

and insightful comments on my work in draft. I am grateful for her generosity, support and, most of all, encouragement and friendship. I would also like to express my gratitude to Professor John Lowry both for his valuable comments and suggestions on this work, and for his admirably succinct Foreword.

I am indebted to many others who have helped me in various ways: to Rachel Chan of Mallesons Stephen Jaques and Jenkin Suen of Des Voeux Chambers for their precious support and friendship; to David Lam of Clifford Chance and Raymond Yip of Allen & Overy, for their insightful comments and ideas; to my special friends Laveena Mahtani, Jude Layas and Alexandra Matheou for their encouragement and support in my difficult times; to my colleague Professor David Donald for reading through the proofs; and to my students Celine Leung, Justin Ho, Kelvin Cheung and Alan Lee for their timely research assistance at various stages in the preparation of the manuscript. Finally, I would like to extend my appreciation to Brendan Clift, Associate Publishing Director, and Ho Yan Leung, Product Development Manager, of LexisNexis Butterworths, for their expertise and support in bringing this work to fruition.

The law is stated as of 1 January 2010 although prospective changes are, where relevant, noted.

Rita Cheung
13 July 2010

Contents

Foreword.....	v
Preface	vii
Table of cases	xiii
Table of legislation	xxvii

Chapter 1 General Principles 1

1 General principles.....	1
Principle (1): Separate legal personality.....	1
Principle (2): Division of corporate powers	2
Principle (3): Company's rights.....	8
Principle (4): Shareholders' personal rights	11
Principle (5): Statutory minority remedies	14
2 Commencement of litigation in corporate name	15
2.1 Division of corporate powers between shareholders and directors	15
2.2 Control of corporate litigation	16

Chapter 2 The Common Law Derivative Action 25

1 The rule in Foss v Harbottle	25
2 The exceptions to the rule	29
2.1 Derivative actions: the 'fraud on the minority' exception.....	30
2.2 Personal rights	49
2.3 Ultra vires and illegality	50
2.4 Special majorities	52
2.5 The 'interests of justice' exception	52
3 Difficulties with the common law derivative action.....	53
3.1 Restrictive standing requirements	53
3.2 Ratification	56
3.3 The costs of litigation	56
3.4 Independent organs.....	57
3.5 Equitable defence	58
3.6 Availability of other adequate remedies	59
3.7 Companies in liquidation.....	59
4 The no reflective loss principle.....	61
4.1 The operation of the no reflective loss principle	62
4.2 Exceptions to the no reflective loss principle	72
4.3 Application in Hong Kong	78

Chapter 3 The Statutory Derivative Action 89

1 Companies Ordinance, Part IVAA	91
2 The new statutory regime for derivative actions	94
2.1 The scope of proceedings	94
2.2 Plaintiff in derivative action	95
2.3 Statutory leave requirement	96
2.4 Ratification.....	106
2.5 Funding the statutory derivative action	109

2.6	Co-existence of the statutory and common law derivative actions.....	112
2.7	Discovery of documents	115
2.8	Court's powers in a derivative action	117
2.9	Multiple derivative actions	118
Chapter 4	Personal action.....	123
1	The statutory contract.....	125
1.1	The section 23 contract.....	126
1.2	Limitations on members' personal rights	129
1.3	The reformed section 23(1A)	137
1.4	Alterations to the articles.....	149
1.5	Articles and the companies legislation	160
2	Shareholders' agreements.....	164
2.1	The legal nature of shareholders' agreements	164
2.2	Enforceability of shareholders' agreement – the <i>Russell</i> principle.....	168
2.3	Application of the <i>Russell</i> principle in Hong Kong	172
3	Class rights	186
3.1	The concept of 'class rights'	186
3.2	Variation of class rights	188
3.3	Procedure for variation of class rights.....	190
Chapter 5	The Unfair Prejudice Remedy.....	193
1	Unfair prejudice remedy: the statutory provision	194
1.1	Introduction of the section 168A unfair prejudice remedy.....	194
1.2	Relationship with just and equitable winding up.....	198
2	The elements of a claim for unfair prejudice.....	201
2.1	Element (1): Interests <i>qua</i> 'member'	201
2.2	Element (2): Conduct of the 'company's affairs'	208
2.3	Element (3): Unfair prejudice.....	225
2.4	Clean hands – relevance of the petitioner's misconduct	241
3	Examples of unfair prejudicial conduct.....	250
3.1	Exclusion from management.....	250
3.2	Excessive remuneration.....	261
3.3	Inadequate dividends	266
3.4	Misappropriation	268
3.5	Mismanagement.....	271
3.6	Improper share allotment.....	274
4	The interrelationship between unfair prejudice petitions and derivative actions.....	280
4.1	Corporate wrongs	281
4.2	The relevance of the no reflective loss principle	290
4.3	The respective merits of unfair prejudice petitions and derivative actions.....	292
5	Unfair prejudice and just and equitable winding up.....	296
6	Remedies under section 168A	298
6.1	Buy-out remedy	300
6.2	Awarding damages and interest	320
6.3	Authorising civil proceedings	321
6.4	Redressing corporate wrongs.....	322
7	Difficulties with the unfair prejudice remedy.....	324

7.1	Lengthy and costly litigations.....	324
7.2	Offer to buy as a bar to an unfair prejudice petition.....	325
7.3	Costs of litigation.....	332

Chapter 6	Reforming the Unfair Prejudice Remedy.....	335
1	Reforming the statutory unfair prejudice remedy.....	336
1.1	The reformed section 168A	336
1.2	Reforming section 168A(2) remedial order: redressing corporate wrongs	338
1.3	Concluding remarks.....	347
2	The English Law Commission's recommendations	347
2.1	Statutory presumptions as to unfair prejudice	350
2.2	Model exit article.....	351
2.3	Adding winding up as a new remedial order.....	353
2.4	Concluding remarks.....	354
3	New models for reform.....	355
3.1	Statutory presumptions and a pro rata basis for share buyouts.....	359
3.2	Inclusion of an optional exit right in the reformed Table A.....	357
3.3	Inclusion of winding up as section 168A(2) remedial order.....	358
3.4	Concluding remarks.....	359
4	Conclusion	359

Index	363
--------------------	------------