Fifteen years of the statutory derivative regime under the Companies Act 2006: a reflection on an unfulfilled superfluous statutory regime

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Abstract

This article explores the effectiveness of the codification of the statutory derivative regime as a remedy to members/shareholders to a company to which a wrong has been committed by those in charge - (the directors) and no steps have been taken by the company to seek a remedy. This is to assess whether, a derivative action as a shareholder remedy has been effective, since its codification in the Companies Act 2006 (CA2006) fifteen years ago, as a form of enhancing public confidence in the business/corporate sector, and a form of reassurance to investors that directorial mismanagement/abuse of office leading to loss/harm to shareholders could be punished. The article analyses the relationship between directors' breach of their statutory duties and corporate insolvency, premised on the contention that where directors are well regulated and governed in the execution of their duties, corporate insolvency may be avoided and shareholder actions, such as derivative claims, would be very rare. The article concludes with an analysis as to whether the statutory derivative regime has indeed, or not, fulfilled its purpose of simplifying access and enhancing shareholder remedies as initially recommended by the Jenkins Committee and taken forward by the Cork Committee report leading to its codification in the CA 2006.

Introduction

The Cork Report was published in 1982 following a review of insolvency law and practice of England and Wales, by the committee chaired by Sir Kenneth Cork that become to be known as the Cork Committee. The Cork Report set out twelve aims of a good modern insolvency law upon which insolvency laws of England and Wales were to be based.[1] Among these aims, and key to this article, was the need to ascertain the cause of insolvency and where the conduct of officers (directors), or agents, merits criticism or punishment, to decide what measures to be taken.[2]

Very often, the role of insolvency law is invoked to deal with legal challenges that are as a result of corporate existence. Challenges, such as mismanagement and/or failure, and directors' abuse or excessive use of powers create a need for a framework within which to solve those challenges. The Cork Report, therefore, made recommendations that aimed to foster/improve corporate governance and the relationship between the company, creditors and the public at large.[3] Most notably, the report emphasised that it is the basic objective of the law to support

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[1] Insolvency Law and Practice: *Report of the Review Committee* (1982; Cmmd. 8558), para. 198(a) – (l). (Hereafter, *Cork Report*).

[2] Cork Report, para. 198 (h).

[3] Cork Report, paras. 1739; 1745.

the maintenance of commercial morality and encourage the fulfilment of financial obligations such that insolvency is not an easy solution for those who can bear with equanimity the stigma of their own failure or responsibility for the failure of the company under their management.[4]

This was because the law of corporate insolvency impacts several stakeholders including *inter alia*, the debtor (company), creditors and society.[5] Although society at large may not have a paramount interest in the preservation or rehabilitation of the company like creditors would, there exists a paramount obligation on those (directors) responsible for the management of the company's affairs to account for the company's failure and where possible, to have their conduct subject to investigation.[6] Therefore, in its recommendations, the report sought to boost public confidence in the company's business as without this, investment in the company may be impacted which would have knock-on effects for members and the economy at large.

To that end, the Cork report made reference to an earlier report by the Jenkins Committee of 1962,[7] that had made a number of recommendations relating to winding up, directors' duties and overall management of the company as these provisions lacked legislative force in the Companies Act,1948.[8] The Jenkins Committee had recommended among other aspects, the need to deal adequately with situations arising from fraud and incompetence on the part of directors, particularly directors of insolvent companies who could be shown to have acted recklessly or incompetently in relation to the affairs of the company.[9]

The other aspect was on shareholder remedies and relief. The Jenkins Committee had recommended that s.210 of the Companies Act 1948 – dealing with shareholder remedies be modified to enable petitions to be presented by members where the company's affairs were being conducted in a manner that was unfairly prejudicial to the interest of the petitioner, premised on unfair acts and conduct of those in control of the company.[10] The report had therefore, recommended that as a form of relief, the courts should consider authorising a petitioner to bring proceedings in the name of the company against directors or third parties

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[4] Cork Report, para. 191.
[5] Cork Report, para. 192.
[6] Cork Report, paras. 193 – 193(a).
[7] Report of the Company Law (Jenkins) Committee (Cmnd 1749, 1962). (Jenkins Committee Report). The Jenkins Committee was appointed in December 1959 to review and report upon the provisions and working of the Companies Act 1948 and the Prevention of Fraud (Investments) Act 1958 and to consider what should be the duties of directors and rights of shareholders. On this, see further, R. R. Pennington, "The Report of the Company Law Committee" (1962) 25(6) *Modern Law Review* 703, 710.
[8] Cork Report, para. 97.
[9] Jenkins Committee Report, para. 85.
[10] Jenkins Committee Report, para. 212.

who have wronged the company as a way of dealing with the restrictive rule in *Foss v Harbottle*,[11] – the proper claimant rule.[12]

However, these recommendations had not been fully implemented by the time the Cork Committee was commissioned which had created a form of dissatisfaction and frustration within these aspects of law.[13] The Cork report therefore, emphasised that failure to fully implement these recommendations was to be deplored as it bred both disrespect and contempt for the law in a context where there was a need to enlist public support in an endeavour to promote the highest standards of probity and competence.[14] This was because, there had only been *partial* implementation of these recommendations. Recommendation for provisions for a member/shareholder to obtain court approval to initiate civil proceedings in the name and on behalf of the company had subsequently been implemented in the Companies Act 1980,[15] including provisions on unfair prejudicial conduct proceedings or derivative claim proceedings.[16] However, these provisions lacked legislative impact.

Therefore, following the Cork Report, the Law Reform Commission Reports of 1997 on Shareholder Remedies,[17] and of 1999 on Company Directors,[18] and the Company Law Review Steering Group (CLRSG)'s final report in 2001 took these recommendations onboard and this led to the tabling of the Company Law Reform Bill 2005 in parliament. Following several parliamentary debates, this Bill later became known as the Company Law Reform Bill 2006, that resulted into the enactment of Companies Act 2006, introducing the statutory derivative regime,[19] and the codification of statutory directors' duties.[20]

This article explores the effectiveness of the codification of the statutory derivative regime as a remedy to members/shareholders to a company to which a wrong has been committed by those in charge - (the directors) and no steps have been taken by the company to seek a remedy. This is to assess whether, a derivative action as a shareholder remedy has been effective, since

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[11] *Foss v Harbottle* (1843) 2 Hare 461.
[12] Jenkins Committee Report, paras. 212; 205-207.
[13] Cork Report, para. 1738.
[14] Ibid, 1738.
[15] Companies Act 1980, s.75(4)(c).
[16] Generally, see, Companies Act 1980, Part VI.
[17] Law Commission, *Shareholder Remedies: Report on a Reference under Section 3(1)(e) of the Law Commission Act1965* (The Stationery Office, 1997) Law Com. No.246, Cm.3769. (Hereafter, Law Com. No.246).
[17] Law Com. No.246, para. 6.4.
[18] Law Commission, *Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties*, (The Stationery Office, 1999) Law. Com. No.261. (Hereafter, Law Com. No.261).
[19] Companies Act 2006, Part 11, ss. 260 – 269; Part 30, ss. 992 – 996.
[20] Companies Act 2006, Chapter 2, ss. 171 – 177.

its codification in the Companies Act 2006 fifteen years ago, as a form of enhancing public confidence in the business/corporate sector, and as a form of reassurance to investors that directorial mismanagement/abuse of office leading to loss/harm to shareholders could be punished.

The article analyses the relationship between directors' breach of their statutory duties and corporate insolvency, premised on the contention that where directors are well regulated and governed in the execution of their duties, corporate insolvency may be avoided and shareholder actions, such as derivative claims, would be rare. The article concludes with an analysis as to whether the statutory derivative regime has indeed, or not, fulfilled its purpose of simplifying access and enhancing shareholder remedies as initially recommended by the Jenkins Committee and taken forward by the Cork Committee report leading to its codification in the CA 2006.

Directors' duties, breach and cause for a remedy

Following the enactment of the CA 2006, seven statutory directors' duties were codified under sections 171 – 177. These general duties are intended to act as a shield to protect companies from directorial abuse of power on the one hand, and improving industrial democracy, that is, to govern and regulate the relationship between the directors and the members/shareholders, (the so-called insiders) and the creditors/general public (the so-called outsiders) on the other hand.[21] Key duties, such as the duty to act within powers,[22] and the duty to act in the way that is in the best interest of the company, that is, to promote the success of the company,[23] are further buttressed by the duty to exercise reasonable care, skill and diligence,[24] duty to avoid conflict of interest[25] and duty to exercise independent judgement.[26]

These duties all set out to regulate and guide director's conduct while in office. This is to ensure that the thin line between directors' exercise of powers and execution of duties is maintained to avoid an overlap between power and duty.[27] This is premised on the notion that despite the

[21] A. Keay, "Directors' Duties and Creditors' Interests" (2014) 130 *Law Quarterly Review* 443; R. Mundy, "Directors' duties during administration and liquidation" (2021) 34(3) *Insolvency Intelligence*, 58, 61.
[22] CA 2006, s.171.
[23] CA 2006, s.172. See further, the reasoning by Popplewell J in *Madoff Securities International Ltd v Raven* [2013] EWHC 3147 (Comm) at [188].
[24] CA 2006, s.174.
[25] CA 2006, s.175.
[26] CA 2006, s.173.
[27] This issue was previously considered in *In Plus Group Ltd v Pyke [2002] EWCA Civ 370; [2003] B.C.C. 332* prior to the enactment of the CA 2006. See further; R. Mundy, "Directors' duties during administration and liquidation" (2021) 34(3) *Insolvency Intelligence*, 58, 61.

fact that these statutory duties exist, boards of directors are also vested with broad powers through companies' articles of association and very often, when matters of breach of duty by directors are taken before courts, courts tend to afford boards of directors room to resolve matters internally. Courts are not so keen on interfering with the internal management/wrangles of the companies.[28]

Therefore, where there has been a breach of duty or wrong done to the company that warrants a cause of action, the board of directors may decide against commencing such action on behalf of the company. This might be premised on a number of reasons, both positive and negative. For example, the potential cost of such litigation or the negative publicity such proceedings would bear on the company. However, there are instances where the refusal to commence causes of action is born out of collusion, especially where such proceedings would impact key players, such as a majority shareholder or one or more directors on the board.[29] On other instances, the breach may be so severe that it drives the company into insolvency. In such instances, English law provides routes through which aggrieved members may seek remedies but the remedies would be based on whether the alleged breaches were committed pre or post insolvency or whether the directors owed members any duties at that moment in time.

This is because, during formal insolvency proceedings, such as administration or liquidation, directors are deemed to still owe duties to the company.[30] In voluntary insolvency proceedings, such as voluntary liquidation, directors still owe their duties to the company as practically, they will only have lost their powers to the liquidator but not their duties. The liquidator can still call upon them to undertake substantive tasks, such as calling for general meetings until such time the liquidator sanctions their services.[31]

The same goes for administration proceedings where directors continue to perform their duties but cannot make substantive decisions without the consent of the administrator.[32] This position was further upheld in *Re System Building Services Group Ltd (In Liquidation)*,[33] where Judge

[28] A. Keay and J. Loughrey, "Something Old, Something New, Something Borrowed: An Analysis of the New Derivative Action Under the Companies Act 2006" (2008) LQR 469.
[29] A. Keay, "Assessing and rethinking the statutory scheme for derivative actions under the companies Act 2006" (2016) 16(1) *Journal of Corporate Law Studies*, 39-68.
[30] R. Mundy, "Directors' duties during administration and liquidation" (2021) 34(3) *Insolvency Intelligence*, 58, 61; A. Gurrea-Martínez (2021) "Towards an optimal model of directors' duties in the zone of insolvency: an economic and comparative approach" (2021) 21(2) *Journal of Corporate Law Studies*, 365-395.
[31] Insolvency Act 1986 s.91(1).
[32] Insolvency Act 1986, Sch.B1 para.64(1) - a director of a company in administration "may not exercise a management power without the consent of the administrator."
[33] *Re System Building Services Group Ltd (In Liquidation)*, [2020] EWHC 54 (Ch).

Barber held that directors owed their general duties to the company even after their company went into administration or voluntary liquidation proceedings. Under the new Part 26A restructuring plan introduced into the Companies Act 2006,[34] by the Corporate Insolvency and Governance Act (2020),[35] the directors continue to work alongside the insolvency practitioner to undertake restructuring initiatives as they are not replaced by the appointed insolvency practitioner. So, they still owe their duties to the company.

Shareholder remedies and directors' duty shift in insolvency

Wrongful trading

Among the main recommendations made by the Cork Report that were later adopted into legislation in relation to company directors and their recklessness or incompetence, was the liability for wrongful trading where the company subject to management entered into insolvency proceedings.[36] Where a company is experiencing financial difficulties and it is at risk of slipping into insolvency, company directors are obliged to intervene promptly to avoid and/or limit potential losses to the company itself, and creditors by discontinuing to trade. A director that continues trading whilst the company is likely to enter into insolvent liquidation would be liable to a civil sanction of wrongful trading as set out in the Insolvency Act 1986, ss.214 and 246ZB (IA 1986).[37]

Therefore, if at some point before the commencement of the winding up process, it is established (by the insolvency practitioner)[38] that a director knew, or ought to have concluded that there was no reasonable prospect of the company avoiding insolvent liquidation, and the company continued to incur liabilities nonetheless, the court on the application of the liquidator, may declare that director to be personally liable to contribute to the assets of the company to such extent it is worse off as a result of such continued trading.[39] Liability may, however, be absolved where a director can show that at that moment in time, every step necessary was taken with a view to minimising the potential loss to creditors that any other diligent person ought to have taken.[40] The decision to absolve liability will then be left to the

[34] Companies Act 2006, Part 26A, s.901A; CIGA 2020, s.7 and Sch. 9.
[35] Corporate Insolvency and Governance Act (2020), s.7 and Sch. 9. (Hereafter CIGA 2020).
[36] Insolvency Law and Practice: *Report of the Review Committee* (1982; Cmmd. 8558), para. (1782).
[37] The former provides the rule for companies in (insolvent) liquidation while the latter for companies in administration.
[38] For example, under s.212(3).
[39] IA 1986, s.214(1) and (2).
[40] IA 1986, s.214(3). See also, the reasoning in *Ralls Builders Limited (in Liquidation)* [2016] EWHC 1812 (Ch). (Hereafter, *Re Ralls Builders*).

court to take based on an objective standard, based on aspects, such as knowledge, skills and experience of the director in question.[41]

However, director's liability for wrongful trading may be exacerbated by the rule on directors' duty shift in insolvency. Under English law, it is an accepted norm that there is a shift in directors' duties when the company subject to their management is either within the vicinity of insolvency, and later, inside insolvency proceedings, such as in administration or liquidation proceedings. Developed mainly through case law,[42] and later buttressed by statute,[43] this common law rule stipulates that when a company is within the vicinity of insolvency, the focus of directors' duty should shift to creditors to ensure that due regard is accorded to creditors' interests.[44]

This rule was first introduced in English courts in the case of *West Mercia Safety Water v Dodd*,[45] where, the Court of Appeal held that the decision by a director of an insolvent company (Mr Dodd) to authorise a payment of a debt owed by the company to its insolvent parent company it had guaranteed, was a breach of director's duty. The court stated that by authorising the payment of (£4000) to reduce his own liability in disregard of creditors' interests of the insolvent company was a breach of duties as a director, and the director was ordered repay the amount back to the company. This has since become to be known as the rule in *West Mercia*.

This common law rule on directors' duty shift is further buttressed by the statutory provisions under s.172(3) of the Companies Act 2006 that requires directors to undertake actions that would promote the success of the company but *subject to any enactment or rule of law* requiring them, in certain circumstances, to consider or act in the interests of creditors.[46] Thus, this shift in directors' duty may be seen as providing a broader scope within which wrongful trading may be committed by directors.[47]

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[41] IA 1986, s.214(4). See also, the dictum by Snowden J in *Re Ralls Builders Ltd (in Liquidation* [2016] EWCH 1812 (Ch), at 245.
[42] See for example; *West Mercia Safetywear v Dodd*, (1988) 4 BCC 30; *Eastford Limited v Gillespie, Airdrie North Limited* [2010] CSOH 132; *Re Idessa (UK) Ltd (sub nom Burke v Morrison)* [2011] EWHC 804 (Ch); [2012] B.C.C. 315; *Bilta (UK) Ltd (in liquidation) and ors v Nazir and ors* (No 2) [2016] AC 1.
[43] See CA 2006, s.172(3).
[44] For example, *Bilta (UK) Ltd (in liquidation) and ors v Nazir and ors (No 2)* [2016] AC 1, [123] per their Lordships - Toulson and Hodge.
[45] *West Mercia Safetywear v Dodd*, (1988) 4 BCC 30. (Hereafter, *West Mercia*).
[46] Companies Act 2006, s.172(3).
[47] Peter Watts, "Why as a matter of English-law principle directors do not owe a duty of loyalty to creditors upon insolvency" [2021] 2 *Journal of Business Law*, 103, 121.

The rule in *West Marcia* has since been followed by English courts and was applied in *BTI 2014 LLC v Sequana SA*,[48] where the Court of Appeal concluded that it was bound by it that directors owed a duty of loyalty to creditors upon insolvency.[49] However, the case was appealed to the Supreme Court which gave its ruling on 5 October 2022,[50] on whether there was a rule (the rule in *West Mercia*) that in certain circumstances the interests of the company, for the purpose of the directors' duty to act in good faith in its interests, are to be understood as including the interests of its creditors as a whole.

All the sitting judges acknowledged that it was clear that such a rule was recognised by the Court of Appeal and lower courts before the enactment of the CA 2006 and existing law in this regard was preserved by section 172(3) of the CA 2006.[51] Therefore, the rule had a legal basis.[52] However, the court rejected the contention raised in the Court of Appeal and in some of the authorities, that there is a "creditor duty" distinct from the directors' fiduciary duty to act in the interests of the company upon corporate insolvency. Lord Reed acknowledged that there were circumstances in which the interests of the company, for the purposes of the latter duty, should be understood as including the interests of its creditors as a whole.[53]

However, he observed that there was a risk of confusion if this was described as a creditor duty as the parties had described it, yet there is not a duty owed to creditors, or any duty separate from the directors' fiduciary duty to the company.[54] Rather, there is a rule that modifies the ordinary rule whereby, for the purposes of the director's fiduciary duty to act in good faith in the interests of the company, the company's interests are taken to be equivalent to the interests of its members as a whole.[55] Therefore, the duty remains the director's duty to act in good faith in the interests of the company of which, the effect of the rule is to require the directors to consider the interests of creditors along with those of members.[56]

He further observed that the way in which that feeling has been expressed in the cases has involved a loose or perhaps metaphorical use of legal terminology.[57] For example, describing

[48] *BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112.
[49] Ibid, at [143].
[50] *BTI 2014 LLC v Sequana SA and others* [2022] UKSC 25.
[51] *BTI 2014 LLC v Sequana SA and others* [2022] UKSC 25, at [76].
[52] Ibid, at [46] – [51]; [250], [261].
[53] *BTI 2014 LLC v Sequana SA and others* [2022] UKSC 25, at [11].
[54] *BTI 2014 LLC v Sequana SA and others* [2022] UKSC 25, at [11];[12].
[55] Ibid.
[56] *BTI 2014 LLC v Sequana SA and others* [2022] UKSC 25, at [12].
[57] Ibid, at [44].

creditors as “beneficially interested in the company or contingently so”[58] or by speaking of the company’s assets becoming the creditors’ assets “in a practical sense”,[59] or by describing the situation where a company is insolvent or approaching insolvency as one where “it is the creditors’ money which is at risk.”[60] It is important to understand that the rule in *West Mercia* does not create any new duty but it merely adjusts the long-established fiduciary duty to act in good faith in the interests of the company.[61]

This view was further supported by Lady Arden who reiterated that the rule in *West Mercia* does not create a duty owed to the creditors, and the duty to promote success remains a duty which is owed to the company.[62] The rule in *West Mercia* is concerned with protecting creditors from harm and it does not require directors to run the business for the benefit of creditors.[63] Their Lordship, Briggs,[64] and Hodge,[65] also agreed with Lady Arden’s and Lord Reed’s observations.

The other key concern, at least to prior to the Supreme Court ruling in *Sequana* was that as the company enters the vicinity of insolvency, its interests divert to creditors alone and not shareholders,[66] and creditors are therefore, considered the major stakeholders in the company.[67] This concern was also explored by the Supreme Court. Lord Reed observed that where the rule in *West Mercia* applies, the company’s creditors have an economic interest in the company, based upon their entitlement to be paid the debts owed to them, ultimately enforceable against the proceeds of realisation of the company’s assets, which is distinct from the interests of its members and requires separate consideration. This is something which can be taken to occur when the company is insolvent or bordering on insolvency, or where an insolvent liquidation or administration is probable, or where the transaction in question would place the company in one of those situations.[68]

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58 *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242, at [249].
59 *Kinsela v Russell Kinsela Pty Ltd* (1986) 4 ACLC 215, at [730].
60 Ibid, at [733].
61 *BTI 2014 LLC v Sequana SA and others* [2022] UKSC 25 at [77].
62 Ibid, at [261].
63 Ibid, at [264]; [288].
64 Ibid, at [205].
65 Ibid, [206]; [224].
66 Per the reasoning in *Brady v Brady* (1988) 3 BCC 535 at 552. See also; A. Keay, “Financially Distressed Companies, Preferential Payments and the Director’s Duty to Take Account of Creditors’ Interests” (2020) 136 *Law Quarterly Review*, 52, 65–66.
67 Per the reasoning in *Kinsela v Russell Kinsela Pty Ltd* (1986) 4 ACLC 215, at [221].
68 *BTI 2014 LLC v Sequana SA and others* [2022] UKSC 25 at [12].

Lady Arden also observed that at a certain point in time the interests of creditors will have to have priority over any other interests. However, that point in time is not reached until the company becomes irreversibly insolvent and must enter liquidation or some formal insolvency procedure, most importantly a "rescue" procedure.[69] Therefore, directors must not only consider creditors' interests but not materially harm them either and should be protected against insolvency deepening activities.[70]

Nevertheless, Her Ladyship reiterated that this did not amount at any stage to a duty to "promote the success of the company for the benefit of creditors" which she referred to as "a self-standing creditor duty."[71] This is because directors cannot have "two masters" but if a company becomes irreversibly insolvent, directors must disregard the interests of shareholders if they conflict with those of creditors. This is especially, if approached from the lens of the rule in *West Marcia* on when exactly, do the interests of creditors override those of shareholders?[72]

Prior to the Supreme Court decision, there were other concerns born out of the conflict between the wrongful trading rule under the IA 1986, s.214 and the rule in *West Mercia* in terms of application. It was unclear, at what point exactly, directors had to consider shifting their duties from shareholders to creditors,[73] yet, non-compliance by the director would lead to a breach of the duty owed to the company that may be actionable by the company or by the shareholder/member, where the company fails to do so.[74]

The Supreme Court also gave its observations on this conflict. In particular, Lord Reed observed that he saw no conflict between understanding the directors' fiduciary duty in light of the rule in *West Marcia*, and the existence of section 214. He observed that in circumstances where section 214 applies – that is to say, where insolvent liquidation or administration is inevitable – the rule in *West Mercia* applies on the basis that the shareholders no longer have any interest in the company. Understood in accordance with the rule in *West Mercia,* directors will be required to act in a way which they consider in good faith will be in the interests of the company but in context, creditors as a whole. That duty is less stringent than, but is consistent

[69] Ibid, at [325]; [356] - [357].
[70] Ibid, at [289] – [290].
[71] Ibid, at [261]; [277].
[72] Ibid, [306; [311].
[73] A. Keay, "Directors' Duties and Creditors' Interests" (2014) 130 *Law Quarterly Review* 443.
[74] *Yukong Line Ltd of Korea v Rendsburg Investments Corporation of Liberia & Ors* [1998] 1 WLR 294; *Stone & Rolls Ltd (in liquidation) v Moore Stephens (a firm*) [2009] 1 AC 1391, [238]. See also; Kristin van Zwieten, "Director liability in insolvency and its vicinity" (2018) 38(2) *Oxford Journal of Legal Studies*, 382–409.

with, section 214, which requires the directors (put shortly) to take reasonable care to minimise the potential loss to creditors.[75]

On this aspect, Lady Arden observed that the rule in *West Mercia* works harmoniously with section 214. The rule in *West Mercia* and s.214 do not cover the same legal space. Whereas the rule in *West Mercia* includes a requirement as to process rather than an obligation of result, the remedy under section 214 is a requirement of result and provides primarily for a compensatory remedy in default.[76] The Supreme Court's ruling provides some clarity on the creditor duty shift on insolvency and/or within the vicinity of insolvency. However, it remains to be seen how subsequent judgements and academic and practitioner perspectives would shape this area of law moving forward.

Fraudulent Trading and Misfeasance liability

The other potential sanctions for directors' breach of their duties when the company goes into insolvency are the liability for fraudulent trading under s.213 of the IA 1986, and for misfeasance under s.212 IA 1986. Under fraudulent trading, a director of the company may be required to make a personal contribution to the company's asset as the court thinks fit, on application by the liquidator, where any business of the company was carried out by such a director, fraudulently or with intent to defraud the creditors of the company.[77] Although the test for liability for fraud under s.213 of the IA 1986 is real dishonesty,[78] it can be extended to include instances where the director had blind-eye knowledge of the fraud but no action was taken.[79] Liability can also be extended to criminal intent as set out by Supreme Court in *Ivey v Genting Casino (UK) Ltd (Trading as Crockfords Club)*,[80] and in the context of accessory liability as was the case in *Group Seven Ltd v Notable Services LLP*,[81] where needed to recover damages from the director.

Under s.212 of the IA 1986 (misfeasance action), past or present officers[82] of a company may be compelled by court (on application of the official receiver or liquidator, etc.,) to make a

[75] *BTI 2014 LLC v Sequana SA and others* [2022] UKSC 25 at [97], [98].
[76] Ibid, [326].
[77] IA 1986, s.213.
[78] As per *Pantiles Investment v Winckler* [2019] EWHC 1298 (Ch).
[79] *Re Overnight Ltd (In Liquidation) (No.2)* [2010] EWHC 613 (Ch).
[80] *Ivey v Genting Casino (UK) Ltd (Trading as Crockfords Club)* [2017] UKSC 67, per Hughes JSC, at 416.
[81] *Group Seven Ltd v Notable Services LLP* [2019] EWCA Civ. 614.
[82] The term officer is defined in IA 1986 s.251 as "Officer, in relation to a body corporate, including a director, manager or secretary". This is, arguably, a broad definition which would include "[any] person who in the affairs of the company exercises a supervisory control in the running of the company, or the general administration of it, within the meaning of management." See, (*Re a Company (No.00996 of 1979)* [1980] Ch. 138 at 144).

contribution to the assets of the company by way of compensation in respect of the misfeasance or breach of fiduciary or other duty as the court thinks just.[83] The term "other duty" is a wider concept which may include, *inter alia*, the duty of care, such as that under s.174 to exercise reasonable care, skill and diligence which resonates with claims based on negligence on the part of the director which may include wrongful trading.[84] However, liability under s.212 may be absolved where the director's actions were drawn on professional advice, (such as from certified accountants or business consultants). For example, where, during the course of proceedings for negligence or breach of duties or trust, the court is satisfied that such a director/officer acted honestly, reasonably and in the circumstances, ought to be absolved of liability.[85]

Shareholder remedies outside insolvency

The derivative claim[86]

A derivative action is one of the avenues that can be used to maintain and/or boost investment and public confidence in the company as it can be used as a tool to deter directorial and management wrongdoing and incompetence.[87] It is a tool that can be used by members/shareholders of the company to hold directors accountable for their actions/decisions while in office and where evidence of recklessness and incompetence is adduced, a derivative claim may be initiated or continued to pursue a remedy on behalf of the company. Where successful, the company is compensated for the wrong or loss made to it.[88] Although a derivative claim can sometimes be seen as a gateway to interfere with the management of the company by members, courts are very aware of the thin line between potential interference with the internal management of the company and members' right to protect their interests. Therefore, the courts are only able to entertain claims only where there are good grounds to do

[83] See, particularly, IA 1986, s.212(3).
[84] Per the reasoning in *Re D'Jan of London Ltd* [1993] B.C.C. 646.
[85] CA 2006, s.1157.
[86] This section focuses primarily on the derivative claim as a shareholder remedy as it is the main focus of the paper. Other shareholder remedies outside insolvency, such as the unfair prejudicial conduct remedy under CA 2006, s.994-996; fraudulent trading under CA 2006, s.993 and fair and equitable winding up under Insolvency Act 1986, s.122 are not broadly discussed where mentioned.
[87] W. Kaplan and B. Elwood, "The Derivative Action: A Shareholder's 'Bleak House?'" (2003) *University of British Columbia Law Review* 443, 451, 455.
[88] J. Coffee and D. Schwartz, "The Survival of the Derivative Suit: An Explanation and a Proposal for Legislative Reform" (1981) 81 *Columbia Law Review* 261, 302-309.

so as there are requirements on members/shareholders to obtain permission before initiating/continuing their claims[89] (as discussed below).

Historical context of the derivative claim

In the seminal case of *Salomon v Salomon & Co. Ltd*,[90] Lord Halsbury LC stated that "… [o]nce the company is legally incorporated, it must be treated like any other independent person with its rights and liabilities appropriate to itself ...."[91] The implication from this statement is that rights and liabilities attributed to a company are reserved to that company alone due to the separate legal personality doctrine.[92] Therefore, it is that company that should pursue or protect its rights, and also, settle its liabilities. This notion is premised on the two rules from the seminal case of *Foss v Harbottle*,[93] that is; the proper claimant and the majority rule that impact a shareholder's ability to pursue a claim in the name or on behalf of a company that has either suffered a wrong or whose interest has been infringed under what has been termed a derivative claim/action.[94]

The effect of these rules, that is, the proper claimant and majority rule, leads to the question of how then, a shareholder would seek to remedy a wrong suffered by a company. Prior to 2006 (that is, before the codification of the statutory derivative regime in Part 11 of the CA 2006), the answer to such a question lay in what was termed as the exceptions to rules in *Foss v Harbottle*. These exceptions included; fraud on the minority, ultra vires, failure to observe procedure and illegality. For example, under the fraud on the minority exception, a shareholder/member would be able to pursue a claim on behalf a company but on own standing and obtain a remedy provided s/he could establish that the wrong committed amounted to fraud and those that committed it were in control of the company.[95]

However, although such exceptions to the rule in *Foss v Harbottle* could provide some avenues to shareholders/members, they were mainly premised on common law with no corresponding

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89 A. Keay, "Assessing and rethinking the statutory scheme for derivative actions under the Companies Act 2006" (2016) 16(1) *Journal of Corporate Law Studies*, 39-68.
90 (1897) AC 22 (HL).
91 Ibid, at [30].
92 L. Watkins, and Hamiisi Junior Nsubuga, "The road to Prest v Petrodel: an analysis of the UK judicial approach to the corporate veil - part 1" (2020) 31 (10) *International company and commercial law review*, 547-588; Hamiisi Junior Nsubuga and Los Watkins, "The road to Prest v Petrodel: an analysis of the UK judicial approach to the corporate veil - part 2: post Prest" (2020) 31(11) *International company and commercial law review*, 597-608.
93 (1843) 2 Hare 461, 67 ER 189.
94 J. Coffee and D. Schwartz, "The Survival of the Derivative Suit: An Explanation and a Proposal for Legislative Reform" (1981) 81 *Columbia Law Review* 261, 302-309.
95 See for example, *Edwards v Halliwell* (1950) 2 All ER 1064, 1067.

statutory provisions to provide an alternative route to seeking remedies. This also meant that for shareholders/members to initiate a derivative claim courtesy of these exceptions, they had to scrutinise/interrogate caselaw spanning over decades to find a sort of suitable precedent upon which to base their derivative claim.[96] This was somewhat burdensome as caselaw was easily accessible by legal practitioners than laypersons like shareholders and the cost of the proceedings presented such a challenge to shareholders/members.[97]

In February 1995, the Law Commission of England and Wales was commissioned by the then Lord Chancellor and the President of the Board of Trade and Industry, Michael Heseltine, to undertake a review (in conjunction with the Scottish Law Commission) of shareholder remedies with particular reference to the rule in *Foss v Harbottle* and its exception; sections 459 to 461 of the Companies Act 1985; and the enforcement of the rights of shareholders under the articles of association; and to make recommendations.

In 1997 the Law Commission published its final report on shareholders' remedies.[98] Most notably, the report concluded *inter alia*, that the rule in *Foss v Harbottle* was complicated and unwieldly and that it could only be found in caselaw, much of it decided many years ago.[99] The report also emphasised that certain terms, such as "wrongdoer control" were not clear and that the requirement on members to establish standing to bring an action easily resulted in a mini-trial which increased the length and cost of such cases.[100] On one of the most used exceptions to the rule in *Foss v Harbottle* – the fraud on the minority exception, the report concluded that there were situations which appeared to fall outside this exception when it might be desirable for a member to be able to bring an action.[101] Overall, the report concluded that there should be a new derivative procedure with more modern, flexible and accessible criteria for determining whether a shareholder can pursue the action.[102]

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[96] Brian R. Cheffins, "Reforming the Derivative Action: The Canadian Experience and British Prospects" (1997) 2 *Company, Financial and Insolvency Law Review*, 227, 233.
[97] A. Reisberg, "Funding Derivative Actions: A Re-examination of Costs and Fees as Incentives to Commence Litigation" (2004) 4 *Journal of Corporate Law Studies*, 345.
[98] Law Commission, *Shareholder Remedies: Report on a Reference under Section 3(1)(e) of the Law Commission Act1965* (The Stationery Office, 1997) Law Com. No.246, Cm.3769. (Hereafter, Law Com. No.246).
[99] Law Com. No.246, para. 6.4.
[100] Ibid, para. 6.4
[101] Ibid; see also, paras. 6.38-6.41.
[102] Law Com. No.246, para. 6.15.9

The birth of the statutory derivative claim

Following the Law Commission report on shareholder remedies above, further review of the recommended remedies was undertaken by the Company Law Review Steering Group (CLRSG), publishing its final report in 2001. This led to the Company Law Reform Bills 2005 and 2006. The Company Law Reform Bill 2006 led to enactment of Companies Act 2006 and the new statutory derivative regime is now codified in the CA 2006, Part 11, Sections 260 – 269 and has been in operation since 1 October 2007. The new statutory regime has replaced the old common law requirements for establishing standing to initiate or continue a derivative claim premised on exceptions, such as fraud on the minority, ultra vires or proving wrongdoer control.

The new statutory regime has widened the scope of the derivative claim as the legal position now, is that, a member/shareholder may initiate or continue a derivative claim against any company director,[103] in relation to negligence, default, breach of duty or breach of trust.[104] In addition, the claimant need not be a member/shareholder at the time the alleged breach or misconduct happened.[105] However, the most underlying factor under the new statutory derivative regime is that permission must be sought from the court by the member before a statutory derivative claim is initiated or continued.[106] This step involves a two-stage process. Stage one is for the member to prove a *prima facie* case,[107] while stage two involves the court's consideration of the evidence presented premised on the list of factors under CA 2006 ss. 263(2) and (3) in order to decide whether to grant or reject the member's application.

However, since its adoption on 1 October 2007, the statutory derivative regime has not been popular with shareholders/members and not frequently used. Earlier work on the usage of the statutory derivative regime demonstrated that only six derivative proceedings in England had been initiated between October 2007 and 2011.[108] Professor Keay's work on the same point five years later, reported that between 1 October 2007 to 1 September 2015, only twenty-two statutory derivative claims had been initiated and all of them dealt with permission hearings.[109]

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[103] This may include present and former directors including shadow directors. See, CA 2006, Pt 11, s.260(5).
[104] CA 2006, s.260(3).
[105] CA 2006, s.260(4).
[106] CA 2006, s.261.
[107] CA 2006, s.262.
[108] David Gibbs, "Has the Statutory Derivative Claim Fulfilled its Objectives? A Prima Facie Case and the Mandatory Bar: Part 1" (2011) 32 *Company Lawyer* 41.
[109] Andrew Keay, "Assessing and Rethinking the Statutory Scheme for Derivative Actions under the Companies Act 2006" (2008) 16(1) *Journal of Corporate Law Studies* 39, 68 at 42.

Professor Milman's report on shareholder litigation in 2021 acknowledges that although there have been cases on derivative claims lately, there has not been an influx and a majority of the cases have been on the unfair prejudice conduct.[110] A search on Lexis+ UK of derivative claims between 2015 – 2022 returned a total of 32 cases, while 17 derivative claim related judgments were recorded in the year 2022.[111]

Has the statutory derivative regime met its expectations?

In its final report on shareholder remedies in 1997, the Law Commission, taking forward the recommendations of the Jenkins Committee and the Cork Committee pushed for the introduction of the statutory derivative regime as a gateway to making shareholder remedies more affordable and in tandem with modern trends.[112] This was in addition to making such shareholder remedies more simplified and accessible, as the common law system was inaccessible and lacked clarity.[113] The new statutory derivative regime would not only enable the member/shareholder to seek a remedy in the name and on behalf of the company, but would also, ensure that the company receives an appropriate remedy in lieu of the wrong suffered, usually compensation or removal of wrongdoer director from office, among other remedies.

This would resonate with the Cork Committee's recommendation for directors' or officers' liability for wrongs committed while in office to improve corporate governance and enhance public confidence in companies from the public that invest in these companies.[114] However, fifteen years since coming into force on 1 October 2007, questions remain unanswered succinctly, as to whether or not, the statutory derivative regime has achieved its intended objectives as set out by the both the Law Commission and legislative force under Part 11 of the Companies Act 2006.

Hurdles associated with the statutory derivative regime, such as the need to establish *a prima facie* case by the member to advance to the second stage in the quest for permission to initiate or continue a derivative claim has been one of the major factors identified by practitioners and academics as inhibiting the effective use of the statutory derivative regime.[115] Other factors,

[110] D. Milman, "UK Shareholder Litigation: Latest Cases Reviewed" (2021) 425 *Company Law Newsletter*, 1-4.
[111] Accessed via the Lexis+ website <17 results for Derivative claims in the UK 2022 (narrowed) (lexis.com)> (accessed 27 October 2022).
[112] Law Commission, *Shareholder Remedies: Report on a Reference under section 3(1)(e) of the Law Commissions Act 1965* (Law Com. No. 246, Cm. 3769) (London: Stationery Office, 1997), Executive Summary.
[113] Ibid, at p.7 and para 6.4.
[114] Cork Report, para. 198 (h).
[115] B. Hannigan, "Drawing boundaries between derivative claims and unfairly prejudicial petitions" [2009] *Journal of Business Law*, 606, 623; S. Griffin, "Alternative Shareholder remedies following corporate

such as the uncertainty with the criteria of what would constitute a *prima facie case*, parallelism of the derivative regime with other remedies, such as the unfair prejudice conduct remedy under s.994 of the companies Act 2006, and a heavy reliance on judicial discretion for permission to continue or initiate a derivative claim have also been cited. These are briefly analysed below.

Proving a *prima facie* case by the member

In order to make effective use of the statutory derivative regime to achieve its intended objectives of improving accessibility and effectiveness to shareholders, the two-stage test to be navigated by a shareholder in order to initiate or continue a statutory derivative regime ought to be revisited. Stage one, of proving a *prima facie* case should either, be dropped, or combined with stage two which involves the court's consideration of the evidence premised on the list of factors under CA 2006 ss. 263(2) and (3). This is because, while the procedure under section 263(2) is of a mandatory nature, that under section 263(3) is discretionary with a high degree of judicial discretion exercised by judges during interpretation of the list of factors under section 263(3).

As stage two is more judge-driven, the judge has jurisdiction to consider a non-exhaustive list of factors that goes beyond a mere quest for establishing a *prima facie* case at stage one. Therefore, where stage one is combined with stage two, a judge may be able to explore the list of factors alongside other (issues) that may invoke mandatory bars to claims that may become apparent during this process. This may include for example, striking out the claims where a person acting in accordance with s.172 – (promoting the success of the company) would not seek to continue such a claim or where, the act or omission is capable of being ratified by the company among other factors.[116] Moreover, the non-exhaustive and open-ended nature of the factors listed under s. 263(3) may have been intended by the Law Commission to give courts flexibility in looking at all relevant circumstances in lieu of a definitive list that may not fit into every circumstance.[117]

The preferred approach for the Law Commission was for the courts to develop a principled approach that is not tied to the rigid language of a particular rule or statutory provision,[118]as

mismanagement—which remedy to pursue?" [2010] *Company Law Newsletter* 1; D. Gibbs, "Has the statutory derivative claim fulfilled its objectives? a prima facie case and the mandatory bar: Part 1" (2011) 32 *Company Lawyer*, 41.

[116] See particularly, CA 2006, s.263(2).

[117] Law Commission, *Shareholder Remedies: Report on a Reference under Section 3(1)(e) of the Law Commissions Act 1965* (Law Com No. 246, 1997), para. 6.73.

[118] Ibid, para. 6.72.

doing so could easily result in a time consuming and expensive mini-trial.[119]Although this would be seen as affording courts broader discretionary powers in considering all relevant circumstances before deciding whether or not to grant a shareholder leave to initiate or continue a derivative claim,[120] it tallies in well with stage two of the current procedural approach under s.263.

Professors Keay and Loughrey have opined that prior to the codification of the statutory derivative regime in the CA 2006, "prima facie" as a concept was well known but its meaning had remained elusive.[121] They argue that the term "prima facie" is more associated with legal practitioners as it is the primary test in interim injunction applications within the legal field.[122] Satisfying this requirement may be a daunting experience for a lay shareholder/member with no legal knowledge/expertise to understand the term, in addition to its procedural underpinnings. Another academic has commented that tasking a shareholder/member with proving a *prima facie* case is like requiring such a claimant to prove a more than 0 percent chance of succeeding with their intended claim and questions the jurisprudence behind that requirement.[123] Therefore, if not addressed, it may defeat the overall objective of simplifying the derivative regime for shareholders' use.

Uncertainty on threshold for establishing a *prima facie* case by court

Another key concern has been identified around the uncertainty on what would constitute a *prima facie* case. Since coming into force of the statutory derivative regime, case law has been rather divided on the threshold to be satisfied by a shareholder/member for proving a *prima facie* case. For instance, in *Iesini v Westrip Holdings Ltd*,[124] the court was of the opinion that a *prima facie* case is established where both the company had a good cause of action and that cause of action arose out of a director's default or breach of duty. However, in *Wishart v Castlecroft Securities*,[125] the court observed that stage one of the statutory derivative claim was a "gateway'' through which the applicant shareholder/member must pass to continue an action, in order to avoid an obvious risk of abuse.

[119] Ibid, para. 6.71.
[120] Ibid, para. 6.73.
[121] Andrew Keay and Joan Loughrey, "Something Old, Something New, Something Borrowed: An Analysis of the New Derivative Action under the Companies Act 2006" (2008) 124 *Law Quarterly Review* 469, 480.
[122] Ibid, 469, 473.
[123] David Gibbs, "Has the Statutory Derivative Claim Fulfilled its Objectives? A Prima Facie Case and the Mandatory Bar: Part 1" (2011) 32 *Company Lawyer* 41, 42.
[124] *Iesini v Westrip Holdings Ltd* [2009] EWHC 2526 (Ch), [2011] 1 BCLC 498.
[125] *Wishart v Castlecroft Securities* [2009] CSIH 65; [2010] BCC 161.

In 2019, the High Court in *Saatchi v Gajjar and Another*,[126] further explored the key factors that the court considers when deciding whether or not to grant permission to a shareholder/member to pursue a derivative claim. In this case, Saatchi and Gajjar had formed the company as equal shareholders, holding a 50 percent shareholding each but Gajjar was to act as a sole director. It was alleged that as a sole director, Gajjar misappropriated company assets, granted himself director loans, luxurious vehicle purchases and other payments. The aggrieved shareholder – Saatchi sought permission from the court to continue a derivative claim in respect to Gajjar's breach of fiduciary and statutory director duties.

Applying the discretionary powers granted under s.263(3) in assessing the threshold for a *prima facie case,* the judge granted Saatchi permission to continue with a derivative claim. The judge held that Saatchi was acting in good faith in bringing the claim, it was unlikely that the derivative claim proceedings would be disruptive to company's business activities and a consideration of alternative remedies available, such as (unfair prejudice petition under s.994 of the CA 2006, or a petition for winding up of the company under the Insolvency Act 1986), did not preclude a derivative claim to be brought.

This level of uncertainty on the threshold for a *prima facie* case has resulted in the statutory regime becoming heavily reliant on the court to decide the petitioning shareholder's fate. It is the court that considers and assesses at stage one of the permission process, whether there exists a *prima facie* case in the alleged claim by the member, not the member him/herself.[127] Where the court is satisfied, it will grant permission or leave to continue with the claim, premised on such terms as it considers fit and if not satisfied, it will refuse permission and dismiss the claim.[128] This creates a form of judicial "screening process" that may be viewed as a policy to protect the proper claimant and the majority rule principles wedded to the jurisprudence in *Foss v Harbottle*.[129]

This may impact the work of both the Jenkins and Cork Committees on improving corporate governance to curb corporate insolvencies, and improving accessibility and functionality of the shareholder remedies to be of less impact. This would also mean that corporate doctrines, such

[126] *Saatchi v Gajjar and Another* [2019] EWHC 3472 Ch.
[127] CA 2006, s.261.
[128] CA 2006, s.261(4). See also, the reasoning in *Zavahir v Shankleman and others* [2016] EWHC 2772.
[129] A. M. Gray, "The statutory derivative claim: an outmoded superfluousness?" (2012) 33 (10) *Company Lawyer*, 295-302.

as the majority rule would still reign supreme and tools, such as ratification,[130] may be used to constrict shareholder petitions, especially for derivative claims.[131] Moreover, ratification is a process that is afforded high regard by courts in their assessment as to whether a member's application for a derivative claim could be granted or rejected.[132]

Availability of a more personal benefit under s.994.

Because of the technicalities with the new statutory derivative regime, especially stage one of proving a *prima facie* case, shareholders have been relying more on the unfair prejudice petition even in circumstances which would otherwise demand a derivative claim.[133] The concern however, is that, where a s.994 unfair prejudicial petition is preferred to a derivative claim, the overall outcome may not benefit the company but the appellant shareholder. This is because, a derivative action as a form of a representative action, mainly benefits the company with the relief awarded, and not individual shareholders/members, as is the case with a s.994 remedy.

The unfair prejudicial conduct remedy under s.994 of the CA 2006 provides a member,[134] of a company an avenue to pursue a claim for a personal remedy where the company's affairs have been or are being conducted in a manner that is unfairly prejudicial to his/her position as a member.[135] The unfair prejudicial conduct may take the form of breach of the terms agreed between the member and the company, upon which the affairs of the company are to be conducted (company's articles of association), some non-compliance with the rules in a manner that the principles of justice and equity would regard as contrary to good faith,[136] or breach of the statutory directors' duties as codified in the Companies Act 2006.[137]

The ease of initiating an unfair prejudicial petition, that is, the absence of the requirement on the shareholder to establish *a prima facie case* (in the form of permission to initiate/proceed

[130] CA 2006, s.239. See also the reasoning in *MacDougall v Gardiner* (1875-76) L.R.1 Ch. D. 13, where it was sufficient ground to bar a member's claim for a derivative claim where the alleged wrong or misconduct could be ratified by the company.
[131] A. Keay and J. Loughrey, "Derivative Proceedings in a brave new world for company management and shareholders" [2010] *Journal of Business Law*, 151.
[132] Christopher Riley, "Derivative claims and ratification: time to ditch some baggage" (2013) 34 (4) *Legal studies*, 582-608.
[133] R. Cheung, "Corporate Wrongs Litigated in the Context of Unfair Prejudice Claims: Reforming the Unfair Prejudice Remedy for the Redress of Corporate Wrongs" (2008) 29 *Company Lawyer*, 98; B. Hannigan, "Drawing Boundaries Between Derivative Claims and Unfairly Prejudicial Petitions" [2009] *Journal of Business Law*, 606.
[134] Although under s.994(2) of the Companies Act 2006, a petition may also be brought by a non-member to whom shares in the company have been transferred by operation of law.
[135] CA 2006, s.994.
[136] *O'Neil v Phillips* [1999] 2 B.C.L.C. 1, at 8, 9, per Lord Hoffmann.
[137] See generally, CA 2006, ss.171 – 178.

with the claim) as is the case under the statutory derivative claim and the wider scope of judicial discretion as to the nature or type of order or relief granted may prove more attractive. Moreover, the order granted may not only be to the benefit of the claimant shareholder, but also to the company in certain instances. For example, the court may authorise civil proceedings to be brought by the shareholder in the name and on behalf of the company on such terms as it thinks fit.[138]

Moreover, under a s.994 petition, the court may widen its scope and application such that it can simultaneously provide for both personal and corporate relief. For example, in *Clark v Cutland*,[139] the court was able to combine a derivative action petition with a s.994 petition into a single hearing to provide a legal remedy. Lady Justice Arden, allowing the appeal, granted a proprietary remedy to the company by ordering that the respondent director indemnify the company directly.[140] Her Ladyship also decided that, although the position on costs between derivative claims and unfair prejudicial remedies was different, in this case, relief was sought for the benefit of the company and it was therefore, open to Mr Clark to seek an order against the company for payment to him of any costs incurred.[141] The decision by her Ladyship was upheld by both Lord Justices Potter,[142] and Schiemann,[143] on the bench.

Similarly, in *Bhullar v Bhullar*,[144] the Court of Appeal widened the scope of s.994 to award corporate relief to a company on the basis of an unfair prejudicial petition where directors had breached their fiduciary duties in acquiring certain properties for themselves. Although both of these cases were decided shortly before the coming into force of the statutory derivative regime, they do provide a wider scope within which judges can exercise discretion, especially in deciding factors that constitute, for example, a *prima facie* case under stage one of the statutory derivative regime. In addition, the coming into force of the statutory regime did not abolish the use of judicial precedents by judges in relation to existing case, especially, in informing approaches to the interpretation and application of the new statutory provisions under Part 11 of the CA 2006.

[138] See, CA 2006, s.996(2)(c). see, also, the cases of *Clarke v Cutland* [2003] EWCA Civ 810; [2004] 1 WLR 783 and *Gamlestraden Fastigheter AB v Baltic Partners Ltd* [2007] UKPC 26; [2008] 1 BCLC 468.
[139] *Clark v Cutland* [2003] EWCA Civ 810; [2004] 1 W.L.R. 783 (Hereafter, *Cutland*).
[140] *Cutland*, at [34].
[141] *Cutland*, at [35].
[142] *Cutland*, at [36].
[143] *Cutland*, at [37].
[144] *Bhullar v Bhullar*, [2003] EWCA Civ 424; [2003] B.C.C. 711.

Conclusion

Surely, the Cork Report has to be commended for its contribution to the reform of English insolvency law and practice. Key features of both company and insolvency laws, such as the codified directors' duties in the CA 2006 and statutory derivative are some of the benefits of the reforms instigated by the Cork Report. Modern rescue-oriented procedures, such as administration aimed at simplifying the rescue and rehabilitation of financially struggling but viable businesses were another and the link between these procedures and corporate governance are deep-rooted in the Cork Report recommendations. However, the recent global shift from traditional insolvency and rescue mechanisms towards preventive restructuring frameworks will surely, demand more director involvement and less court involvement in restructuring processes.

This will create a demand for more protection to shareholders such that they are in a position to pursue remedies where their interests or those of the company have been infringed. A derivative claim in this perspective would be one of the central remedies as the relief would go to the company and may contribute towards rehabilitation of the company. However, to achieve this, the statutory regime may have to be revisited by the draftsmen/legislator to fit modern trends. As discussed in this article, the two-stage procedure to be navigated by the shareholder before permission to either initiate or continue a derivative claim has been one of the major challenges impacting the effective adoption of the statutory derivative regime.

As argued in this article, there may be a need to combine the two stages of establishing a *prima facie* case and the stage two, of the court's consideration of the factors before a decision is given on the shareholder's application as both stages involve heavy judicial control and would provide a quicker turnaround. Otherwise, the statutory regime may continue to be less accessible due to technical challenges as was the case under the old common law regime which may fail the aims and objectives that mandated the codification of the statutory regime.