

A. J. BOYLE

Minority Shareholders' Remedies

Cambridge Studies in Corporate Law

Minority Shareholders' Remedies

A. J. Boyle assesses the current state of English company law on minority shareholders' remedies from historical, theoretical and comparative perspectives in this important new addition to *Cambridge Studies in Corporate Law*.

He analyses the reforms of the UK Law Commission, which have been further appraised and amplified by the work in progress of the Company Law Review Steering Group. The book covers the common law actions by exception to the rule in *Foss v. Harbottle*, and the statutory remedies by way of petition for unfair prejudice and/or just and equitable winding up. As well as considering the complexities of derivative actions and statutory minority remedies, Boyle discusses future directions for minority shareholders' remedies.

This book will be of interest to academics and practitioners in company and corporate law, particularly in the UK, USA, France and Germany, as well as throughout the Commonwealth.

A. J. BOYLE is Emeritus Professor of Law in the University of London. He is General Editor of *Gore-Browne on Companies* (1972 to date) and original joint author of *Boyle and Bird's Company Law* (four editions, 1982–2000). He has published widely in the field of company law.

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Preface

It must be admitted that there is already an extensive literature in the form of both monographs and periodical articles on the subject of minority remedies. A further attempt to explore this controversial and complex subject is nevertheless warranted not only by the continuing developments in the case law but even more so by the fundamental reforming work of the Law Commission, as further appraised and amplified by the work in progress of the Company Law Review Steering Group. To this must be added the impact of the new Civil Procedure Rules and the possible effect of conditional fee agreements.

The first two chapters explore in turn the *Foss v. Harbottle* rule and the common law actions that the rule itself permits despite its general prohibition against minority suits. These topics are explored in the context of their legal history as well as in the light of legal theory and comparative law. Consideration is given to the possible reasons for the long neglect of this area by law reformers. A further matter requiring attention relates to the problems in terms of both policy and practice posed by the public listed company.

The most significant reform set out in the Law Commission's Report on shareholder remedies is a new statutory derivative action to replace its common law equivalent. Broadly, this new remedy is based on models provided by existing Commonwealth legislation. The Law Commission's version is, however, somewhat more cautiously conservative than, for example, the well-tested Canadian model. The Law Commission's proposed remedy if not further amended will provide little overall improvement on the common law derivative action in the case of public listed companies. It is here that a more effective new remedy is most needed. For private companies, the existing minority remedies are largely adequate.

The last two chapters are devoted to the linked statutory remedies by way of petition on the ground of unfair prejudice and/or for just and equitable winding up. A significant development here is the House of Lords' endeavour to set out a new conceptual framework for the ever expanding case law on unfair prejudice. Academic scholarship has also

had a useful part to play in theorising the unfair prejudice remedy. The Law Commission's attempt to frame an expeditious and simplified procedure applicable to owner-managed companies deserves more attention than it has yet received. The Company Law Review Steering Group has been much too dismissive of the Law Commission's work in this respect. This study of minority shareholders' remedies makes two assumptions. First of all, it is assumed that the specialised procedures allowing minority shareholders to apply to court in particular statutory contexts (e.g. mergers or takeovers or constitutional amendments) lie beyond the scope of the present study. Secondly, it is assumed that the readers of this monograph have a sound understanding of company law in general and directors' duties in particular.

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Introduction

This chapter is concerned with the rule in *Foss v. Harbottle*.¹ The chapter explores the historical origins and subsequent evolution of a rule whose principal effect is to bar minority shareholders' actions. The treatment of minority actions by exception to the rule, or lying beyond its scope, is the subject-matter of Chapter 2. Chapter 3 is concerned with a proposed statutory derivative action. This is intended to reform defects in the common law shareholder's derivative action.

Inevitably, as part of the process of exploring the conceptual thinking on which the rule in *Foss v. Harbottle* rests, as well as the judicial policies it expresses, this chapter will begin to open up some of the themes² that will be explored more fully in Chapters 2 and 3. Chapter 1 also explores the slow process of reforming the rule and the factors which appear to have inhibited both the judiciary and the Department of Trade and Industry in undertaking that task of reform. The particular difficulties that beset the use of the derivative action against directors and other wrongdoers in public listed companies are also considered in Chapter 1.³

Relying on certain judicial decisions and *dicta* early in the last century, some academic writers have put forward a seemingly attractive solution to the problems posed by the rule in *Foss v. Harbottle*. This takes the form of invoking the provisions of the membership contract contained in what is now section 14 of the Companies Act 1985. The question this theory raises is how far it can be reconciled, if at all, with the general body of case law associated with the rule in *Foss v. Harbottle*.

This chapter concludes with a review of some reflections found in the writing of corporate law theorists on the significance of shareholder

¹ (1843) 2 Hare 461.

² E.g. 'fraud on a minority' and 'wrongdoer control'. Cross-references in the footnotes indicate where further examination occurs.

³ This is an important issue that goes to the heart of the matter in determining the role of shareholders' actions as a mode of civil redress in policing corporate abuse. This issue is further explored in Chapters 2 and 3.