that it was based on an incorrect assumption about the law and is therefore incorrect itself. Millett L.J.'s judgment should help us to do this.

NICHOLAS J. MCBRIDE

BIGGER AND BETTER GUNS FOR MINORITY SHAREHOLDERS?

Is the arsenal of weapons at the disposal of disgruntled minority shareholders sufficiently well-stocked at the present time? The Law Commission was given an extremely wide remit: to "carry out a review of shareholder remedies ... and to make recommendations". The need for reform is widely acknowledged, but respondents to the Consultation Paper No. 142 on this topic were less than enthusiastic about some of the suggested changes. The Commission has now published its Report No. 246, *Shareholder Remedies.*

The principal remedies available to minority shareholders who are dissatisfied with the way in which the company is being run are, of course, the derivative action, for wrongs done to the company, the unfair prejudice remedy under sections 459–461 of the Companies Act 1985, for wrongs done to the shareholder (and, in certain circumstances, for wrongs done to the company, *e.g. Re Saul D. Harrison & Sons plc* [1995] 1 B.C.L.C. 14), and the enforcement of the shareholder's personal rights under the articles of association. The last of these has received scant attention from the Law Commission, which recommends no reform, despite voluminous academic writings which are indicative of the confused state of the law in relation to section 14. Of the other two, the Law Commission is clear that "the derivative action is of much less importance in practical terms than the statutory remedy under section 459", an insight which will hardly surprise academics or practitioners.

As regards the unfair prejudice remedy, the Law Commission's concerns echo those of Harman J. that "[p]etitions under section 459 have become notorious to the judges of this court—and I think also to the Bar—for their length, their unpredictability of management, and the enormous and appalling costs which are incurred upon them ..." (*Re Unisoft Group Ltd. (No. 3)* [1994] B.C.L.C. 609). To tackle these concerns the Report recommends a series of case management measures designed to give courts greater powers, for example to hear preliminary issues and dismiss those parts of a claim which the court regards as having no realistic prospect of success. It is unfortunate that the Law Commission has not addressed the concerns surrounding case management, particularly the research done in the US which suggests that case management may actually increase the cost of litigation, by generating more work for lawyers.

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However, in view of the strong lead taken by the Woolf Report on this topic, this failure is not, perhaps, surprising. A more justifiable criticism is the failure to address some of the other obvious concerns in this area, such as the limited access which minority shareholders have to the "inside" corporate information necessary to underpin a shareholders' action.

A statistical survey carried out by the Law Commission revealed that the vast majority of section 459 actions concerned shareholders in small companies who were claiming to have been excluded from management. The Law Commission therefore regards the provision of a "speedy and economical" exit route for such shareholders as a high priority. The suggestion in the Consultation Paper of an *additional* remedy for shareholders in "small" companies was not well received, since it seemed guaranteed to add to the cost and complexity of proceedings by doubling the number of claims brought by a well-advised petitioner. Consequently the Report changed tack and instead offers two legislative presumptions, to be inserted into section 459. Where a petitioner holds at least 10 per cent. of the voting rights in a private company, "all or substantially all" of the members of that company are directors, and the petitioner is claiming exclusion from management, then (i) that exclusion will be presumed to constitute unfairly prejudicial conduct, and (ii) where the first presumption is not rebutted and the court is satisfied that it ought to order a buy out of the petitioner's shares, it should do so on a *pro rata* basis. Other important recommendations for reform are made in relation to section 459, including adding winding up to the list of available remedies, but obvious avenues of exploration, such as the expansion of section 461 to include the power to award a remedy to the company, were rejected after only the most cursory examination.

The Law Commission's Report recommends that a new statutory derivative action be introduced to replace the old common law, and in particular the much criticised fraud exception, which the Law Commission regards as the only true exception to *Foss* v. *Harbottle.* Rather than having to struggle through the acknowledged intricacies of "fraud" and "wrongdoer control", the basis of the new remedy is a breach of duty by a director, including mere negligence, *cf. Pavlides* v. *Jensen* [1956] Ch. 565. It is intended that these derivative actions will be under strict judicial control at all times and that, in particular, leave of the court will be required to take such an action beyond the preliminary stages. Although these suggested changes may remove the worst of the problems associated with the fraud exception, they seem unlikely to halt the decline of the derivative action in the face of an ever-stronger section 459 action. The main reason for not

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reforming the derivative action is that it is virtually obsolete in any case, a situation which the Law Commission's recommendations seem unlikely to alter.

The other area of reform suggested by the Report concerns the encouragement of self-help by shareholders, principally via the insertion of specific provisions into Table A, to deal with the situation in which shareholders in small private companies (with no obvious market for their shares) want to get out of the company without recourse to litigation. The extensive suggestions in the Consultation Paper were heavily criticised for their lack of practicality, and those relating to arbitration and valuation provisions have been dropped. All that remains, albeit in amended form, is the suggested exit article. A draft article in the Report suggests that shareholders would need to pass an ordinary resolution to attach exit rights to particular shares. The exit rights would then be activated by service of a notice requiring those on whom it is served to purchase the shares of the outgoing shareholder at a "fair price", as defined by the shareholders.

Whilst the Law Commission's agenda was bold, the large-scale rationalisation which was hoped for has not been forthcoming. Many of the assumptions which lie at the heart of the Law Commission's work, such as the idea that a division between the personal actions and derivative actions of shareholders is a necessary one, needed reappraisal. Although the detail of the reforms proposed in the Report are generally to be welcomed, the opportunity for a more fundamental rethink of the content of a minority shareholders' armoury has been lost.

JENNIFER PAYNE

THE VALUE OF A REPUTATION

IN the global market, the value of a growing number of trade marks lies in qualities which adhere to the marks themselves rather than those intrinsic to the goods to which they are attached. Since Nike and Adidas produce shoes of similar quality and price, their ability to maintain or expand their respective market share depends, in large measure, upon nurturing the attractive image of their marks. For such companies, the reputation of their marks is an appreciating currency, rapidly overtaking in importance the traditional role of the marks as indicators of origin. Two recent cases before the European Court of Justice have explored the extent to which the new European trade mark regime, introduced by the European Directive (89/104/

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