

## Arbitration Law Review

---

Volume 4 *Yearbook on Arbitration and Mediation*

Article 35

---

7-1-2012

# Unfair Prejudice in the United Kingdom: An Inalienable Right for Shareholders Comes to an End as Courts Resolve Split Between Exeter and Vocam

Paul Jorgensen

Follow this and additional works at: <http://elibrary.law.psu.edu/arbitrationlawreview>



Part of the [Dispute Resolution and Arbitration Commons](#)

---

### Recommended Citation

Paul Jorgensen, *Unfair Prejudice in the United Kingdom: An Inalienable Right for Shareholders Comes to an End as Courts Resolve Split Between Exeter and Vocam*, 4 316 (2012).

This Student Submission - Foreign Decisional Law is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Arbitration Law Review by an authorized editor of Penn State Law eLibrary. For more information, please contact [ram6023@psu.edu](mailto:ram6023@psu.edu).

# UNFAIR PREJUDICE IN THE UNITED KINGDOM: AN INALIENABLE RIGHT FOR SHAREHOLDERS COMES TO AN END AS COURTS RESOLVE SPLIT BETWEEN EXETER AND VOCAM

Paul Jorgensen\*

## I. INTRODUCTION

While sports typically generate a vast and extensive physical competition, the governance of organized sports also generates intense legal disputes. Recently, one of these disputes resolved an issue of corporate law in the United Kingdom, although the case is currently being appealed.<sup>1</sup> In *Re the Football Association Premier League Ltd. v. Fulham* (“Fulham”), decided in 2011, the court affirmed judgment on a purely legal issue previously left unclear: is an unfair prejudice action arbitrable?<sup>2</sup> Ultimately, the court decided to issue a stay of court proceedings pending the outcome of arbitration, reasoning that the subject is capable of being heard in arbitration.

This decision resolves an issue of corporate law which was in disarray due to the competing decisions of *Re Vocam Europe Ltd.* (“Vocam”) and *Exeter City Association Club Ltd. v. Football Conference Ltd. and another* (“Exeter”).<sup>3</sup> In *Vocam*, the court held that a court’s capacity to render greater relief than an arbitrator could does not preclude arbitration.<sup>4</sup> Conversely, in *Exeter*, the court held against compelling arbitration on the grounds that the relief available in an arbitration cannot protect third party shareholders and creditors, noting that the statutory rights of shareholders are “inalienable.”<sup>5</sup>

The case at hand, *Fulham*, chose to follow *Vocam* rather than *Exeter*.<sup>6</sup> In brief, the court found that it was unsound to apply the logic of a winding up action to an unfair prejudice action, and that the essence of *Fulham*’s dispute is merely contractual.<sup>7</sup>

Herein, a look at unfair prejudice in the United Kingdom as it pertains to arbitration will be followed through these three decisions. Consequently, the prior law shall be set out. It will be shown that the prior law is not irreconcilable. Then the present dispute will be delineated and an

---

\* Paul Jorgensen is Associate Editor of *The Yearbook on Arbitration and Mediation* and a 2013 Juris Doctor Candidate at The Pennsylvania State University Dickinson School of Law.

<sup>1</sup> *Fulham launch appeal against Premier League Chairman Sir David Richards*, THE INDEPENDENT, Aug. 16, 2011, <http://www.independent.co.uk/sport/football/premier-league/fulham-launch-appeal-against-premier-league-chairman-sir-david-richards-2338525.html>.

<sup>2</sup> *See Re the Football Ass’n Premier League Ltd. v. Fulham Football Club (1987) Ltd.*, [2011] EWCA (Civ) 855, [94].

<sup>3</sup> *See Re Vocam Europe Ltd.*, [1998] B.C.C. 396; *Exeter City Ass’n Club Ltd. v. Football Conference Ltd.*, [2004] EWHC (Ch) 2304.

<sup>4</sup> *Vocam*, [1998] B.C.C. 396 [10].

<sup>5</sup> *Exeter*, [2004] EWHC (Ch) 2304, [22-23].

<sup>6</sup> *Fulham*, [2011] EWCA (Civ) 855, [76].

<sup>7</sup> *Id.* at 77,

analysis of the current court's logic will follow. Finally, a discussion of the desirability of the new state of the law will be presented.

## II. BRIEF OVERVIEW OF UNFAIR PREJUDICE IN THE UNITED KINGDOM

Historically, the unfair prejudice action arose as an alternative to a derivative suit. It was envisioned as a personal remedy for shareholders to pursue in cases of personal or corporate wrongs perpetrated by corporate officers.<sup>8</sup> The idea dates back to the 1948 Companies Act, although it uses the term “oppressive conduct” in lieu of the current language introduced by the 1980 revisions to the same act.<sup>9</sup>

The unfair prejudice action today is defined by s.994 of the Companies Act 2006. According to that section, any member may petition on the grounds 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.”<sup>10</sup> In addition to such broad applicability, the remedies available to a successful application are wide and discretionary, allowing a court to “make such order as it thinks fit for giving relief.”<sup>11</sup> This power includes, but is explicitly not limited to, the ability to “regulate the conduct of the company's affairs in the future.”<sup>12</sup>

While a controversy exists regarding the scope of the action, the relevance of this for the purposes of arbitration is in the tension between a definition of unfair prejudice as a personal remedy for individual shareholders and a definition as an alternative to a derivative suit.<sup>13</sup> If the issue is considered a personal remedy, theoretically there is no reason arbitration should be unsuitable. The action primarily only implicates the contracting parties so a purely bilateral means of resolving the dispute, such as arbitration, should be unproblematic. However, a derivative suit is brought for the benefit of the corporation itself.<sup>14</sup> Consequently the corporation would be an indispensable party, at least in the United States, and arbitration would theoretically be an unsuitable method for resolving the dispute.<sup>15</sup>

This distinction is of particularly grave consequence when the remedies available in arbitration are considered. Arbitrators are only authorized through contract to make an award that affects the parties to the arbitration.<sup>16</sup> Consequently, while an English court would have unfettered discretion to issue judgments which affect the rights of third parties, the arbitrator could not govern the corporation with respect to other members whose interests are typically affected by derivative suits and their ilk.

---

<sup>8</sup> Cheung, Rita. Corporate Wrongs Litigated in the Context of Unfair Prejudice Claims: Reforming the Unfair Prejudice Remedy for the Redress of Corporate Wrongs. *COMPANY LAWYER* 2008, 98.

<sup>9</sup> Griffin, Stephen. The Statutory Protection of Minority Shareholders: Section 459 of the Companies Act 1985. *COMPANY LAWYER* 1992, 83.

<sup>10</sup> Companies Act, 2006, c. 46 §994.

<sup>11</sup> Companies Act, 2006, c. 46 §996.

<sup>12</sup> Companies Act, 2006, c. 46 §996.

<sup>13</sup> See Cheung, Rita, Corporate Wrongs Litigated in the Context of Unfair Prejudice Claims: Reforming the Unfair Prejudice Remedy for the Redress of Corporate Wrongs, *COMPANY LAWYER* 2008, 98 (discussing the liberal and strict constructionist views of the unfair prejudice action).

<sup>14</sup> 19 AM. JUR. 2d Corporations §2082.

<sup>15</sup> 19 AM. JUR. 2d Corporations §2082.

<sup>16</sup> See Arbitration Act, 1996, c. 23 §67(1)(a); Arbitration Act, 1996, c. 23 §30(1)(c).

Today, under *Fulham*, the matter is resolved. Unfair prejudice is undoubtedly suitable for bilateral arbitration. It is not enough to assert the possibility that third parties could be strongly impacted by the results of the action and that arbitration would fail to address these concerns. However, in the past some courts considered that, as an alternative to a derivative action, unfair prejudice actions could not be resolved by arbitration and, though it is debatable, as a consequence where the impact of the actions is likely to address third parties arbitration may be barred. In theory, this rule is desirable but the practical importance of the distinction may be nonexistent, leading to a world where shareholder actions are de facto arbitrable as a whole.

### **III. THE PRIOR STATE OF THE LAW: HOW EXETER CAN BE READ CONSISTENTLY WITH VOCAM**

While in *Fulham*, the court treats *Exeter* and *Vocam* as being fully at odds, this is not necessarily the case.<sup>17</sup> While some of the language in *Exeter* is particularly strident, a narrower construction of these authorities still presents a reasonable legal rule and rationale.<sup>18</sup>

#### **A. Vocam Finds the Issue of Available Remedy Immaterial to Arbitrability**

Factually, there is nothing particularly extraordinary about the situation in *Vocam*. The dispute at the heart of the issue comes from personal issues between directors of a company, Vocam Europe Ltd.<sup>19</sup> As a consequence of these issues, the majority shareholders of the company removed Mr. Hespe, a minority shareholder, from the board of directors.<sup>20</sup> Their stated reason was that he terminated his services under Clause 11.1 of the agreement that originally created the company. That agreement reads, in pertinent part, “Should [Mr. Hespe] decide within the first 24 months of the commencement of this agreement to terminate their services as per this agreement, they agree . . . to resign as directors of [the company] and hand back the rights for the Hesperides Midland zone.”<sup>21</sup> Mr. Hespe then brought a petition for unfairly prejudicial conduct, alleging that the use of this clause was improper and merely intended “to obtain for themselves the large profits of the business now being made by [his] efforts.”<sup>22</sup>

Responding to this accusation, the majority shareholders invoked clause 18 of the same agreement to refer the matter to arbitration.<sup>23</sup> This clause reads, “Any and all disputes between the parties hereto whether or not they arise under the agreement shall be settled and determined by arbitration . . .”<sup>24</sup> While there are multiple parties involved in the dispute who are not implicated by the arbitration clause, the difficulty for the purposes of the dispute in *Fulham* is given short shrift by the court here. The court quickly declares that one party, VIP, is entitled to a stay “and that it is no answer to such application that the remedies which would be available in the arbitration might not be as extensive as those which the English court would be able to grant

---

<sup>17</sup> See *Re the Football Ass'n Premier League Ltd. v. Richards*, [2011] EWCA (Civ) 855, [94].

<sup>18</sup> *Exeter City Ass'n Football Club Ltd. v. Football Conference Ltd.*, [2004] EWHC (Ch) 2304 [23].

<sup>19</sup> *Re Vocam Europe Ltd.*, [1998] B.C.C. 396 [1, 5].

<sup>20</sup> *Id.* at [5].

<sup>21</sup> *Id.* at [3].

<sup>22</sup> *Id.* at [1, 6].

<sup>23</sup> *Id.* at [10].

<sup>24</sup> *Id.* at [4].

on a successful application. . .”<sup>25</sup> Having decided that, the court exercised its discretion under the 1996 Arbitration Act to send the other related parties to arbitration.<sup>26</sup>

### **B. Exeter Overreaches When it Finds Shareholder Rights “Inalienable”**

The Exeter City football club had steadily declined and in 2003 was demoted to competition in the Nationwide Conference from the third division of the Football League in 2003.<sup>27</sup> As such, Exeter is a member of Conference, the company which regulates football in the Nationwide Conference and must abide by its articles of association.<sup>28</sup> Understandably, with struggling athletic performance came a financial quagmire, the solution to which, as chosen by Exeter, was to pursue a creditor's voluntary arrangement (“CVA”) rather than enter into bankruptcy.<sup>29</sup>

According to the CVA, certain creditors, called “football creditors,” were required to be paid in full over five years while other creditors could expect to be paid substantially less.<sup>30</sup> This term was created specifically to address a longstanding policy of Conference with regard to article 5(3)(d) of their articles of association.<sup>31</sup> Under that article, a club can be expelled from Conference for entering into a CVA, which would destroy Exeter as a team.<sup>32</sup> The policy in question is that Conference will only “exercise that discretion in favour of the club [to not expel it from Conference] if, and only if, it can establish that “football creditors[]” will be paid in full.”<sup>33</sup> However, the Inland Revenue applied for a revocation of the CVS on account of this same term.<sup>34</sup> The Inland Revenue insists on equal treatment for itself and other creditors by Exeter.<sup>35</sup> Consequently, Exeter sued Conference for unfair prejudice in the policy by which it conducts its affairs, specifically the “football creditor” policy.<sup>36</sup>

In opposition to Exeter's petition, Conference sought a stay of proceedings to allow for arbitration by the terms of the articles of association, specifically rule K.<sup>37</sup> That section states: “[A]ny dispute or difference ('a dispute') between any two or more participants (which shall include for the purposes of this section of the rules the Association), including but not limited to a dispute arising out of or in connection with, including any question regarding the validity of (I) the rules or regulations of the Association; (ii) the rules and regulations of an affiliated association or competition; (iii) the statutes and regulations of FIFA and UEFA; or (iv) the laws of the game, shall be referred to and finally resolved by arbitration. . .”<sup>38</sup>

---

<sup>25</sup> *Id.* at [10].

<sup>26</sup> *Id.* at [13].

<sup>27</sup> *See* Exeter City Ass'n Football Club Ltd. v. Football Conference Ltd., [2004] EWHC (Ch) 2304, [4].

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at [5].

<sup>30</sup> *Id.* at [6].

<sup>31</sup> *Id.* at [8-9].

<sup>32</sup> *Id.* at [8].

<sup>33</sup> *Id.* at [9].

<sup>34</sup> *Id.* at [7].

<sup>35</sup> *Id.* at [11].

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 15.

<sup>38</sup> *Id.*

While the articles of association are not listed explicitly, the court decided that “any dispute” was wide enough language to include the articles of association.<sup>39</sup> Instead, the court ultimately decides that this arbitration would be against the public interest generally.

The judge compared the issue of unfair prejudice to the issue of winding up. It has historically been held that the right to apply for a winding up, or dissolution, of a company cannot be limited by contract.<sup>40</sup> A company is created entirely by statute and any statutorily created rights to manage the company cannot be removed<sup>41</sup>

In a winding up action, this makes a great deal of sense. The Companies Court is given special jurisdiction to hear these cases and special powers to render relief that are greater than a regular court.<sup>42</sup> However, the court goes farther than to say in analogous situations, the right cannot be abridged, leading to the conflict with *Vocam*. The court said, “The statutory rights conferred on shareholders to apply for relief at any stage are, in my judgment, inalienable and cannot be diminished or removed by contract or otherwise.”<sup>43</sup> This is an extreme statement and it appears to be motivated by the same rationale which *Vocam* dismissed as inappropriate.<sup>44</sup> While *Vocam* dismissed the possibility that the availability of plenary relief could be determinative, *Exeter* points to a particular area of law, the winding up action, in which the capacities of a special court typically instructed to oversee the issue determines the issue of arbitrability to say that the unavailability of plenary relief is an acceptable reason for restricting arbitrability in shareholder driven actions.

### **C. Reconciling *Exeter* and *Vocam* as a Matter of Error, Scope, or Inherent Jurisdiction**

In considering this stark difference, there are three means by which the two cases can be reconciled. First, and least convincingly, there is a technical possibility. Second, there are strong factual distinctions that can be made. Third, the matter could be settled by allowing for wide judicial discretion.

While not intellectually compelling, the court in *Exeter* makes the point that the arguments on which the court relies were not argued in *Vocam*.<sup>45</sup> Under this theory, it would have to be assumed that *Vocam* is purely erroneous. However, as tempting as that may be, as has already been pointed out, the court was motivated by the same concerns, the ramifications of an ineffective forum, in both cases.<sup>46</sup> Consequently, although merely trusting the word of the *Exeter* court would be simple, this theory cannot be maintained.

The best theory is merely to observe the most significant factual difference between *Vocam* and *Exeter*. *Vocam* concerned a specifically internal matter between shareholders and directors.<sup>47</sup> The choice to arbitrate was entered into knowingly and the ramifications of the choice

---

<sup>39</sup> *Id.* at 18.

<sup>40</sup> *See Exeter*, [2004] EWHC (Ch) 2304 [21]; *A Best Floor Sanding Party Ltd. v. Skyer Austl. Party Ltd.* [1999] VSC 170.

<sup>41</sup> *Exeter*, [2004] EWHC (Ch) 2304, [22].

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at [23].

<sup>44</sup> *See Re Vocam Europe Ltd.*, [1998] B.C.C. 396, [10].

<sup>45</sup> *Exeter*, [2004] EWHC (Ch) 2304, [23].

<sup>46</sup> *See Exeter*, [2004] EWHC (Ch) 2304, [23]; *Vocam*, [1998] B.C.C. 396, [10].

<sup>47</sup> *Vocam*, [1998] B.C.C. 396 [3, 5].

were clearly envisioned by the parties. Conversely, in *Exeter*, although the parties to the dispute are all members of the corporation, the motivation for the dispute would not have existed but for the interference of an important third party, namely creditors.<sup>48</sup> The rationale which was found so fundamentally important as to warrant the declaration that shareholders had “inalienable” rights was the public importance to “give protection to shareholders by enabling . . . special relief.”<sup>49</sup>

Under this theory, the court's extreme language in granting “inalienable” rights should be tempered by the importance of the factual situation. The law under this theory would be that in situations where there is a significant public interest in protecting a third party to the litigation and arbitration cannot give relief sufficient to protect the third party, then arbitration is inappropriate.

Finally, the results could be reconciled as an exercise of “inherent jurisdiction in the court to stay proceedings where there is a more suitable alternative means of resolving the dispute.”<sup>50</sup> While the Arbitration Act of 1996 presents situations in which a stay is mandatory, where it does not apply a court retains the discretion to grant a stay regardless.<sup>51</sup> Here, assuming that the act does not apply, presumably under Section 9(4) that the agreement is “incapable of being performed” in the situation, the discrepancy between *Vocam* and *Exeter* could merely be a matter of legitimate case-by-case discretion in action.<sup>52</sup> While the court in *Vocam* found that the concern of remedies was not great enough, perhaps the court in *Exeter* found that the issue was a great concern.

Regardless of how this could have been reconciled, the issue has been rendered mostly moot. Although these arguments may come forth on appeal, *Fulham* presents a new interpretation which, as shall be shown, seems to destroy any impact which *Exeter* may have on the law.

#### **IV. THE CURRENT LAW: FULHAM DISCREDITS EXETER**

In *Fulham*, the court decided that *Exeter* was wrongly decided.<sup>53</sup> The court decided that there was no persuasive reason to extend the logic behind a winding up order to an unfair prejudice action.

##### **A. The Factual Background: How the Organization Structure of FAPL Produced an Issue of Law**

The Football Association Premier League (“FAPL”) is organized as a corporation with each of the twenty clubs involved in the league holding a single share.<sup>54</sup> The corporation and its members must abide by the articles of association, which includes a requirement to comply with the Football Association rules as well as an additional set of FAPL rules.<sup>55</sup> Fulham alleges that an

---

<sup>48</sup> *Exeter*, [2004] EWHC (Ch) 2304 [6, 9, 11].

<sup>49</sup> *Id.* at [22].

<sup>50</sup> *Id.* at [14].

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at [13].

<sup>53</sup> See *Re the Football Ass'n Premier League Ltd. v. Fulham Football Club (1987) Ltd.*, [2011] EWCA (Civ) 855, [88].

<sup>54</sup> *Id.* at [2].

<sup>55</sup> *Id.* at [9].

implied term of the FAPL rules is that the board will follow its fiduciary obligations and act in a disinterested manner when dealing with one club as opposed to another.

Fulham further alleges that this obligation was breached in 2009. At that time, Portsmouth, another club in FAPL, was in dire financial straits and required nine million pounds to avoid insolvency proceedings.<sup>56</sup> Consequently, Portsmouth sought to transfer one of its players, Mr. Peter Crouch.<sup>57</sup> In response, both Fulham and Tottenham made offers: Fulham offered nine million pounds and, by its account, was willing to pay eleven million while Tottenham made lower offers.<sup>58</sup> While the decision by Portsmouth to accept Tottenham's offer may be explainable by Mr. Crouch's personal preference, the fact remains that Tottenham increased its offer to nine million pounds on July 26<sup>th</sup> and the offer was accepted.<sup>59</sup>

The breach asserted was that the chairman of FAPL, Sir David Richards, was asked by the chairman of Portsmouth to facilitate the trade with Tottenham.<sup>60</sup> Sir David agreed and spoke with Tottenham on behalf of Portsmouth to obtain the increased offer which was acceptable to Portsmouth.<sup>61</sup> Fulham issued a complaint through internal channels which resulted in internal findings to the effect that Sir David mediated between the two clubs but did not facilitate a trade.<sup>62</sup> Fulham alleges that dismissing the complaint on the basis of these findings constitutes unfair prejudice to Fulham as a member of FAPL.<sup>63</sup>

While Sir David and FAPL do oppose this allegation in substance, the purpose of their opposition for the present case is merely to petition for a stay pending the results of arbitration.<sup>64</sup> They find substance for this position in the FAPL rules, particularly Section S, as well as the FA rules in Section K. In pertinent part, Section S reads, "Membership of the League shall constitute an agreement between the Company and Clubs and between each Club . . . to submit all disputes which arise between them . . . to final and binding arbitration . . . [Potential disputes include] other disputes arising from these Rules or otherwise."<sup>65</sup> Should Section S not apply, Section K states, "[A]ny dispute or difference between any two or more Participants . . . shall be referred to and finally resolved by arbitration under these Rules . . . [The above] shall not apply to any dispute . . . which falls to be resolved pursuant to any rules . . . in force of any Affiliated Association or Competition."<sup>66</sup> Faced with this language, the judge found, and with no disagreement herein, that the dispute and the parties fall within the scope of at least one of the above agreements.<sup>67</sup>

---

<sup>56</sup> *Id.* at [3].

<sup>57</sup> *Id.* at [2].

<sup>58</sup> *Id.* at [3].

<sup>59</sup> *Id.* at [3, 4].

<sup>60</sup> *Id.* at [4].

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at [6].

<sup>63</sup> *Id.* at [12].

<sup>64</sup> *Id.* at [14].

<sup>65</sup> *Id.* at [17-18].

<sup>66</sup> *Id.* at [20].

<sup>67</sup> *Id.* at [91].



## B. Interpreting Fulham: An End to the Inarbitrability of Unfair Prejudice

The court in *Fulham* views the issue posed by the decision in *Exeter* as three separable problems, each of which the court discusses. They are:

- (a) Whether the arbitration agreements contained in the FAPL Rules and the FA Rules purport . . . to refer to arbitration the issues which arise between the parties . . . (b) Whether, if so, the CA 2006 [containing the statutory provision regarding unfair prejudice] expressly or impliedly prohibits the reference to arbitration of such matters. (c) Whether, if there is no statutory prohibition . . ., public policy of the law of England and Wales prohibits such a reference.<sup>68</sup>

The first issue, namely the issue of construction of the agreement between FAPL and the clubs, is dealt with briefly and poses no barrier to arbitration. However, the other two are given significant weight.

Each of these questions must necessarily be considered in the abstract. Fulham must be able to prove that any unfair prejudice action must necessarily be inappropriate in arbitration.<sup>69</sup> They cannot rely on the particular facts of their complaint to inform the decision.<sup>70</sup> The statute itself must have been designed in such a way that makes a court the exclusive remedy or there must be a public policy to make a court the exclusive remedy. For instance, although Fulham argues that an arbitrator could not have made a decision affecting other shareholders (such as a winding up order), in the court's view this would only be proof that the arbitration should proceed with limitations to the available remedies rather than found inarbitrable.<sup>71</sup>

With this in mind, the court looks to the issue of construction of the statute itself, Corporations Act Section 994, as to whether it grants an “unfettered right of access” to a court.<sup>72</sup> Remarkably good evidence for the view that this right is unfettered does exist. After *Exeter* was handed down, Parliament seems to have considered the consequences of *Exeter's* logic on similar litigation. Thus, when Parliament passed the Limited Liabilities Partnerships Regulations, it included provisions mimicking Section 994 of the Corporations Act with small adjustments, including one which appears to directly address *Exeter*.<sup>73</sup> It reads, “The members of an LLP may by unanimous agreement exclude the right [to petition for unfair prejudice] either indefinitely or for such period as is specified in the agreement.”<sup>74</sup>

This clearly cannot square with *Exeter* in its statement that shareholders cannot abridge their rights by contract.<sup>75</sup> The failure of Parliament to modify the Corporation Act to include similar “opt-out” language may be seen as either tacit acceptance of *Exeter* for the purposes of corporate governance or an active attempt to view a stark distinction between the management of corporations and LLPs.<sup>76</sup>

---

<sup>68</sup> *Id.* at [94].

<sup>69</sup> *Id.* at [50].

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at [61].

<sup>72</sup> *Id.* at [85].

<sup>73</sup> *Id.* at [86].

<sup>74</sup> *Id.*

<sup>75</sup> See *Exeter City Ass'n Football Club Ltd. v. Football Conference Ltd.*, [2004] EWHC (Ch) 2304, [23].

<sup>76</sup> *Fulham*, [2011] EWCH (Civ) 855 [88].

However, the court here is hesitant to make inferences from the failure of Parliament to act. While an act of Parliament which modifies the language of the Corporations Act to exclude *Exeter* would limit the freedom of the court to decide, a failure to act is not an affirmation of correctness.<sup>77</sup> Consequently, without other evidence, the court finds that the statute does not give exclusive jurisdiction to courts in the same way that bankruptcy law gives exclusive jurisdiction to courts over winding up orders.

With respect to finding exclusive jurisdiction as a matter of public policy, the court draws a very narrow line. The court certainly admits that these types of situations exist. It acknowledges, for example, that a liquidation confers “rights . . . for the benefit of the creditors as a whole.”<sup>78</sup> However, these types of policies come in two types, although the court does not explicitly state that they are exclusive types.

The first is one where the arbitrator is asked to decide something outside of his powers.<sup>79</sup> However, this is either redundant considering the inability of arbitrators to exceed the scope of their contractually given authority in the first place or impossible considering that when the relief traditionally available is outside the capacity of the arbitrator to give it merely requires the court to limit the scope of the proceeding.<sup>80</sup> If the court remains purely in the abstract, it should be impossible to find this type of public policy issue without some other means for invalidating the contract. Hence, the court does not find such an issue.

The other is when “determination of issues of this kind call for some kind of state intervention in the affairs of the company which only a court can sanction.”<sup>81</sup> That is just as nebulous as it sounds. It is certainly implicated in a winding up and the court probably conceived of this language as applying to such matters as criminal penalties.<sup>82</sup> However, it gives little guidance as to what satisfies the condition. For present purposes however, the court does not find that unfair prejudice implicates this issue. The court views the action here as a mechanism for resolving the internal affairs of the corporation.<sup>83</sup> As evidence, it points to the present case, noting that this is a predominantly contractual issue regarding adjudication of officer conduct, factually analogous to the issues in *Vocam*, here between the chairman of a corporation and a member.<sup>84</sup> While the action allows for winding up which does implicate state intervention, this fact is not determinative.<sup>85</sup> The arbitrator is not required to give such an order and the court is confident that such an order will not be given, at least where the company is solvent.<sup>86</sup> Consequently, the case goes to arbitration.

---

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at [74].

<sup>79</sup> *Id.* at [77].

<sup>80</sup> *Id.* at [61].

<sup>81</sup> *Id.* at [77].

<sup>82</sup> *Id.* at [38].

<sup>83</sup> *Id.* at [58].

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 40].

<sup>86</sup> *Id.* at [58].

### C. What Remains of Exeter in a Post-Fulham World?

We are left after this revision of the law with a puzzling question: to what extent are “[t]he statutory rights of shareholders to apply for relief . . . inalienable”?<sup>87</sup> The court’s reasoning in *Fulham* ultimately draws a distinction between situations which merely “engage third party rights” and those which “represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process.”<sup>88</sup> To what extent does this distinction continue to protect shareholders?

In any possible interpretation, shareholders uncontroversially have unfettered access to courts where a statute explicitly gives access by its terms.<sup>89</sup> Where legislative will is apparent, the courts will not interfere. However, this grant of access must be affirmative.<sup>90</sup>

At its narrowest, *Fulham* stands for the principle that, to successfully avoid a petition for arbitration, a plaintiff must prove something akin to the likelihood that state interventionist or public policy concerns will be addressed by an arbitral award. While the court finds that a winding up order is unlikely to be brought out by the current case on account of the FAPL’s solvency, if empirical evidence had, for example, shown that a solvent company is typically wound up by an unfair prejudice action, arbitration probably would have been barred. The court did not address this counterfactual situation where such evidence was presented, and it was not required to address the issue to answer the petition. However, even if this narrow interpretation is true, it is unlikely to have practical value if future cases address the problem in the same way as the *Fulham* court did.

When considering a particular action in the abstract, how likely is a court to find a public policy concern that will most likely be implicated by the remedy? In the abstract, the *Fulham* court cannot even state conclusively that a criminal charge would likely implicate public policy.<sup>91</sup> The court is simply unclear regarding the type of evidence that would be necessary to prove an inarbitrable claim. It is unlikely that a plaintiff could ever prove the type of situation where the inability of an arbitrator to give a particular remedy would make the shareholder’s supposed rights under *Exeter* prevail.

The court in *Fulham* even pedals back in terms of how this principle should apply to winding up actions. Entities cannot override by agreement the terms by which liquidation of assets proceeds because this is a power reserved for good cause in protecting creditors as a whole to the liquidator.<sup>92</sup> Similarly, they cannot agree to add conditions to execute a winding up petition.<sup>93</sup> It is, according to the court, clearly a matter of public policy. However, the court does “not suggest that it would have been unlawful for the members to have agreed not to petition to wind up.”<sup>94</sup> In fact, the court decides that an agreement to arbitrate would act as an agreement to

---

<sup>87</sup> *Exeter City Ass'n Football Club Ltd. v. Football Conference Ltd.*, [2004] EWHC (Ch) 2304, [23].

<sup>88</sup> *Fulham*, [2011] EWCH (Civ) 855 [40].

<sup>89</sup> *Id.* at [85].

<sup>90</sup> *See Id.* at [88] (requiring more than inaction to find legislative intent for sustaining *Exeter's* rationale).

<sup>91</sup> *See Id.* at [38] (stating “it would be wrong . . . to draw from this any general rule that criminal, admiralty, family, or company matters cannot be referred to arbitration”).

<sup>92</sup> *Id.* at [74].

<sup>93</sup> *See Re the Football Ass'n Premier League Ltd. v. Fulham Football Club (1987) Ltd.*, [2011] EWCH (Civ) 855 [81]; *See Re Peveril Gold Mines Ltd.*, [1898] 1 Ch. 122.

<sup>94</sup> *Fulham*, [2011] EWCH (Civ) 855 [81].

not present the winding up petition until the dispute has been resolved in arbitration, at which point a judge would decide whether or not to issue the order to wind up the company.<sup>95</sup>

This seemingly glib point highlights the status *Exeter* has been relegated to. The broadest construction of *Exeter's* language that is now permissible is to say that the conditions by which a shareholder driven action can be presented to an adjudicator cannot be modified. However, shareholders are entirely allowed to contract away access to a court in favor of arbitration unless public policy must, in all cases where the action is brought, be implicated by the remedy. Yet even then, shareholders could be required to agree in the articles that they will not bring actions seeking such remedies. De facto, *Exeter's* protections for shareholders no longer exist in the unfair prejudice action and it places it is even possible that shareholder rights have been eroded significantly in other types of actions.

## V. CONCLUSION

The sweeping change to corporate law, wrought by *Fulham*, reaffirms a general theme of arbitration that it is pervasive. Shareholders no longer enjoy a special right of access to courts and must fight it out in arbitration with everyone else.

However, this commentator is not convinced that this rule is a desirable one. As a preliminary theoretical matter, if the rule actually does rest on the likelihood of a particular remedy, that type of line drawing will be difficult to do consistently. If that is not the case and third party shareholders and creditors are not given special protections, instead giving de facto plenary authorization to arbitral clauses located in articles of association, then this is a poor policy. It would put an end to the derivative suit and make the types of remedies capable of being administered by that action wastefully duplicative as arbitration would be required between the corporation and each individual shareholder.

From a fact specific point of view, consider the impact of this case on participation in the FAPL. The FAPL is a peculiarly structured entity in that participants pass in and out of FAPL for non-economic reasons.<sup>96</sup> Performance in a sport may move a shareholder from the Nationwide Conference to the FAPL and subject the shareholder to different rules. Success in this peculiar situation may become a hindrance. More generally, investment takes place in large corporations without much regard to the manner in which the corporation's rules are organized.

In cases where the corporation takes advantage of shareholders for the benefit of other shareholders, a minority shareholder with no control of the corporation, thrust into an arbitration agreement perhaps by an unusual structure such as FAPL, may be affected by an arbitration they are not a party to in a system where they never agreed to arbitrate or be unable to obtain an effective remedy that regulates the corporation as a whole.

A better rule would be a clearer rule for these corporate disputes. Rather than hinge the outcome on the likelihood of a particular remedy, which is in most cases impossible to predict ex ante, it would be more useful to ask whether the action forecloses interested parties from participating in the dispute or whether the dispute is an internal matter. The rule as it is makes a present outcome determined by a future event. This is an unacceptable rule because it attempts to create compromise by creating an unprovable condition.

---

<sup>95</sup> *Id.* at [83].

<sup>96</sup> *Id.* at [2].

The best rule would be merely to ask if the dispute is, in essence, contractual in nature. This is even a part of the court's analysis in determining that winding up is unlikely. It states, "A dispute . . . about alleged breaches of the articles of association or a shareholder's agreement is an essentially contractual dispute which does not necessarily engage the rights of creditors or impinge on any statutory safeguards for the benefit of third parties."<sup>97</sup> While a rule that distinguishes between contractual and non-contractual disputes may have its own flaws, it is a distinction that could be proved on a case-by-case basis. The law as it is makes the burden of proof prohibitively high.

While it is perhaps the case that the *Exeter* rule should not have been entirely destroyed, the outcome of the law is clear. Under *Fulham*, so long as appeal does not contradict the situation, shareholders are bound to arbitrate their unfair prejudice claims.

---

<sup>97</sup> *Id.* at [77].