this provision be amended by deleting the word 'unanimous'.⁹⁷ In light of the above the following amendment is proposed to section 163(2)(d):

⁹⁵ See 4.11.6.2 above.

⁹⁶ See 4.11.6.2 above for a discussion of a 'unanimous shareholder agreement'.

⁹⁷ See also 5.9.5 and in particular 5.9.5.3 (a)–(b) above for the use of the phrase 'unanimous shareholder agreement' in the context of South African law.

- (d) an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a **[unanimous]** shareholder agreement;

6.3.5.4 Section 163(2)(g)

This provision caters for the return of consideration paid for shares.⁹⁸ An order may require the company or any other person to return any part of the consideration paid for shares. It is recommended that the return of any consideration by the company must be subjected to the solvency and liquidity test in section 4 of the Act. This amendment will provide protection to the interests of creditors. The following amendments are proposed in this regard:

- (g) **[an order directing the company or any other person]** to restore to a shareholder any part of the consideration that the shareholders paid for shares, or pay the equivalent value, with or without conditions [;] by
 - (i) the company, subject to section 4; or
 - (ii) any other person;

6.3.5.5 Section 163(2)(f)(ii)

The appropriateness of the inclusion of section 163(2)(f)(ii) as a form of relief must be evaluated in light of its purpose and function and the general function and purpose of section 163. Section 163(2)(f)(ii) directly refers to section 162. The purpose and function of the latter section should also be considered when a court exercises its discretion in granting relief 'it considers fit'.⁹⁹ While the objective of the relief in terms of section 163(2) is to end and rectify the conduct complained of,¹⁰⁰

⁹⁸ See 5.9.9 above.

⁹⁹ Companies Act 71 of 2008, s 163(2). See also 5.9 above.

¹⁰⁰ See 5.9.1 above.

an order for probation or delinquency serves a public interest function.¹⁰¹ In this regard it is important to note that section 163 applies to the private relationship between parties to a company.¹⁰²

It is recommended that section 163(2)(f)(ii) be removed from section 163. This will resolve issues relating to the interpretation and application of section 163(1) read with section 163(2)(f)(ii) and section 162. The forms of relief in section 163(2) and an order in terms of section 162 serve two different purposes. In exercising its discretion in terms of section 163(2) a court has to determine whether the relief sought is appropriate in that the relief will rectify the matters complained of in the least intrusive manner possible.¹⁰³ In contrast with section 163(2), section 162 serves a public interest function.¹⁰⁴ To declare a person a delinquent or placing a person under probation in terms of section 162 different considerations apply when a court exercises its discretion under section 162 when compared to the general discretion a court enjoys in terms of section 163(2) of the Act. Sections 162 and 163 further appear as separate and distinct remedies in the Act. The fact that an order may in terms of section 163(2)(f)(ii) or section 162 have the effect of rectifying the conduct complained of in terms of section 163(1), will only be incidental.¹⁰⁵

The inclusion of section 163(2)(f)(ii) also creates some interpretational

¹⁰¹ See 5.9.7.2 (a) and (b) above.

¹⁰² See also 5.9.5 and in particular 5.9.5.2 above.

¹⁰³ See 5.9 above.

¹⁰⁴ See 5.9.7.2 (a) and (b) above.

¹⁰⁵ For a similar argument in the context of section 165 see *Lewis Group Limited v Woollam and Others* 2017 (2) SA 547 (WCC) [40] where the court held that '[i]t is significant that the evident object of s 162 goes essentially to the provision of a protective remedy in the public interest, and it is only incidentally that the provision can in some circumstances operate arising out of a wrong done to an individual company [shareholder or director]'.

problems.¹⁰⁶ Section 163(2)(f)(ii) states clearly that a court may make an order 'declaring any person delinquent or under probation, as contemplated in section 162'. The provisions of section 162 reveal that a court *may* order that a person be placed under *probation* on the grounds that he or she 'acted in, or supported a decision of the company to act in, a manner contemplated in section 163(1)'.¹⁰⁷ It is interesting to note that while section 163(1)(f)(ii) states that conduct contemplated in terms of section 163 may justify an order for declaring a person a delinquent and/or placing a person under probation, section 162(7)(b)(iii) implies that conduct in terms of section 163(1) may only possibly justify relief in the form of an order declaring a person under probation. This is further indicative of the fact that the grounds on which relief may be relied on for purposes of section 162 and section 163 are not necessarily aligned.¹⁰⁸

The removal of section 163(2)(f)(ii) will resolve the discrepancies between these two sections. This will also not prejudice any person who has standing for purposes of section 163(1), as a shareholder or director also have standing to rely directly on section 162 for an order declaring a person a delinquent or placing a person under probation, if required.

In light of the above the following amendment to section 163(2)(f) is proposed:

¹⁰⁶ See 5.9.7.2 (c) above.

¹⁰⁷ Companies Act 71 of 2008, s 162(7)(a)(iii).

¹⁰⁸ The fact that the conduct of a director triggers relief under this section cannot be seen as justifying relief in the form of a probation or delinquency order. This is because relief under this section is triggered based on the commercial unfairness of the conduct complained of. For purposes of section 163 conduct can be rendered commercially unfair despite the relevant conduct not being unlawful or being *bona fide*.

- (f) an order [–]
 - (i) appointing directors in place of or in addition to all or any of the directors then in office [;].
 - [(ii) declaring any person delinquent or under probation, as contemplated in section 162;]**

6.3.5.6 Section 163(2)(j)

This section provides for the payment of compensation to an aggrieved person.¹⁰⁹ Such payment is subject to any other law entitling that person to compensation. The purpose of this form of relief is uncertain.

A similar form of relief can be found in section 241(3)(j) of the Canada Business Corporations Act.¹¹⁰ This form of relief is used to hold the directors of corporations personally liable by ordering such directors to compensate a party prejudiced by unfair conduct.¹¹¹ Based on the current formulation of section 163(2)(j) of the Act and the conceptual difficulties associated with this form of relief in the context of the current South African law,¹¹² South African courts should be prudent in blindly adopting the Canadian approach to section 241(3)(j) of the Canada Business Corporations Act.¹¹³

It appears that the purpose of the provision is the payment of compensation in circumstances where an aggrieved person's right to compensation is not recognised by other branches of the law such as the law of delict. The reference to 'an

¹⁰⁹ See 5.9.11 above for a discussion of section 163(2)(j) of the Companies Act 71 of 2008.

¹¹⁰ RSC 1985 c C-44.

¹¹¹ See 4.11.13 above.

¹¹² See 5.9.11 above.

¹¹³ RSC 1985 c C-44. See also 1.5.1 above for a caveat against the blind application of English company law to South African company law. It is submitted that the application of Canadian company law to South African law must also be approached with the same circumspect for similar reasons.

aggrieved person' also adds some confusion to the interpretation of the provision. Currently, only a shareholder or a director may rely on the provisions of section 163 to obtain relief. Therefore, an aggrieved person can only be a shareholder or director. Alternatively, the provision makes it possible for a shareholder or director to obtain compensation for 'an aggrieved person' which is someone other than a shareholder or director. The provision also refers to 'compensation' and not 'damages'. This indicates that when relief is granted in the form of compensation it will be done on the basis of fairness.

It is recommended that section 163(2)(j) be removed from section 163(2) as it does not make any meaningful contribution to the current form of the remedy. It is further suggested that the position be regulated by the common law principles and applicable statutory provisions relating to the award of compensation and/or damages.

The following legislative amendment is therefore proposed in this regard:

[(j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;]

6.3.5.7 Section 163(2)(k)

Section 163(2)(k) provides for an order directing the rectification of the register or other records of a company. As has been pointed out earlier, this form of relief is not available to a shareholder whose name does not appear on the register of securities of a company.¹¹⁴ The position of the shareholder will be vastly improved and strengthened in this regard by extending standing to former shareholders

¹¹⁴ See 5.9.12 above.

and/or beneficial shareholders as recommended above.¹¹⁵ In addition to the recommendation above the suggestion by Oosthuizen and Delport for the incorporation of a summary remedy similar to section 115 of the previous Act is strongly supported. Using the exact wording of section 115 of the previous Act, it is recommended that the following provision be inserted as section 161A of the Act:

'Rectification of register of securities. –

- (1) If –
- (a) the name of any person is, without sufficient cause, entered in or omitted from the register of securities of a company; or
 - (b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a shareholder,

the person concerned or the company or any shareholder of the company, may apply to the Court for rectification of the register.

- (2) The application may be made in accordance with a rule of Court or in such other manner as the Court may direct, and the Court may either refuse it or may order rectification of the register and payment by the company, or by any director or prescribed officer of the company, of any damages sustained by any person concerned.
- (3) On any application under this section the Court may decide any question relating to the title of any person who is a party to the application to have this name entered in or omitted from the register, whether the question arises between shareholder or alleged shareholders or between shareholders or alleged shareholders on the one hand and the company other hand, and generally may decide any question necessary or expedient to be decided for the rectification of the register.

6.3.5.8 Legal proceedings by or on behalf of the company

Traditionally and theoretically a strict distinction was maintained between the personal remedy and the derivative remedy of shareholders. This approach is still observed in the statutory forms of the personal and derivative remedy in some of

¹¹⁵ See 6.3.3.6 (e) above.

the jurisdictions considered in this thesis.¹¹⁶

However, from a practical point of view the maintenance of a strict distinction between these remedies may be extremely complex and may create and promote injustices. To avoid the injustices that flows from the strict application of the principles in *Foss v Harbottle*¹¹⁷ and to adopt a more practical approach in this regard some jurisdictions incorporated relief in the form of derivative proceeding into the statutory unfair prejudice remedy.¹¹⁸ It must be emphasised that this form of relief will only be applied in very specific circumstances. The fact that derivative relief will also be available in terms of the statutory personal remedy will not justify or necessarily lead to the abolishment of a separate statutory derivative remedy.¹¹⁹

It has been demonstrated above that the statutory personal remedy has enough mechanisms in place to prevent abuse of the statutory unfair prejudice remedy such as section 163 to bypass or circumvent the provisions of section 165.¹²⁰ If the current legal position in South Africa is compared with similar

¹¹⁶ See 5.9.15.4 above for the position in South Africa where the strict distinction between the statutory personal action and the statutory derivative action is maintained. The Canadian equivalent of section 163 of the Companies Act 71 of 2008 does not expressly provide for authorisation of derivative proceedings and case law is currently divided on whether derivative proceedings may be ordered or authorised in terms of the Canadian derivative proceedings. For the position in Canada see 4.12, and more specifically 4.12.6 above.

¹¹⁷ (1843) 2 Hare 461, 67 ER 189.

¹¹⁸ See, for example, 2.10.3 above for the approach in England, 3.9.6 for the position in Australia. See also the ratio of the cases in Canada that support the granting of derivative relief in terms of the statutory personal remedy as discussed in 4.12 above.

¹¹⁹ See 2.10.3.5 read with 2.10.3.6 (c) above for the position in England where doubt is expressed whether the availability to order derivative relief in term of a statutory personal remedy should be interpreted to circumvent the provisions of the statutory derivative action.

¹²⁰ See 3.9.6.3 (d) above for an example the approach in Australia where courts consider the nature of the grounds on which a person relies regarding the relief sought.

jurisdictions it is clear that the traditional and theoretical approach where a strict distinction is maintained between the statutory unfair prejudice remedy and the statutory derivative action is an outdated approach and in some circumstances may be impractical which further may lead to injustices which the statutory personal and derivative actions attempt to eradicate.

It is therefore recommended that section 163(2) be amended as follows:

- i. To provide a court with a discretion to grant relief similar to the relief that can be obtained in terms of the statutory derivative proceedings.
- ii. A court may exercise this discretion only after considering the specific circumstances of each case. The factors that a court would need to consider will have to include but not be limited to the nature of the grounds on which relief is sought, the nature of the relief sought and the nature of the relationship between the shareholders of a company.
- iii. A person who has been granted authorisation to institute legal proceedings in terms of section 163 to obtain relief for the company must be indemnified for the relevant costs incurred. It is further important that the provisions relating to the granting of costs for the institution of legal proceedings on behalf of a company in terms of section 163 and the provisions relating to costs pertaining to the institution of the statutory derivative action in section 165 be aligned as far as possible, to prevent that one of the sections is preferred above the other because of costs considerations in stead of the application of the correct principle. It should, however, be noted that the provisions of

section 165 dealing with costs are subjected to sharp criticism.¹²¹

In light of the above, the inclusion of an amendment to section 163(2) is proposed:

- (m) order the company to
 - (i) institute or defend legal proceedings;
 - (ii) authorise a person to institute or defend legal proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct including the making of an appropriate order in relation to the reasonable costs incurred or to be incurred by a person in connection with instituting or defending legal proceedings on behalf of the company;

6.3.5.9 Relief in the form of a buy-out order

(a) *The need for legislative intervention*

Relief in the form of a buy-out order is one of the most practical forms of relief that a court may grant.¹²² This is because the purpose of the relief is to end the association between parties on fair terms and conditions.¹²³ It is surprising that despite the frequency with which this form of relief is granted, it is not included in the list of orders expressly mentioned in section 163(2).¹²⁴ This omission is significant in light of the fact that the predecessors of the remedy explicitly included buy-out orders as a form of relief.¹²⁵ However, this does not necessarily mean that

¹²¹ See MF Cassim 'Costs Orders, Obstacles and Barriers to the Derivative Action under Section 165 of the Companies Act 71 of 2008 (part 1)' (2014) 26 *SA Merc LJ* 1; MF Cassim 'Costs Orders, Obstacles and Barriers to the Derivative Action under Section 165 of the Companies Act 71 of 2008 (part 2)' (2014) 26 *SA Merc LJ* 228. See also 5.9.15 above for a discussion of the interrelationship between section 163 and section 165 of the Act.

¹²² See 5.9.14.1 and 5.9.14.2 above.

¹²³ See 5.9.14.1 and 5.9.14.2 above.

¹²⁴ See 5.9.14.2 above.

¹²⁵ See section 111*bis*(2)(b) of the Companies Act 46 of 1926 as discussed in 5.2.3 above and section 252(3) of the Companies Act 61 of 1973 as discussed in 5.2.4 above.

this form of relief is excluded from section 163(2).¹²⁶ For purposes of section 163 it is not only important that buy-out orders should have been expressly mentioned in section 163(2) but the legislature should have made use of the opportunity to clarify some aspects regarding relief in the form of a buy-out order. Aspects that could have been clarified included the persons against whom such order could be made and the role that the solvency and liquidity test plays in the event of such an order being made against the company.¹²⁷

(b) Recommendations for legislative intervention in relation to buy-out orders

In light of the evaluation of buy-out orders as a form of relief in terms of section 163(2) the following legislative interventions are recommended:

- i. That the provision explicitly provides for relief in the form of a buy-out order.
- ii. That the inclusion of a buy-out order must clearly provide that such an order may be made against the company or a shareholder of a company.
- iii. That buy-out orders against the company are made subject to the solvency and liquidity requirements of section 4 of the Act.

In light of the above, the following amendment to section 163(2) is proposed:

- (o) provide for the purchase of the shares of a shareholder or shareholders of the company
 - (i) by another shareholder or shareholders of the company or related company; or

¹²⁶ See 5.9 above.

¹²⁷ See 5.9.14.5 above.

- (ii) by the company itself, subject to the solvency and liquidity requirement of section 4(1) of the Act, and the reduction of the company's capital accordingly.

6.3.6 Arbitration

During this study no reason was found why the adjudication of disputes in terms of the remedy must remain exclusively within the jurisdiction of the courts provided that the nature of relief sought in terms of section 163 does not take the form of an order for the winding-up of a company or any other form of relief that could not be subjected to arbitration based on public policy considerations. The fact section 163(1) refers to 'a court' does not mean that proceedings in terms of section 163 cannot be submitted to arbitration proceedings.¹²⁸ It is submitted that arbitration agreements between parties must be enforced even when reliance is placed on the provisions of section 163.¹²⁹ To clarify the position, the following recommendations are made:

- i. Section 163 be amended so that a court or arbitrator may grant relief in terms of section 163(2) of the Act. Consideration may also be given for the referral of such disputes to the Companies Tribunal.
- ii. Alternatively, the Arbitration Act 42 of 1965 be amended to include a similar provision as found in section 7(2) of the International Arbitration Act 15 of 2017. The effect of such an amendment would be that

¹²⁸ See 5.11.2.5 (c) above. Compare with the position in England as discussed in 2.11.3.2 (e) above. See also 3.11.5 above for the approach of the judiciary in Australia and 4.14 and in particular 4.14.2.3 above for the approach in Canada.

¹²⁹ Although disputes in terms of section 163 may be arbitrated this would not mean that an arbitrator may grant relief such as an order for the winding-up and liquidation of a company on public policy considerations.

‘[a]rbitration may not be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling within the terms of an arbitration agreement’.

In light of the above the following amendments to section 163(1) and (2) of the Act are proposed:

In relation to section 163(1):

- (1) A person [shareholder or a director of a company] may [apply to] approach a court [-or, where appropriate, an arbitrator or other competent tribunal] for relief if an act or omission of a company, including that a shareholder, director or prescribed officer or related person to the company –

In relation to section 163(2):

- (2) Upon considering an application in terms of subsection (1), [the] a court, arbitrator or other tribunal has the discretion to make any interim or final order it considers fit, to primarily end the matters complained of in the least intrusive manner possible or alternatively grant any other form of relief appropriate to the facts and circumstances of the case, including –

Alternatively, the following amendment should be made to section 3 of the Arbitration Act 42 of 1965:

3 Binding effect of arbitration agreement and power of court in relation thereto

- (1) Unless the agreement otherwise provides, an arbitration agreement shall not be capable of being terminated except by consent of all the parties thereto.
- (2) The court may at any time on the application of any party to an arbitration agreement, on good cause shown-
 - (a) set aside the arbitration agreement; or
 - (b) order that any particular dispute referred to in the arbitration agreement shall not be referred to arbitration; or
 - (c) order that the arbitration agreement shall cease to have effect with reference to any dispute.
- (3) An arbitration agreement may not be excluded solely on the ground that an enactment confers jurisdiction on a court or other tribunal to determine a matter falling with the terms of an arbitration agreement.

6.4 PART C: Principles for judicial interpretation and application

6.4.1 Introduction

The statutory unfair prejudice remedy in section 163 is drafted in open and flexible terms.¹³⁰ This creates the possibility for various interpretations and applications of the remedy which may create legal uncertainty which threatens the consistency with which the remedy is interpreted and applied.¹³¹ It is therefore essential that the provisions of section 163 are interpreted and applied in a principled manner.¹³² The correct interpretation and application of section 163 are not only dependent on a proper understanding of the terminology and concepts used, but also on an understanding of the interrelationship that the various terms and concepts have with each other.¹³³ Guidelines and principles distilled from case law in relation to the interpretation and application of the provisions of section 163 are provided below.

6.4.2 Principles and guidelines

6.4.2.1 An interpretation has to be given to the provisions of section 163 that will advance the remedy rather than limit it.¹³⁴ However, this does not mean that the jurisdictional requirements of the remedy can be ignored or be indiscriminately applied.¹³⁵ For example, the provisions relating to standing cannot be interpreted to provide standing to persons who do not

¹³⁰ See 5.7.2.1 above.

¹³¹ See 5.7.2.1 above.

¹³² See 5.7.2.2 (a)(ii) above.

¹³³ See, for example, 5.7.3 above.

¹³⁴ See 5.7.2.1 above.

¹³⁵ See 5.7.3.5 above.

fall within a class of persons predefined by the Act.¹³⁶

6.4.2.2 For section 163 to apply the conduct must not only be prejudicial but must also be unfair.¹³⁷ This emphasises that not all prejudice will be regarded as unfair for purposes of section 163.¹³⁸ The unfairness of the prejudice suffered must be evaluated in the context of the application of established corporate law principles and the facts and circumstances of a specific case.¹³⁹ Conduct that is contrary to the legitimate expectations of a party may be indicative of unfairness.¹⁴⁰ The statutory provisions of section 163(1) remain the criteria against which the conduct complained of must be measured.¹⁴¹ This is especially relevant when the conduct of directors is under scrutiny. The fact that a director or directors complied with their duties or acted *bona fide* and in the best interests of a company does not by default exclude the application of section 163. This is because commercial fairness is the criterion for reliance on section 163 and not unlawfulness.¹⁴² Further, fairness to a shareholder does not necessarily coincide with the best interests of the company.

6.4.2.3 When the result or consequences of the conduct complained of is evaluated an objective test is used to establish the commercial fairness or unfairness of the conduct.¹⁴³ This means that as a general rule the

¹³⁶ See 5.7.1 and more particularly 5.7.1.2 (b) and (c) above.

¹³⁷ See 5.7.1.4 above.

¹³⁸ See 5.7.1.4 above.

¹³⁹ See 5.4.3 read with 5.7.1.4 above.

¹⁴⁰ See 5.7.6 above.

¹⁴¹ See 5.7.3.5 above.

¹⁴² See 5.7.3.5 above.

¹⁴³ See 5.7.2.2 (a)(ii) and 5.7.3.5 above.

motive of the party or person who committed the conduct complained of is irrelevant.¹⁴⁴ However, the motive of the party may in some circumstances be taken into account to determine whether the conduct complained of is commercially fair or unfair.

6.4.2.4 Section 163 specifically protects interests.¹⁴⁵ The concept of interests is to be given a wide interpretation.¹⁴⁶ Although the prejudice suffered is usually of a financial nature, it does not exclude other forms of prejudice such as the exclusion from the participation in the business and affairs of a company. It is submitted that such an interpretation is in line with the introduction of the phrase 'unfair disregard' of the interests of a director or shareholder.¹⁴⁷ It should be noted that the interests of a shareholder include the commercial and legal interests of a beneficial shareowner/holder.¹⁴⁸

6.4.2.5 Although some courts require that a person has been prejudiced in his or her capacity as shareholder or director, it must be pointed out that such an interpretation is highly undesirable as it introduces an unjustifiable restriction to the wording of section 163.¹⁴⁹

6.4.2.6 In the evaluation of the commercial fairness or unfairness of the conduct complained of it has to be emphasised that it is the effect or result of the conduct that has to be commercial unfair for purposes of relying on the provisions of section 163 to obtain relief. It is not and must not be a

¹⁴⁴ See 5.7.3.5 above.

¹⁴⁵ See 5.7.4 above.

¹⁴⁶ See 5.7.4 above.

¹⁴⁷ See 5.7.1.4 above.

¹⁴⁸ See 5.7.4 above.

¹⁴⁹ See 5.7.1.4 (c).

requirement for a person to prove that both the conduct and the result thereof are commercially unfair.¹⁵⁰

6.4.2.7 Section 163 has important implications for the enforcement of a company's Memorandum of Incorporation, rules and, where applicable, shareholder agreements.¹⁵¹ Courts are usually reluctant to interfere with the contractual arrangements between parties, especially if such arrangements relate to the conduct of the internal affairs of a company.¹⁵² Such an approach limits the application of section 163 without justification. Section 163 plays an important role in balancing the interests of various parties such as those of the company, the directors and shareholders without being restrained by the traditional law of contract principles. This does not mean that a court can ignore contractual arrangements between parties to a company dispute.¹⁵³ Section 163 provides the court with the power and discretion to give effect to understandings or arrangements (legitimate expectations) that are not necessarily formulated and contained in the Memorandum of Incorporation of a company or a shareholder agreement.¹⁵⁴ These legitimate expectations are enforceable provided that they are based on consensus between the parties.¹⁵⁵ Based on section 163 a court can enforce a legitimate expectation despite the inclusion of contractual clauses in a written agreement excluding agreements or understandings

¹⁵⁰ See 5.7.3.6 above.

¹⁵¹ See 5.9.5 above.

¹⁵² See 5.9.5.2 above.

¹⁵³ See 5.9.5.3 above.

¹⁵⁴ See 5.6.6 read with 5.9.5.3 above. See further 5.9.5.3 (c) above.

¹⁵⁵ See 5.9.5.3 (c) above.

not embodied in the written agreement between the parties.¹⁵⁶ Section 163 also recognises that changing circumstances may render the enforcement of understandings or agreements commercially unfair. The agility of section 163 in this context is commendable in the context of the dynamic nature of the company structure and the relationships within its structure.

6.4.2.8 Section 163 is available to any shareholder or director who cannot use his or her control in the company to protect him- or herself against the commercially unfair conduct complained of.¹⁵⁷

6.4.2.9 As far as establishing the value of shares for purposes of section 163(2) is concerned, the overriding principle is that such value must be fair to all the parties involved in and affected by the dispute.¹⁵⁸ Factors that may affect the valuation of the shares subject to a buy-out order include the possible application of a minority discount, the date on which the valuation will be based and the adjustments that have to be made to fix a fair value.¹⁵⁹

6.5 Concluding remarks

6.5.1 The economic importance of shareholder protection

Shareholder protection is important for the development and growth of the South African economy. Appropriate remedies aimed at the protection of shareholders

¹⁵⁶ See 5.9.5.3 (d) above.

¹⁵⁷ See 5.7.1.1 (e) above.

¹⁵⁸ See 5.9.14.4 above.

¹⁵⁹ See 5.9.14.4 above.

and/or other investors is one of the mechanisms to attract capital and to lower the costs and risks of investment in South African companies.¹⁶⁰ Effective remedies further protect the sustainability and existence of companies as such remedies will reduce the need to liquidate companies on just and equitable grounds.¹⁶¹

6.5.2 Implications of following of Canadian approach

In drafting section 163 of the Act, the legislature followed similar wording to the statutory unfair prejudice remedy in Canada. This potentially has significant implications for the approach to the statutory unfair prejudice remedy in South Africa on various levels.

6.5.2.1 The role of the courts

Traditionally the statutory oppression or unfair prejudice remedy in South Africa followed the developments in English law.¹⁶² In this regard it is important to recall that English company law developed from the law of partnership.¹⁶³ In contrast with English company law, Canadian company or corporations law did not develop from

¹⁶⁰ See section 7(g) which states the aggregation of capital as one of the purposes of the Act.

¹⁶¹ Section 163 of the Act is often an alternative remedy to the liquidation of companies. See 5.8 above for a discussion of the statutory unfair prejudice remedy as an alternative form of relief. This gives effect to the purpose in section 7(b)(ii) of the Act to encourage high standards of corporate governance as companies play a 'significant' role within the social and economic role of the South African nation. Companies are one of the means to achieve social and economic benefits. See in this regard section 7(d). Effective remedies also contribute to encourage efficient and responsible investment in companies as envisaged in section 7(j) of the Act. See also E Hurter *Aspekte van Statutêre Minderheidsbeskerming in die Suid-Afrikaanse Maatskappyereg* (1996) (unpublished LLD thesis; University of South Africa) 456 in the context of the previous Act.

¹⁶² See 2.1 read with 5.1.3 and 5.2.2.5 above.

¹⁶³ For the role and implications that the law of partnership had on the development of the English company law see 2.3.1.3 (b), 2.3.1.5, 2.6.5.1, and 2.6.5.4 (b) above.

the law partnership.¹⁶⁴ This casts doubt on the traditional approach to court intervention (or the reluctance thereof) which is associated with the English law equivalent of the statutory unfair prejudice remedy.¹⁶⁵ This is because the Canadian company is a form of *universitas* in contrast with *societas*. At the moment there are doubt whether the Act ascribes to the contractarian or the division of powers model as the Act contains features of both.¹⁶⁶

To follow the Canadian model of the unfair prejudice remedy further implies that courts are now specifically mandated to restore balance to the interests of role players within the company structure when imbalances arise.¹⁶⁷ From a company law perspective, the sanctity of contract will therefore not always be appropriate justification for not intervening in the relations between parties to a dispute in relation to a company. Although the legislature adopted the statutory oppression and unfair prejudice remedies, courts were reluctant to intervene in the relations between the

¹⁶⁴ JS (Schoeman) Oosthuizen and PA Delpont 'Rectification of the Securities Register of a Company and the Oppression Remedy' (2017) 80 *THRHR* 228, 235-36.

¹⁶⁵ See 2.6.5.3 above for a discussion of the contractual theory in relation to companies and the unfair prejudice remedy in England. For the nature of the relationship between the company, directors and shareholders under South African company law see 5.5.1 and 5.5.3 above.

¹⁶⁶ JS (Schoeman) Oosthuizen and PA Delpont 'Rectification of the Securities Register of a Company and the Oppression Remedy' (2017) 80 *THRHR* 228, 244-45 point out that under the Act companies enjoy the same powers as natural persons in so far as a juristic person can exercise such a power, the directors hold the original power to manage the business and affairs of company and the Act allocates powers and remedies to specific persons. Amongst others, these are all features of the Act that are associated with the division of powers model. However, it must be noted that the statutory contract provision has been retained in section 15(6). This is one of the features of the contractarian model. The authors submit (245) that the Act follows a hybrid model. It is submitted that this issue deserves further in-depth research.

¹⁶⁷ See also section 7(i) where it is stated that the purpose of the Act is to balance the rights and obligations of shareholders and directors within companies.

shareholders pertaining to matters of internal management.¹⁶⁸

6.5.2.2 The formulation of the statutory unfair prejudice remedy – standing

Following the Canadian model of the statutory unfair prejudice remedy implies that the traditional approach to the drafting and interpretation of the remedy is replaced or at least must be reconsidered. This must be done especially in light of the fact the *locus standi* or status of person in terms of the Canada Business Corporations Act¹⁶⁹ is statutorily determined by the provisions of the Canada Business Corporations Act.¹⁷⁰ Therefore, it is imperative that the Act contains clear statutory provisions relating to the standing of persons in relation to specific remedies in the Act. It is found that the South African legislature extended the unfair prejudice remedy to a too narrowly defined group of persons.¹⁷¹ The legislature further failed to address criticism raised against the predecessors of section 163 that may still be relevant.¹⁷²

6.5.3 Predictable environment and legal certainty

The Act places emphasis on corporate governance¹⁷³ and the efficient regulation of companies.¹⁷⁴ The principle of majority decision-making within companies aids the

¹⁶⁸ The reluctance of courts to intervene in the relations between shareholders was described as a problem associated with the contractarian company model deriving from the law of partnership in English law. However, some authors argue that a more acceptable justification for the reluctance of courts to intervene in the relations between shareholders would rather be the principle of majority decision-making within companies. See in this regard specifically 2.3.1.3 (b) above.

¹⁶⁹ RSC, 1985, c C-44.

¹⁷⁰ RSC, 1985, c C-44.

¹⁷¹ See 5.12.7 above.

¹⁷² See 5.12.7 above.

¹⁷³ See section 7(b)(iii).

¹⁷⁴ See section 7(l).

efficiency of decision-making.¹⁷⁵ The strict application of established corporate law principles, such as majority decision-making, and related rights may be abused or may be inappropriate in some circumstances.¹⁷⁶

Section 163 of Act is a flexible remedy under which courts do enjoy a wide discretion. However, it is essential that its provisions be clearly drafted to promote a predictable environment within which companies are regulated and to ensure that the remedy is consistently applied based on a principled approach. However, it must be kept in mind that it is impossible for the legislature provide for all possible circumstances in which the remedy will be applied. To address this the legislature has to draw from past experience to introduce practical statutory provisions and to provide the courts with the ability to grant innovative forms of relief to solve company disputes.

6.5.4 The purpose of the proposed legislative amendment and interpretational framework

Although the statutory unfair prejudice remedy in section 163 of the Act has incorporated features to strengthen and improve the remedy, the ‘good intentions’ of the legislature are hampered by poor execution. It is submitted that the proposed amendments to section 163 of the Act together with the proposed interpretational framework will assist in streamlining and strengthening the application and interpretation of the remedy.

¹⁷⁵ See 5.4.3.2 above regarding decision-making within companies.

¹⁷⁶ See 5.2.2 above.

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