

Challenging Controlling Shareholders in UK Courts:^{*} The Substantive Standard of Review

I. Introduction

The “tunnelling” of corporate wealth by controlling shareholders has attracted much academic attention, especially after the 1997-1998 crisis.¹ One way to deal with the controlling shareholder opportunism is to subject their conducts to court review. In the UK, controlling shareholders’ conducts might be challenged in court in three types of actions: a derivative action for breach of directors’ duty,² a common law action for abuse of majority power, or a statutory action for unfair prejudice. This paper is focused on the substantive standards adopted by the UK courts when they deal with these controlling shareholder-related cases. Section 2 to 4 will discuss the three types of actions respectively, followed by a comparative section of the substantive standards used in each action concerning the fair use of controlling power. By conclusion, the author argues that the standard set by the UK judiciary for the substantive fairness of controlling shareholders’ conducts is “no non-proportional distribution.”

II. Directors’ Duty and Derivative Action

The separation of ownership and control is seen as one of the basic features of modern companies.³ While the shareholders are said to be the owners of the corporation, the power to manage the corporation is delegated to the board of directors.⁴ Under most circumstances, therefore, controlling shareholders dominate the company through their

^{*} This paper is based on a section in my Ph.D. thesis. My research is concerned with the role of court review in dealing with controlling shareholders opportunism in public companies. The research is limited to the setting of public company as a going concern.

¹ Simon Johnson *et al.*, “*Tunnelling*” (available at http://papers.ssrn.com.paper.taf?abstract_id=204868), p2. Simeon Djankov *et al.*, “*The Law and Economics of Self-Dealing*”(available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=864645), p1.

² The derivative action was originally a common law action, but later was substituted by Companies Act 2006 with a statutory derivative action. See the section on derivative actions below.

³ Reinier R. Kraakman *et al.*, *The Anatomy of Corporate Law*, Oxford Univ. Press, 2004, pp11-14.

⁴ *Id.*, pp33-34.

control over the board of directors.⁵ The regulation of controlling shareholders is thus closely related with the regulation of directors.⁶

The legal framework of regulating directors' conducts can be used both directly and indirectly in the regulation of controlling shareholder conducts. The direct approach is to identify a controlling shareholder as a shadow director, then subject him/her to certain duties owed by a *de jure* director; the indirect approach is to hold the *de jure* directors liable for breach of their duties if they defer to the will of the controlling shareholder and further the controlling shareholder's interest at the cost of the company.

Directors' Duty

Directors have a fiduciary duty to act in good faith for the best interests of the company,⁷ which has been interpreted by the British case law to mean the interests of the shareholders as a group.⁸ The fiduciary duty has several facets. Subjectively, they must act with good faith belief that their conduct is in the best interest of the corporation; and objectively, they should act with proper purpose, must not fetter their discretion, and must not let their personal interest get in the way of their discharging of the duty.⁹

The fiduciary duty requires a director to make full disclosure of conflict of interest and obtain shareholder approval whenever the company enters a director-related transaction.¹⁰ Breach of this duty will make the conflict-of-interest transaction voidable at the instance of the company; the breaching director will be accountable for any profit he/she made and any loss the company suffered from the transaction.¹¹ Furthermore, under the provision of Companies Act 2006 ("CA2006"), if a third party has knowingly benefited from the breach, the company will also be entitled to a recovery from such

⁵ Stephen M. Bainbridge, *Corporation Law and Economics*, Foundation Press, 2002, p513.

⁶ A board structure itself is seen as a check of opportunistic behavior by controlling shareholders. See Kraakman, *supra* note 3, p12.

⁷ Paul L. Davies, *Introduction to Company law*, Oxford Univ. Press, 2002, p159.

⁸ *Greenhalgh v. Arderne Cinemas Ltd.*, [1950] 2 All.E.R. 1120. Whether the company's interest means the interests of the shareholders is an issue strongly contended by the academics. The "stakeholderists" disagree the proposition of "shareholder primacy" by contending that the interests should cover broader constituencies. (See Leonard I. Rotman, *Fiduciary Duty*, Thomson Ltd., 2005, pp421-23.) This paper follows the approach adopted by the British case law. (CA2006 basically follows the same proposition, see s.172(1).) Actually, while the two approaches seem to be radically in conflict with each other, their applications in practice result in much less difference. See Bainbridge, *supra* note 5, pp413-14.

⁹ Robin Hollington Q.C., *Shareholders' Rights*, Sweet & Maxwell, 2004, pp44-48.

¹⁰ Kraakman, *supra* note 3, p105. The British law allows a company to substitute shareholder approval with board approval in its Articles of Association (unless the transaction is substantial, then shareholder approval is mandatory by law.) See Davies, *supra* note 7, pp171-74.

¹¹ John H. Farrar, *et al.*, *Farrar's Company Law*, Butterworths & Co (Publishers) Ltd., 1991, p403.

third party.¹²

Besides the fiduciary duty, directors also owe a common law duty of using reasonable skill and care.¹³ This standard used to be purely subjective; after an objective element was introduced into the standard in the late 1980s, it became a “twofold” standard which regards to both the function and ability of the particular director and the circumstances of the company.¹⁴ Notwithstanding this development, the duty of skill and care has never been strongly enforced, and only played a limited role in director regulation.¹⁵

Shadow Director

The notion of “shadow director” is purely a statutory creation.¹⁶ The definition of the term, as given out in the Companies Act 1985 and later adopted by the Companies Act 2006,¹⁷ is “a person in accordance with whose directions or instructions the directors of the company are accustomed to act.” As observed by Pennington, to extend the obligations owed by *de jure* directors to those exercise “the same kind of influence over the board as dominant directors” was the sole purpose for the creation of the concept of shadow director.¹⁸

To suffice the definition of “shadow director”, the communications between a putative shadow director and the *de jure* directors must amount to directions and instructions.¹⁹ The term “accustomed to” requires the showing of a “pattern of conduct,”²⁰ which means it exceeds occasional response to the instructions and a degree of continuity can be found.²¹ Although a shadow director may not necessarily be a controlling shareholder,²² it is not a surprise that in practice, among those who have

¹² CA2006, s.260(3). See “A Statutory Derivative Action”, editorial, *Comp. Law.* 2007, 28(8), 225-227, at 226.

¹³ Farrar, *supra* note 11, pp380.

¹⁴ Ben Pettet, *Company Law*, Pearson Education Ltd., 2001, pp174-77; Mayson *et.al.*, *Company Law*, Oxford Univ. Press, 2003 (20th Ed.), pp510-11. For a codified statement of directors’ duty, see CA2006, ss.171-177.

¹⁵ Victor Brudney, “Contract and Fiduciary Duty in Corporate Law”, 38 *B.C.L.Rev.* 595, 599.

¹⁶ Pennington, *Directors’ Personal Liability*, BSP Professional Books, 1987, p28.

¹⁷ UK ST 1985 c 6 Pt XXVI s 741(2); CA2006 s. 251(1)

¹⁸ Pennington, *supra* note 16, p28.

¹⁹ *Secretary of State for Trade and Industry v. Deverell*, [2001] Ch. 340 (CA (Civ Div)), at 340.

²⁰ Chris Noonan & Susan Watson, “The nature of Shadow directorship: *ad hoc* Statutory Intervention or Core Company Principle”, *J.B.L.* 2006, DEC, 763-798, at 794.

²¹ Andrew Hicks, “Advising on Wrongful Trading: Part 2”, *Comp. Law.* 1993, 14(3), 55-60, at59.

²² For instance, other major “investors,” such as creditors, are also possible of being identified as shadow

been found to be shadow directors, many are shareholders holding a controlling block in their companies.

Once a person is identified as a shadow director, certain statutory obligations of directors become applicable to him/her. The principle rules, as provided in CA2006, involve two types of obligations: (1) the obligation to disclose personal interest in company transactions to its board of directors;²³ and (2) the obligation to acquire member approval of certain transactions with the company, such as substantial property transactions and loans.²⁴ Default of these statutory obligations leads to statutory liability and gives the company standing to sue the defaulting shadow director.²⁵

Derivative Action

If a *de jure* director or a shadow director breached his/her duty, the right to enforce the duty lies in the hands of the company,²⁶ which usually means either the board of directors or the general meeting of shareholders (“GM”) should be the proper organ to sue the breaching director.²⁷ Sometimes, however, these legitimate bodies may fail to take action. For instance, a defaulting shadow director who holds a controlling block of shares will never vote for a resolution in the GM to sue him/herself. Derivative action—an individual shareholder suing in the name of the company—is thus needed to cure the wrong.

Before CA2006, the rule governed the availability of derivative actions by the minority is called the rule of *Foss v. Harbottle*²⁸ (together with its exceptions), under which a derivative action is not allowed unless the plaintiff-minority shareholder can show both “fraud on the minority” and “wrongdoer control”.²⁹ The “fraud on the

directors.

²³ See CA2006 s.182.

²⁴ See CA2006 s.188.

²⁵ See CA 2006, s. 183.

²⁶ CA2006 s.195(2). CA1985 s.322(1). This is often called the proper plaintiff rule, and the underlying reason is that the fiduciary duty is owed to the company, not individual shareholders. (CA2006 s.170)

²⁷ The default rule is the board has the power to sue, but GM can sue if the board is unable or unwilling to sue. (See Victor Joffe et al., *Minority Shareholders: Law, Practice and Procedure*, Butterworth, 2004, pp2-3.) GM can make the decision with a simple majority (See, Hollington, *supra* note 9, p8.)

²⁸ (1843) 2 Hare 461.

²⁹ A modern statement of the rule in *Foss v. Harbottle* can be found in *Prudential v. Newman Industries (No.2)*[1982] Ch. 204, 210-11. (The rule used to be said as having four exceptions: ultra vires, infringing personal rights, violating supermajority rule and fraud on minority. The *Prudential* decision differed the circumstances under which the rule has no room to play and which the rule is excepted. According to the Court of Appeal, only the fraud on the minority is a real exception, the other three are where the rule has

minority” element requires a plaintiff to show both benefit accrued to the wrongdoer and loss suffered by the company;³⁰ the “wrongdoer control” requires a showing of the wrongdoer holding the majority voting power in the GM.³¹

The CA2006 substituted the common law derivative action with a statutory derivative action, which allows minority shareholders to sue derivatively if they can establish a *prima facie* case of breach of directors’ duty.³² It is then left with the hands of the courts to decide whether the case may or may not proceed.³³ A derivative action will not be permitted if the challenged conduct has been effectively authorized or ratified,³⁴ or, if the court is satisfied that a person acting in accordance with the general duty of directors to promote the success of the company would not seek to continue the claim.³⁵ Otherwise, neither fraud on the minority or wrongdoer control will be a prerequisite for a statutory derivative action.³⁶ However, this does not mean the proposition of a court would be of any substantial difference. It has been submitted that under the new statute provision, “[p]resumably where the ratification effects a fraud on the minority the Court will be able to let the derivative action continue. Where the wrong can be effectively ratified presumably the Court will be able to adjourn the case to enable a meeting to be held.”³⁷

no room to operate. See also CA2006, Explanatory Notes, p73)

³⁰ Victor Joffe , *supra* note 27, p14. See also Law Commission’s Consultation Paper (LC-CP142) “*shareholder Remedy*”, para.4.9.

³¹ LC-CP142, para 4.12.

³² CA2006, s.260.

³³ CA2006, s.263.

³⁴ CA2006, s.263(2)(b), (c). A breach of directors’ duty can be ratified by the shareholders unless the breach amount to fraud on the minority. Whether ratification is effective, however, is open to be challenged. See “*A Statutory Derivative Action*”, *supra* note 12, at 227.

³⁵ CA2006, s.263(2)(a).

³⁶ CA2006 Explanatory Notes, para 491.

³⁷ “*A Statutory Derivative Action*”, at 227. See also Joseph Lee, “*Shareholders’ Derivative Claims under the Companies Act 2006: Market Mechanism or Asymmetric Paternalism*”, I.C.C.L.R. 2007, 18(11), 378-392, at 388.

The relevant factors that a court should take into consideration include: whether the member applying for permission is acting in good faith, the importance of the suit for the promotion of the company’s success, whether the challenged conduct could be and would likely to be ratified, whether the company has decided not to pursue the claim, and whether the claim can be pursued through a direct action, etc. (See CA2006, s.263(3)). Special weight should be given by the court to the opinion of disinterested members. S.263(4).

III. Regulating Majority Voting Power

When shareholders exercise their voting rights in the GM, the basic rule is there is no general duty of good faith owed by shareholders to each other.³⁸ The voting right is considered a proprietary right and can be exercised for a shareholder's own interest, regardless whether that interest is against the company's or the other shareholders' interest.³⁹

In practice, controlling shareholders' voting power does subject to certain limitations in common law. There are two categories of cases in which the exercises of voting power by majority shareholders have been repeatedly reviewed by the court, namely, alteration of Articles and ratification of breach of directors' duty.

Alteration of Articles

The Articles of Association ("AOA") of a company is seen as a statutory contract⁴⁰ which can be altered by a special resolution of the GM.⁴¹ When vote for an alteration to the AOA, a majority shareholder should cast his/her vote bona fide for the interest of "the company as a whole."⁴² The notion of "company's interest as a whole" has been interpreted by Evershed M.R. to mean interest of "the corporators as a general body."⁴³ Further interpreting the *Allen* test of "bona fide for the company's interest as a whole", he asserted that a special resolution which discriminates between the majority and minority so as to give the majority an advantage of which the minority shareholders were deprived could not meet the *Allen* test.⁴⁴

The test of "bona fide for the interest of the company" is actually more difficult to apply in practice than it first appears, especially in case of conflict of interest between the majority and minority shareholders.⁴⁵ Very often, it is only when "no reasonable man could consider [the alteration is] for the benefit of the company" that the resolution

³⁸ Hollington, *supra* note 9, p164.

³⁹ *Id.*, p8.

⁴⁰ *Id.*, p24. See also Brenda Hannigan, "Altering the Articles to Allow for Compulsory Transfer—Dragging Minority Shareholders to a Reluctant Exit", J.B.L. 2007, AUG, 471-501, 489.

⁴¹ See CA2006, s.21(1).

⁴² *Allen v. Gold Reefs of W. Africa*. [1900] 1 Ch. 656, at 671. See Hannigan, *supra* note 40, at 475.

⁴³ *Greenhalgh v. Arderne Cinemas Ltd.*, [1950] 2 All.E.R. 1120.

⁴⁴ See Hannigan, *supra* note 40, at 480.

⁴⁵ *Id.*, at 479

fails the test.⁴⁶

Ratification of Breach of Directors' Duty

It is a basic principle of the fiduciary law that breach of duty by a fiduciary can be forgiven by the beneficiary.⁴⁷ Applying this principle in the company context means that shareholders, upon full disclosure, can release directors from liability of breaching their duty by an ordinary resolution in the GM.⁴⁸ Ratification not only releases the director from possible liability, but also makes the challenged transaction binding on the company.⁴⁹ However, the shareholders' power to ratify a breach is subjected to a limitation, that is, breaches amount to fraud on the minority cannot be ratified.⁵⁰ This not only means that a director who committed fraud on the minority cannot be forgiven by shareholder ratification, but also that a majority shareholder cannot use his/her power to ratify to misappropriate company asset. Such a use of majority power in itself would be fraud on the minority and cannot bind the company.

The prohibition of fraud on the minority has been used in settings other than ratification to regulate majority voting power. In *Estmanco v. GLC*.⁵¹, the majority shareholder breached the contract they had with the company and the board of directors brought a lawsuit against them. The majority shareholder then adopted a resolution in a special shareholder meeting to instruct the directors to drop the suit, which the directors followed.⁵² The plaintiff-minority shareholder applied to the court for permission to continue the suit derivatively. In finding the resolution amounted to fraud on the minority, the court held the case fell into the exception of the *Foss* rule and allowed the derivative suit to proceed. Although the UK courts are reluctant to stipulate a general principle concerning controlling shareholders' voting rights,⁵³ *Estmanco* presents an example of limiting their discretion in exercising the voting rights.

⁴⁶ See Hanningan, *supra* note 40, at 477.

⁴⁷ Paul L. Davies, *Gower's Principles of Modern Company Law (6th Ed.)*, Sweet&Maxwell, p644.

⁴⁸ *Id.*, p645.

⁴⁹ *Id.*

⁵⁰ Hollington, *supra* note 9, p44.

⁵¹ [1982] 1. W.L.R. 2.

⁵² "A *Statutory Derivative Action*", *supra* note 12, at 226. (The directors have in no way breached their duty in this case.)

⁵³ Hollington, *supra* note 9, p74.

IV. Unfair Prejudice Remedy

The statutory unfair prejudice remedy (“UFPR”) was designed to “strengthen the position of minorities ‘... primarily but not exclusively in private companies...’”⁵⁴ It was first introduced by s.210 of CA1948, then developed into s.459-461 of the CA1985, and now restated as s.994~998 of CA2006.

S.994(1) of CA2006 states as follows:

“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.”

Under the statutory provision, a petitioner must establish four elements to bring an unfair prejudice petition:⁵⁵

- (1) the actions complained of consist of the conduct of the company’s affairs;
- (2) concerning the petitioner’s interests as a member;
- (3) there is prejudice suffered; and,
- (4) unfairness of the prejudice.

The four elements are inter-related, and they must co-exist with each other to establish an unfair prejudice case.⁵⁶

Conduct of Company’s Affair

As commented by Davies, the statutory provision has a very wide coverage: it catches the activities of “controllers of companies”, no matter they conducted the business of the company through the exercise of their powers as directors or as shareholders.⁵⁷ If a minority shareholder wants to bring an unfair prejudice petition, however, the conduct being challenged must be a conduct of the company’s affairs, or an act (or omission) by

⁵⁴ LC-CP142, p57. UFPR is applicable to public company cases as well. (In *Re Leeds United Holdings Plc.*, Rattée J. acknowledged that an s.459 action for a shareholder in a public company is not impossible, but just unlikely. ([1996] 2 BCLC 545, 559).

⁵⁵ Hollington, *supra* note 9, p143.

⁵⁶ Hollington, *supra* note 9, p143.

⁵⁷ Davies, *supra* note 47, p735.

the company.⁵⁸ For instance, a shareholder voting in the GM is not conduct of company's affair, but passing a resolution in the GM is.

Interests qua Member

UFPR protects not only the strict legal rights, but also a petitioner's interest as a member.⁵⁹ However, the interest protected is limited to the interest qua member, and cannot extend to "other interests of persons who happen to be members."⁶⁰ Under most circumstances, the article of association and the Companies Act will be the only basis of a member's interest.⁶¹ Special context—such as a personal relationship of confidence or shareholder agreements—may enlarge the scope of such interest.⁶² For public companies, however, this is not likely to happen.⁶³

Prejudice

The element of prejudice requires a petitioner to show that his position is materially worse off because of the accused conduct of the controller.⁶⁴ Prejudice will be found when the value of the petitioner's shareholding is seriously diminished or jeopardized.⁶⁵ It has been held that conducts prejudicial to the company must also be prejudicial to the shareholders.⁶⁶

Unfairness

To get a relief under UFPR, not only the petitioner's interest must have been prejudiced, but also unfairly so prejudiced.⁶⁷ The element of unfairness is at the heart of UFPR.⁶⁸ The term, however, is left by the legislature deliberately being vague and broad.⁶⁹

In the early days following the enactment of s.459, there was an opinion that the statutory remedy provided for "an entirely new jurisdiction, untrammled by previous

⁵⁸ See Victor Joffe, *supra* note 27, p181. See also LC-CP142, p74.

⁵⁹ LC-CP142, p76.

⁶⁰ Victor Joffe, *supra* note 27, p191. See also Hollington, *supra* note 9, p150.

⁶¹ Hollington, *supra* note 9, p150

⁶² LC-CP142, p77. Hollington, *supra* note 9, p149.

⁶³ Jennifer Payne, "Section 459 and Public Companies", LQR 1999, 115(JUL), 368-372, 370.

⁶⁴ Hollington, *supra* note 9, p155.

⁶⁵ *Id.*

⁶⁶ *Re Macro (Ipswich) Ltd*, [1994] 2 BCLC 354, at 404.

⁶⁷ LC-CP142, p79.

⁶⁸ Hollington, *supra* note 9, p157.

⁶⁹ *Saul D. Harrison*, [1994] BCC 475, 488.

authority or established principles, and based on a new concept of ‘fairness’.”⁷⁰ Later on, however, courts became more aware of the need of striking a balance between the courts’ discretion and legal certainty.⁷¹ Hollington Q.C., after an examination of the modern leading UFPR cases,⁷² concluded the following:

“In the light of these cases, it is now clear that the ambit of the statutory remedy can only be properly understood in the context of the traditional and established principles of law and equity developed by the courts since the middle of the 19th century, that is so to say the principles of internal management and the legal bargain between shareholders, majority rule, the rule in *Foss v. Harbottle* and its exception and the doctrine of ‘fraud on a minority’...”⁷³

Therefore, as far as public companies are concerned, the substantive standard of fairness in an UFPR action should be the same with the traditional common law actions.

V. The Substantive Standard of Fairness

The previous sections show three regulatory institutions which provide different, but sometimes overlapping regulation of the controlling power.⁷⁴ Derivative actions mostly aim at the misconduct of company affairs within the board authority and is more useful when a controlling shareholder has cross the line and usurped directors’ function; common law actions for abuse of majority power regulate controlling shareholders’ conducts when they act qua shareholder; UFPR provides a more flexible approach for minority shareholders to get relief, but with largely the same substantive standards established in the common law cases.

While the UK courts have used different terminologies in describing the substantive standards for reviewing controlling shareholder related cases, as shown in the previous sections, the notion of “fraud on the minority” plays a central role. Under the *Foss* rule, fraud on the minority is a prerequisite for derivative actions. The statutory derivative

⁷⁰ Hollington, *supra* note 9, p129.

⁷¹ *Id.*, p130.

⁷² The most important ones include *Saul D. Harrison*, [1995] 1 BCLC 14; *O’Neill v. Phillips*, [1999] 1 WLR 1092.

⁷³ Hollington, *supra* note 9, p132.

⁷⁴ For instance, breach of directors’ duty can be challenged either through a derivative action or an unfair prejudice petition because the directors’ fiduciary duty is considered as part of the legal bargain between the shareholders and the company, thus a breach of the director’s duty is presumably unfair. (*Id.*, pp40-41, p196)

action seems to have loosened the requirement. Nonetheless, as submitted by commentators, the courts' proposition is not likely to take a dramatic change and if no fraud on the minority has been committed, the courts would very much likely to let the GM decide whether to pursue the litigation.⁷⁵ In case of a controlling shareholder is present at the GM, by definition, such decisions will be at his/her discretion.

The result would not be of much difference if the minority shareholder had sought for relief under UFPR. While any breach of directors' duty is presumable unfair,⁷⁶ courts have held that in conflict of interest transactions, the only issue is whether the price is fair. Indeed, when the transaction price is fair, no prejudice is suffered by the company or the minority shareholders; an unfair prejudice petition must fail.

Fraud on the minority also constitute a limitation on controlling shareholders' voting power, at least when it is concerned with ratification. When alteration of Article is at issue, the standard is "bona fide for the interest of company as a whole." This so-called *Allen* test has been observed by Davies as being a "twin concept" of "fraud on the minority."⁷⁷ The similarity between the two standards is apparent when *Evershed M.R.*' held that a discriminative resolution which gives the majority an advantage not shared by minority fails the *Allen* test.

Indeed, no matter which kind of action a minority shareholder is pursuing, this central idea of "fraud on the minority" is a line drawn by the UK judiciary for abuse of controlling power. On the one hand, the majority cannot use their position to make a gift to themselves at the cost of the company and minority shareholders; on the other hand, if no such an element exists, courts will not hold controlling shareholders liable for exercising their controlling power.

VI. Conclusion

The regulation of controlling power is a matter of balancing authority with accountability. Controlling shareholders have not only the "power" to direct the company affairs, but also the "right" to do so.⁷⁸ However, their power cannot be abused.

⁷⁵ See "A Statutory Derivative Action", *supra* note 12, at 227.

⁷⁶ Hollington, *supra* note 9, pp40-41, p196.

⁷⁷ Davies, *supra* note 47, p716.

⁷⁸ Controlling shareholders' controlling power flows from their controlling block holding of the company's equity, which is justified by the principle of equality of shareholders. See below FN80 and

The UK judiciary has, under various situations, held that controlling shareholders cannot use their power to expropriate company assets and discriminate the minority shareholders. Such a conduct amounts to fraud on the minority and will be void if challenged by minority shareholders in court.

It is not very difficult to see the reason of prohibiting fraud on the minority—protecting the equality of shareholders has always been a theme of company law.⁷⁹ It is a basic principle that all shares, unless explicitly provided otherwise, are attached with equal rights and limits.⁸⁰ This means both equal voting power and equal right to distributions.⁸¹ It is exactly based on this consensus of equality that controlling shareholders receive their controlling power. If the power such gained is then used to attract non-proportional benefit, it would breach the original consensus among all shareholders and cannot be compatible with the idea of fairness.

A more difficult question may be, why only rule out fraud on the minority? In *Re Astec(BSR) plc.*,⁸² the court held that the controlling shareholder's replacing independent directors with their own nominees was not unfair, and inadequate disclosure concerning the replacement was of no importance since the majority view prevailed on such matters. This deference to the majority power reflects the traditional reluctance of the UK courts to interfere with internal matters of a company. Justification of such judicial deference, however, is beyond the topic of this paper.

Another important issue which cannot be covered here is the efficiency of judicial review based on the substantive standard. Establishing the substantive standard for court review of controlling shareholder conduct is only one step on the way of fighting controlling shareholder opportunism. From a practical perspective, judicial check has its strong as well as weak points and need to co-function with other strategies, such as the so-called decision right strategy, to achieve an efficient outcome. These issues need be examined in further research.

accompany text.

⁷⁹ Brian R. Cheffins, *Company Law: Theory, Structure and Operation*, oxford Univ. Press, 1997, p472.

⁸⁰ *Id.*, p490.

⁸¹ *Id.*

⁸² *Re Astec (BSR) Plc.*, [1999]B.C.C. 59, at 60.