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RESOLVING AGENCY COSTS IN UNITED KINGDOM PRIVATE COMPANIES

Jonathan C Hardman
LLB (Hons), Dip L.P., LLM (Distinction)

SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE OF PhD

SCHOOL OF LAW
COLLEGE OF SOCIAL SCIENCES
UNIVERSITY OF GLASGOW

Supervisors: **Prof Iain MacNeil**
Prof Irene-marie Esser

Resolving Agency Costs in United Kingdom Private Companies

Abstract

In companies, agency cost analysis generally focuses on agency costs arising between owners and managers. The purpose of this thesis is to offer an holistic theoretical overview of different types of agency costs and externalities which arise in different types of business organisations and the legal responses to them. From this analysis, it emerges that high agency costs (directly and indirectly manifested) and externalities are, in the main, mitigated by mandatory rules. There is one exception to this: indirect manifestations of majority/minority agency costs (that is, agency costs which are transmitted through directors) are not mitigated. Worse, they are actively exacerbated by what are referred to in this thesis as '*twin exacerbations*': the ability of the shareholders (by majority rule) to assume powers of the company; and their ability (by majority rule) to remove directors. This thesis undertakes historical, comparative, doctrinal, and empirical research into these twin exacerbations. A general historical overview confirms the theoretical proposition of this thesis: that, historically, mandatory rules have been used to resolve the main examples of agency costs/externalities in company law. Applying historical analysis to the twin exacerbations, it is argued that the first occurred by accident, while the second does not adequately resolve the wrong it is designed to. Comparatively, different jurisdictions have attempted to resolve equivalent problems, and while Delaware resolves them it does so in a way which makes being a shareholder in a Delaware company differ fundamentally from being a shareholder in a UK company. Doctrinally, other areas of company law do not act to mitigate the twin exacerbations: directors' duties are neutralised; shareholders owe no duties to each other when voting; minority protection is weak; and soft law does not work for private companies. Empirically, this thesis undertakes a leximetric study to establish whether the 'market' resolves the twin exacerbations. If we establish that it does not, and may not be able to, legislative reform becomes inevitable. By resolving the twin exacerbations, we align the law regarding indirect manifestations of majority/minority agency costs with the general proposition established for company law: rules in business organisations should operate by default, unless an agency cost/externality arises, in which case mandatory (or, where there are public markets, 'comply-or-explain') rules should apply. This reform resolves the theoretical, historical, comparative, doctrinal, and empirical issues highlighted in this thesis.

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Statement of Originality to Accompany Thesis Submission

Name: Jonathan Hardman

Registration Number: 0406882

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CHAPTER 1

1. INTRODUCTION

It has been stated that:

> [C]orporate law performs two general functions: first, it establishes the structure of the corporate form as well as ancillary housekeeping rules necessary to support this structure; second, it attempts to control conflicts of interest among corporate constituencies, including those between corporate 'insiders', such as controlling shareholders and top managers, and 'outsiders,' such as minority shareholders or creditors.[1]

The aim of this thesis is to explore the second of these functions. In particular, it explores these conflicts of interest, how the law responds to them, whether it responds consistently, how it has arrived at its current position, how any exceptions to the general principle have evolved, whether they appear in other jurisdictions, and whether they have been otherwise resolved by law or by the market. In order to achieve this goal, this thesis engages theoretical, historical, doctrinal, comparative and empirical methodologies.

Chapter 2 reviews these conflicts of interest by undertaking a general analysis of the conflicts. From this it emerges that they can be broken down into agency costs and externalities suffered by three constituents: third parties experience externalities from organisations; owners experience agency costs from managers; and minority owners experience agency costs from majority owners. Chapter 2 also reviews the characteristics of business organisations in the United Kingdom (UK) to establish whether these different characteristics result in different risks of such costs in different organisations: is the risk of agency costs suffered by a retail shareholder in a traded company from the managers of that company the same as such risks within a partnership? Similarly, is the risk of externalities arising from a limited company any different from the risk of externalities arising from a partnership? Chapter 2, therefore, focuses on a theoretical analysis of costs which arise within different business organisations. It compares and contrasts the different organisations and their characteristics and identifies which risks are greater in what types of organisation.

Risks of agency costs/externalities on their own, however, do not provide the complete analytical picture as they do not indicate how these costs may manifest for the sufferer. For these costs to manifest the organisation must do something. Chapter 3, therefore, reviews

[1] R Kraakman and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, OUP 2017) 29.

the legal framework applicable whenever an organisation attempts to do anything across three categories of rules which govern its actions: capacity rules; third party protection rules; and governance rules. It breaks this legal framework into four types of rule: permissive rules (which can be opted into); default rules (which apply unless opted out of); 'comply-or-explain' rules (similar to default rules but where there must be a public disclosure of opting out); and mandatory rules (which cannot be opted out of). By plotting a matrix between the rule type and rule category, we can establish when different types of rule are used. By applying this matrix to our agency cost/externality analysis, we gain insights into when different types of rule are used. Chapter 3 explores the types of rule generally used to resolve or mitigate risks of high agency costs or externalities. Externalities are suffered directly by the third party from the organisation in question and, therefore, can only manifest in this direct manner. However, agency costs can manifest indirectly: for example, a manager may push for preferential terms between the company she manages and a different company which she owns. This would initially appear to be a cost between the company and the third party, but is actually a manifestation of owner/manager agency costs which arises indirectly from a third party. Similarly, the majority may force managers to act to the detriment of the minority. While this, too, initially appears to be an owner/manager cost, it is in fact an indirect manifestation of majority/minority agency costs. By mapping these potential manifestations of agency costs, we can establish whether there is a uniform solution to resolve the risks of such costs. Chapters 2 and 3, therefore, provide the theoretical basis for the thesis. This analysis reveals that some form of non-default rule mitigates direct and indirect manifestations of agency costs and externalities with one notable exception: indirect manifestations of majority/minority agency costs in private companies are not only unmitigated by non-default rules, they are actively exacerbated by the operation of two techniques designed to reduce owner/manager agency costs – the ability of shareholders to change the division of powers between themselves and directors; and the ability of shareholders to remove directors. As each of these actions is subject to majority capture, they form twin exacerbations of majority/minority agency costs in private companies.

Chapter 4 undertakes an historical analysis of UK company law to establish whether the historical development of company law reflects the agency costs/externalities analysis undertaken. It then reviews the historical development of any exceptions identified in the analysis to understand how these exceptions arose – were they deliberately created (and if so, to what end), and, if deliberately created, do they match the policy purposes for which they were created. Chapter 4 takes the form of an historical analysis which explains the current legal landscape, and also verifies the theoretical approach. If the history of company

law supports the theoretical position advanced, then the analysis changes from the purely normative to become reflective of the legal landscape: making any exceptions starker.

If Chapters 2 and 3 create a theoretical framework for how company law should operate, Chapter 4 contextualises this analysis within the historical development of UK company law. Accordingly, Chapter 4 seeks to reinforce the conclusions reached in the theoretical section of this thesis.

Chapter 5 moves from the past to the present and examines any such exceptions in current UK law. Other jurisdictions are reviewed to establish a comparative basis from which to explore whether (and, if so, how) other jurisdictions have resolved any exceptions. Any such exceptions will already be mitigated if they are resolved in other ways in the UK, either by legal rule or market practice. Chapter 6, consequently, considers whether extant UK legal rules, primarily directors' duties, shareholder voting, and minority protection mitigate these risks. Accordingly, Chapter 6 undertakes a doctrinal analysis of other elements of company law to establish whether any exceptions are resolved by other legal rules.

Chapter 7 is a quantitative leximetric analysis aimed at establishing whether the market has perhaps adequately resolved these issues. This introduces an empirical element to the analysis. Chapter 8 proposes how to resolve any exceptions in a manner which is compatible with the theoretical, historical, comparative, doctrinal, and empirical approaches outlined.

Ultimately, this thesis identifies the highest risks associated with agency costs/externalities are owner/manager agency costs in traded companies, and majority/minority agency costs in private companies. It also shows that high agency costs are, as a rule, remedied by mandatory rules. This corresponds to the theoretical proposition that rules should apply by default unless there is an interest which needs to be protected by mandatory or ‘comply-or-explain’ rules. But this is not always the case. The peculiar characteristics of a private limited company mean that an indirect manifestation of agency costs is not resolved: mandatory rules provide protection where directors do something against shareholders (primarily through protections against personal appropriation of company assets) and in respect of the interaction between majority and minority shareholders (primarily through mandatory voting thresholds and notice periods), but there is a lacuna where this process is mediated and directors undertake activity designed to benefit the majority shareholders to the detriment of the minority. As the risk of majority/minority agency costs within private companies is high, this lack of mandatory legal protection sits as an exception. The position is even starker, as not only is the indirect manifestation of majority/minority agency costs in

private companies not mitigated by mandatory rule, it is exacerbated by two elements. As division of powers between shareholders and directors is a matter for the articles of association, the shareholders can assume the management powers of the company by resolution; and shareholders are entitled to remove directors. These are referred to as the *'twin exacerbations'* in this thesis. Each increases the likelihood that directors will act to appease the majority to the detriment of the minority, so exacerbating the indirect manifestation of agency costs.

This thesis shows that since the repeal of the Bubble Act, company law has developed through periodic mandatory responses to perceived agency costs/externalities. It demonstrates that the emergence of the division of powers as a default approach happened by accident, and that the ability of shareholders to remove directors has been neutralised by its interpretation by the courts. It further shows that while the United States (US) adopts a (generally) mandatory division of powers, Australia, New Zealand and Malaysia adopt default rules. Only the US, therefore, addresses the first exacerbation, while neither Australia nor New Zealand adequately mitigates the second exacerbation. The US does mitigate the second exacerbation, but uses tools that make broader changes to company law, the parameters of which had to be established by the courts. This resulted in a period of uncertainty. It then establishes that other elements of company law in the UK – directors' duties, shareholder voting obligations, minority remedies, and potential soft law responses – do not adequately mitigate indirect manifestations of majority/minority agency costs in private companies.

This is followed by a quantitative empirical study to establish whether the market has mitigated these exacerbations. The question asked in this empirical study is whether the market has the potential to mitigate the twin exacerbations. Having identified that the twin exacerbations exist as a theoretical and historical exception, un-remediated in most jurisdictions and remedied by way of a blunt tool in the US; un-remediated by UK company law; and un-remediated (and arguably un-remediable) by market practice, this thesis undertakes to resolve the exacerbations in Chapter 8.

Identifying such exceptions is of academic importance as it exposes an incoherence at the heart of company law. It also raises a vitally important and highly relevant practical issue. The corporate vehicle is one of the key drivers of economic expansion.[2] Companies exist

[2] ibid 1.

because 'a more complicated form of association, with a large and fluctuating membership, requires a more elaborate organisation' than a traditional partnership.[3] A company is a private company by default.[4] As at 2015, while there were in excess of three million companies on the public register, only around 7,500 were public companies with the vast majority of the rest being private.[5] Private companies are, as a rule, associated with smaller companies while public companies are seen to denote larger companies.[6] However, this is not always the case: many large companies are private,[7] and the private company is used structurally in several industries, most notably in private equity.[8] Private companies are, therefore, important commercial vehicles and any structural flaws in them have far-reaching effects. While considerable research has been undertaken into public companies,[9] private companies remain under-analysed and they are therefore ripe for study. Identifying the structural flaws in the functioning of these entities is of considerable practical importance – remedial action is long overdue.

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[3] PL Davies and S Worthington, *Gower: Principles of Modern Company Law* (10th edn, Sweet & Maxwell 2016) paras 1–2 ('**Gower and Davies**').
[4] Companies Act 2006, s 4(2).
[5] Gower and Davies, 1–23.
[6] See A Cosh and A Hughes, 'Size, financial structure and profitability: UK companies in the 1980s' in A Hughes and DJ Story, (eds) *Finance and the Small Firm* (Routledge 1994)18.
[7] See Anon, 'FRC consults on new governance principles for large private companies' [2018] Company Lawyer 328.
[8] E Berry, 'Limited partnership law and private equity: An instance of legislative capture?' [2018] Journal of Corporate Law Studies 1.
[9] For example, R Kraakman and others, *Anatomy of Corporate Law* ch 8 (Control Transactions) relates exclusively to control transactions in listed companies. Similarly, in AA Berle and G Means, *The Modern Corporation and Private Property* (rev edn, Harcourt, Brace & World, Inc 1967) the modern theory that company law exists to deal with the separation of ownership and control arose in the context of US listed companies. SM Bainbridge, *The New Corporate Governance in Theory and Practice* (OUP 2008) 12 acknowledges that his 'director primacy' theory is effectively a theory for public companies only.

CHAPTER 2

2. SITUATIONS RESULTING IN AGENCY COSTS IN COMMERCIAL ORGANISATIONS

2.1. Introduction

Our first query is into the types of issues that can arise within different forms of business organisations. Organisations exist when two or more individuals join together to achieve a common goal. In a business context, their goal is to create lower transaction costs than would otherwise apply were separate individuals to interact repeatedly.[10] These business organisations tend to be known as 'firms' in economic literature.[11] This should be distinguished from the narrower, more technical meaning of 'firm' which denotes an unincorporated, general partnership.[12] For the purposes of this thesis, the term 'firm' is used to indicate a UK entity with more than one participant which exists for the purpose of profit. For any firm it is important to establish how it can make decisions and what it can do. Arrow indicates that in any firm decisions can be made by way of consensus or by the imposition of authority.[13] Either of these requires a form of rule: if decisions are made by imposition, who is entitled to impose and what limits are there on such imposition; and if decisions are made by consensus, who is entitled to count towards the consensus, does it require unanimity, and are there situations in which an individual can be excluded from decision making? As a result, even ostensible requirements as to unanimity result in some actor in the firm making decisions on behalf of others. Jenson and Meckling have stated that whenever

> one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent,[14]

there is an incentive for that agent to enrich herself rather than the principal. These costs are known as 'agency costs' and underpin much of corporate law analysis.[15] Agency costs reflect the internal conflicts of interest arising within corporate constituents. Third parties, or

[10] R Coase, 'The Nature of the Firm' (1937) 4 Economica 386.
[11] Ibid.
[12] Partnership Act 1890, s 4(1).
[13] KJ Arrow, *The Limits of Organisation* (Norton 1974).
[14] MlC Jensen and WH Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 305, 308.
[15] See, eg, R Kraakman and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, OUP 2017) 2.

external actors to a company, experience a different type of cost known as 'externalities'. Pigou describes externalities as:

> A, in the course of rendering services, for which payment is made, to a second person, B, incidentally also renders services or disservices to other persons (not producers of like services) of such assort that payment cannot be exacted from the benefited parties or compensation enforced on behalf of the injured parties.[16]

This can be contrasted with agency costs, which are the costs experienced by B when A renders services to B. These externalities can be positive or negative. Pigou argues that negative externalities should be resolved by the state,[17] whereas Coase argues that they will be bargained away where it is efficient to do so.[18] The result is:

> What is involved is a value judgment: if you believe that markets internalize everything, you will believe that externalities do not exist; on the other hand, if you believe that markets do not internalize side effects, you will believe in the persistence of externalities as deviations from an attainable optimum…it is thus doubtful whether the term 'externality' has any meaningful interpretation, except as an indicator of the political beliefs and value judgments of the person who uses (or avoids using) the term.[19]

We refer to agency costs and externalities together as 'Costs' in this thesis. This chapter begins by examining different types of firm and their key features. It then examines the Costs that exist within firms generally, ie, externalities suffered by third parties, and agency costs between owners and managers and the majority and the minority. It turns then to the degree of Costs which exist across types of firm in the UK to establish which actors within which types of UK firm are exposed to greater agency costs and/or externalities.

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[16] AC Pigou, *The Economics of Welfare* 184 (4th edn, Macmillan 1932).
[17] ibid 127–130.
[18] R Coase 'The Problem of Social Cost' (1960) 3 Journal of Law and Economics 1.
[19] CJ Dahlman, 'The Problem of Externality' (1979) 22 Journal of Law and Economics 141, 156.

2.2. Types of Firm

Before we analyse Costs arising within different firms, it is necessary to identify the characteristics of the different firms available in UK law so as to link the particular characteristics to the presence of such Costs. This will, in turn, provide a deeper understanding of situations in which Costs arise. On a spectrum moving from simplest to most complex, these are: partnerships; limited partnerships (or LPs); limited liability partnerships (or LLPs); private companies; public companies; and publicly traded companies. We turn now to the key features of each.

2.2.1. General Partnerships

Partnerships were recognised at common law,[20] but much of this common law was codified in 1890.[21] The Partnership Act 1890 is not a complete codification of the law of partnerships, but rather a key starting point.[22] Partnerships do not require incorporation or registration, but arise 'between persons carrying on a business in common with a view to a profit'.[23] While not essential, it is common for partnerships to be constituted by formal agreement between the partners.[24] Partnerships enjoy separate legal personality in Scotland but not in England or Wales.[25] This means that only Scottish partnerships are entitled to own property and contract in their own name. Lord Lindley provided the following key characteristics of a partnership:

> The partners are the agents and sureties of the firm: its agents for the transaction of its business; its sureties for the liquidation of its liabilities so far as the assets of the firm are insufficient to meet them. The liabilities of the firm are regarded as the liabilities of the partners only in case they cannot be met by the firm and discharged out of its assets.[26]

In other words, there is no discernible distinction between the assets and liabilities of the partnership and those of its individual partners. It should also be noted that, while there is flexibility between the parties to agree contractually on the rights and obligations of partners, legally all partners are treated equally.[27] Therefore, all partners, regardless of their agreed

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[20] RI Banks, *Lindley and Banks on Partnership* (20th edn, Sweet & Maxwell 2017) para1-01 (**'Lindley and Banks'**).
[21] ibid.
[22] *Hopper v Hopper* [2008] EWCA Civ 1417 para 45;
[23] Partnership Act 1890, s 1(1).
[24] Lindley and Banks, ch 10.
[25] Partnership Act 1890, s 4(2).
[26] Lindley and Banks, para 3-03.
[27] ibid para 2-26.

rights and obligations, are responsible for the liabilities of the firm. The partnership is the most basic of the forms we review.

2.2.2. Limited Partnerships

Limited partnerships (LPs) are more complex, and were introduced as a result of the efforts of Sir Frederick Pollock to introduce the European *partnership en commandite* to UK law.[28] His desire to introduce LPs arose from flaws facing passive investors in the partnership form: receiving profit from a partnership did not make someone a partner who would otherwise not have been one;[29] this 'did not go so far as to enable a person to become a partner and at the same time avoid unlimited liability'.[30] Given the increase in the ability to secure limited liability by registration,[31] it appeared logical to expand this protection to certain partnerships. Thus the Limited Partnership Act 1907 created a new entity termed the Limited Partnership, or LP. The general rules of partnership apply to LPs save where expressly otherwise provided.[32] The LP itself is 'registered' rather than incorporated.[33] This has several implications, including that an LP does not rate as an incorporated vehicle under various pieces of legislation.[34] Limited partnerships have two types of partners: general partners (who have unlimited liability); and limited partners (whose liability is limited to the amount of capital sum they agree to contribute, but who are excluded from taking management decisions for the LP).[35] As with partnerships, LPs are tax transparent,[36] so partners are taxed on their share of the LP's profits rather than the LP being taxed on its profits and then the individual partners being taxed on distributions. They also avoid the publicity requirements of filing accounts.[37] This has made the LP popular as a private equity vehicle and, in Scotland, for agricultural holdings.[38] Unlike other jurisdictions, the UK does not expressly allow for a single entity to be both a limited partner and a general partner of an LP.[39] An LP

[28] ibid para 28-01. See also J Hardman, *A Practical Guide to Granting Corporate Security in Scotland* (W Green 2018) para 2-36.
[29] *Cox v Hickman (*1860) 8 HLC 268, put on a statutory footing in the Partnership Act 1865.
[30] Lindley and Banks, para 28-04.
[31] Commencing with the Joint Stock Companies Act 1856.
[32] Limited Partnerships Act 1907, s 7.
[33] ibid s 5.
[34]See Hardman, *Granting Corporate Security* para 2-39.
[35] Limited Partnerships Act 1907, s 4(2).
[36] Income Tax (Trading and Other Income) Act 2005, s 848.
[37] Unless the general partners are all companies. See Partnership (Accounts) Regulations 2008 (SI 2008/569) reg 4(1).
[38] Hardman, *Granting Corporate Security* para 2-36, and E Berry, 'Limited partnership law and private equity: An instance of legislative capture?' [2018] Journal of Corporate Law Studies 1.
[39] Unlike Jersey and Guernsey. See the Limited Partnerships (Jersey) Law 1994, art 6 and the Limited Partnerships (Guernsey) Law 1995, s 2(2).

is, therefore, a more complex form of a partnership: one which allows certain partners to receive the benefits of limited liability in exchange for their exclusion from management.

2.2.3. Limited Liability Partnerships

Limited Liability Partnerships (LLPs) are still more complicated than LPs and were introduced by the Limited Liability Partnerships Act 2000. This form of organisation resulted from pressure from the professional services community – primarily to protect the personal assets of partners of auditing firms. LLP status also made it easier to sue professional bodies.[40] Only Scottish partnerships and LPs have separate legal personality,[41] whereas all LLPs enjoy that status.[42] Unlike LPs, the default position for LLPs is that partnership law does not apply unless specifically provided otherwise.[43] An LLP can be seen as a hybrid entity somewhere between a partnership and a company. There are five key elements to an LLP:

1. Separate personality (like a company);
2. Limited liability (like a company);
3. Disclosure of accounts (like a company);
4. Tax transparency (like a partnership); and
5. Inherent conflation of ownership and control based on partnership-style default governance rules.[44]

An LLP can be formed by two or more persons associated for the purposes of carrying on a lawful business.[45] This formulation does not require all members of an LLP to contribute to the LLP.[46] An LLP must also have designated members who effectively act as its compliance officers,[47] for example, if there is a winding up of the LLP it is the designated members who

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[40] V Finch and J Freedman, 'The limited liability partnership: Pick and mix or mix-up? [2002] Journal of Business Law 475. See also J Freedman and V Finch, 'Limited Liability Partnerships: Have accountants sown up the "deep pockets" debate?' [1997] Journal of Business Law 387.
[41] Partnership Act 1890, s 4(2).
[42] Limited Liability Partnerships Act 2000, s 1(2).
[43] ibid s 1(5).
[44] Finch and Freedman, [2002] Journal of Business Law 475, 481–495. See also J Hardman, 'The Moral Hazard of Limited Liability? An Empirical Scottish Study' (2018) 6 Nottingham Insolvency and Business Law eJournal 30.
[45] Limited Liability Partnerships Act 2000, s 2(1)(a).
[46] J Whittaker and J Machell, *The Law of Limited Liability Partnerships* (4th edn, Haywards Heath: Bloomsbury 2015) para 2.5.
[47] ibid para 12.2.

make any necessary solvency statements.[48] In addition, if the LLP breaches any of its statutory duties (eg, filing accounts) the designated members are also liable.[49] The designated members, however, have no greater role in the management than other members – each member has a share and interests in the LLP. Neither the share nor the interests is defined[50] but both involve a series of rights and obligations, primarily relating to finances and governance.[51] There is, therefore, only one constituency of corporate participant in an LLP and that is the members.

2.2.4. Companies

This can be contrasted with companies. The common view is that company law 'developed seamlessly from the law of partnership'.[52] However, arguably the modern company is, rather, a hybrid between a partnership and a company incorporated by Royal Charter.[53] The modern company is now governed by the Companies Act 2006, and allows shareholders to elect to subscribe for shares at a predetermined price[54] to be held in a vehicle with separate legal personality[55] which is then managed by appointed individuals called directors.[56] Amongst other options, a company can be a 'private' company or a 'public' company.[57] The primary difference between a private and a public company is that the latter is able to offer its shares to the public – although it is not obliged to do so.[58]

The final three forms of firm are private companies, public companies, and those companies whose shares are publicly traded. Whether a company is private or public must be stated in the company name, which generally ends with 'Limited' or 'Ltd' in the case of the private companies, and 'Public Limited Company' or 'plc' in the case of public companies.[59] Legislation governing both public and private companies is contained a single Act, which is

[48] Insolvency Act 1986, s 89(1).
[49] Whittaker and Machell, *Limited Liability Partnerships* para 12.
[50] Hardman, *Granting Corporate Security* para 2-44.
[51] Whittaker and Machell, *Limited Liability Partnerships* para 8.18.
[52] *O'Neill v Phillips* [1999] 1 WLR 1092, 1098 (Lord Hoffman).
[53] PG Mahoney, 'Contract or Concession? An Essay on the History of Corporate Law ' (2000) 34 Georgia Law Review 873 and the discussion in J Hardman, *The Duomatic Principle* 2017 LLM(R) Thesis, University of Glasgow 7–9.
[54] Companies Act 2006, s 3.
[55] ibid s 16(2).
[56] ibid s 40.
[57] ibid s 4.
[58] ibid s 755; Financial Services and Markets Act 2000, s 74 and Gower and Davies, para 1-18.
[59] Companies Act 2006, ss 58–59.

unusual and raises the risk of insufficient consideration being paid to the rules which distinguish the two forms of organisation.[60]

Public limited companies are companies whose shares may be offered to the public[61] although they do not have to be. We shall use 'public limited companies (plcs)' to describe companies that take this legal form but are not publicly traded, and 'traded companies' to describe those that take this legal form and are publicly traded.[62] The plc form is very similar to the Ltd form, but is subject to additional rules. Once a plc is publicly traded on certain markets[63] it is referred to as a 'listed entity', the etymology of which is that the plc then appears on a bourse's 'list' of shares available.[64] Listed entities, therefore, are traded on specific bourses whereas traded companies are traded on any bourse, which makes listed entities a subset of traded companies. Traded companies are subject to additional requirements which untraded companies are not. The basis for the majority of the additional traded requirements stem from EU law,[65] which is incorporated in UK law under various pieces of UK legislation.[66] These requirements restrict various aspects of the traded company's life ranging from what it can offer to the public, to the disclosure of market information to ensure that a false market in shares is not created. Accordingly, the additional rules exist to protect shareholders invested (or considering investing) in the traded entity. Traded companies also have additional requirements regarding the public disclosure of information that do not apply to non-traded companies, again to protect investors and ensure that the price of traded securities reflects all relevant information.[67]

We can therefore see a wide range of business vehicles available within the UK. In essence, these fall into two categories, partnership vehicles and company vehicles.[68] Each of these

[60] This can be compared to civilian systems (eg, Germany) which have separate legislation to govern the equivalent of public companies and private companies. See Gower and Davies, paras 1-19, 1-20.
[61] Companies Act 2006, s 755.
[62] There is an additional subset of traded companies, being those traded on the main market. These are referred to here as 'listed' companies.
[63] Following the definition deployed in Gower and Davies, para 25-5
[64] ibid.
[65] See the Admission and Reporting Directive 2001 (EU 2001/34/EC); the Prospectus Directive 2003 (EU 2003/71/EC); the Transparency Directive 2004 (ED 2004/109/EC); Markets in Financial Instruments Directive (known as MIFID) (EU 2004/39/EC); and the Market Abuse Directive (EU 2003/124/EC) for examples of EU directives leading regulation in this sphere.
[66] See Financial Services and Markets Act 2000; Prospectus Regulations 2005; Companies Act 2006 Part 28; and Financial Services Act 2012. See general discussion in Geoffrey Morse and others (eds), *Palmer's Company Law* (Release 164, Sweet & Maxwell 2019) 5.105-5.106.
[67] Companies Act 2006 ss 414CA and 414CB.
[68] Gower and Davies, para 1-2. Ultimately partnership vehicles do not separate the ownership function from the management function, as all participants in either are 'partners'. Whilst a partner can choose to not have any involvement in the management of the partnership (*Ward v Newalls Insulation Co Ltd* [1998] 1 WLR

types of corporate vehicle arose from different pressures at different points between the 1800s and 2000s.[69] In summary, the principal characteristics of these entities are:

Entity	Limited liability for owners	Separation of ownership and management	Requirement for involvement of independent management	Tax transparency	Minimum capital requirement	Ability to offer shares to the public	Are shares actually offered to the public?
Partnership	No	No	No	Yes	No	No	No
LP	Partial	Partial	No	Yes	No	No	No
LLP	Yes	No	No	Yes	No	No	No
Ltd	Yes	Yes	No	No	No	No	No
Plc	Yes	Yes	No	No	Yes	Yes	No
Traded	Yes	Yes	Yes	No	Yes	Yes	Yes

Thus, a partnership offers no asset shielding through limited liability,[70] does not envisage the separation of an ownership interest from a management interest, offers tax transparency, does not require minimum capital, and cannot have its interests offered to the public. At the opposite end of the spectrum, a traded company offers limited liability for its shareholders, envisages separation of ownership and management, requires independent management, is not tax transparent, has a minimum capital requirement, can offer its shares to the public, and does so.

On one level, this appears to allow those establishing a business maximum flexibility to choose their business type. However, this is not the case – it allows those establishing a business flexibility in choosing the characteristics that constitute their business type, but

1723), she remain a partner. Even the LP, which does have spit roles, deems both roles to be partners. Company forms formally distinguish between owners (shareholders) and managers (directors).

[69] Gower and Davies, para 1-47.

[70] H Hansmann and R Kraakman, 'The Essential Role of Organizational Law' (2000) 110 Yale Law Journal 387.

once they have decided on those characteristics their options are inherently limited. Consequently, it is not possible to offer ownership interests to the public without having limited liability. Similarly, if entities want tax transparency and limited liability for all owners, they must use the LLP as their corporate vehicle. This means that corporate participants whose firms meet the required criteria do not in fact enjoy flexibility in their choices – there is only one business form available to them. They are faced with a menu[71] – one can either pick chicken and potatoes or fish and beans, but it is not possible to choose chicken and beans. International analysis holds that no rule is truly mandatory as a business can simply incorporate in a different jurisdiction which offers the requirements for a business entity which it seeks.[72] This practice is commonly known as regulatory arbitrage.[73] However, there are many drivers of jurisdiction.[74] In this light, jurisdiction becomes another feature to factor into the above: if business participants want a vehicle in the UK in which owners have partial limited liability, they must use a limited partnership – and all the other characteristics that are associated with it. As McDonnell states,

> in choosing whether to incorporate in Delaware or Minnesota, one might conceivably prefer Delaware's case law on the duty of loyalty but Minnesota's case law on the duty of care and good faith. In that example, it is nearly impossible to mix and match – the corporation must either choose Delaware's law as a whole or Minnesota's.[75]

Accordingly, the ostensible choice of business entity is in fact illusory. It is not open to participants to choose freely between business forms once they have established the characteristics they wish their business form to have.

This overview of the types of firms offers necessary background for the discussion of the application of rules within these firms. We now review the types of agency costs within firms generally, before moving on to the specific agency costs arising within individual firm types.

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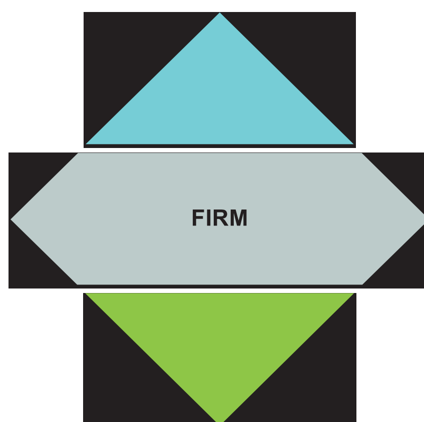
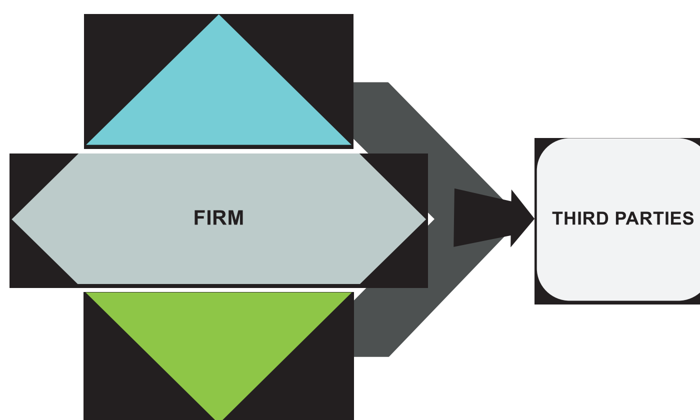
[71] I Ayres, 'Menus Matter' (2006) 73 The University of Chicago Law Review 1.
[72] See R Romano, 'Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws' (1989) 89 Columbia Law Review 1599; H Hansmann and R Kraakman, 'The End of History for Corporate Law' (2000) 89 The Georgetown Law Journal 439; R Romano, 'Law as a Product: Some Pieces of the Incorporation Puzzle' (1985) 1 Journal of Law, Economics and Organization 225.
[73] V Fleischer, 'Regulatory Arbitrage' (2010) 89(2) Texas Law Review 227.
[74] Especially tax and reputation driven. See O Kun, 'Corporate Inversions: The Interplay of Tax, Corporate and Economic Implications' (2003) 29 Delaware Journal of Corporate Law 313.
[75] BH McDonnell, 'Sticky Defaults and Altering Rules in Corporate Law' (2007) 60 SMU Law Review 383, 422.

2.3. Costs

We have seen that agency costs arise when one person undertakes activity for another, and externalities arise where the action of parties A and B create effects for third parties over which the third parties have no control – they arise structurally within firms as defined in paragraph 2.1.[76] To begin, let us consider the firm as an entity:



As part of its normal commercial activity, this entity must interact with others. According to Kraakman and others, the first cost arises out of this interaction as there is a risk that third parties may suffer costs as a result of the use of the firm form by way of externality:



The best illustration of such cost is limited liability. It is frequently stated[77] that a logical result of a firm's owners enjoying limited liability is that the owners will use the firm for riskier projects, exporting risk from themselves to third parties.[78] This would result in third

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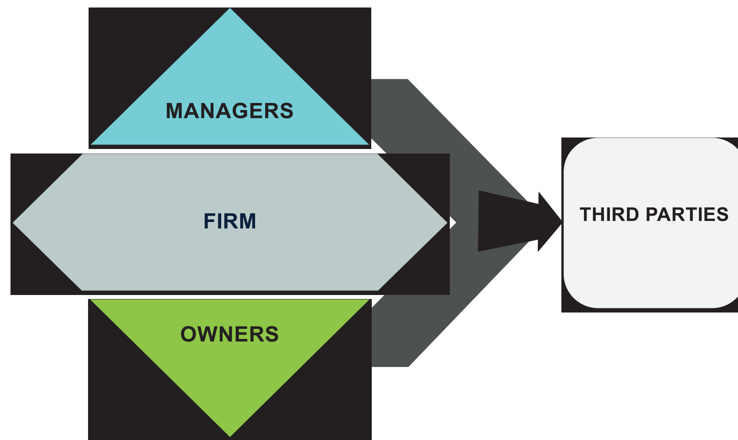
[76] Kraakman and others, *Anatomy of Corporate Law* 2.

[77] For example, M-L Djelic and J Bothello, 'Limited Liability and its Moral Hazard Implications: The Systemic Inscription of Instability in Contemporary Capitalism' (2013) 42(6) Theory and Society 589.

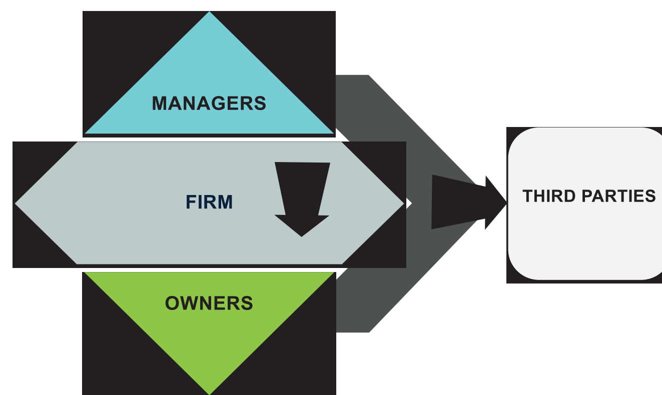
[78]Whilst this risk is theoretically sound, evidence of it is empirically lacking in qualitative studies (C Lennox and Bing Li, 'The Consequences of Protecting Audit Partners' Personal Assets from the Threat of Liability' (2012) 54(2-3) Journal of Accounting and Economics) 154 and quantitative studies (J Hardman, 'The Moral Hazard of Limited Liability? An Empirical Scottish Study' [2018] Nottingham Insolvency and Business Law e-Journal 30).

parties experiencing the Cost of the form of the firm being used. This is clearly an example of an externality, and yet Kraakman and others classify it as an agency cost.[79]

Agency costs in fact arise within the firm. Thus we can split the main participants in any firm into owners and managers:



Managers run the firm, while owners are entitled to the residue of profits and capital within the firm, raising the risk of agency costs being inflicted on the owners by the managers. This provides us with the second category of Costs:

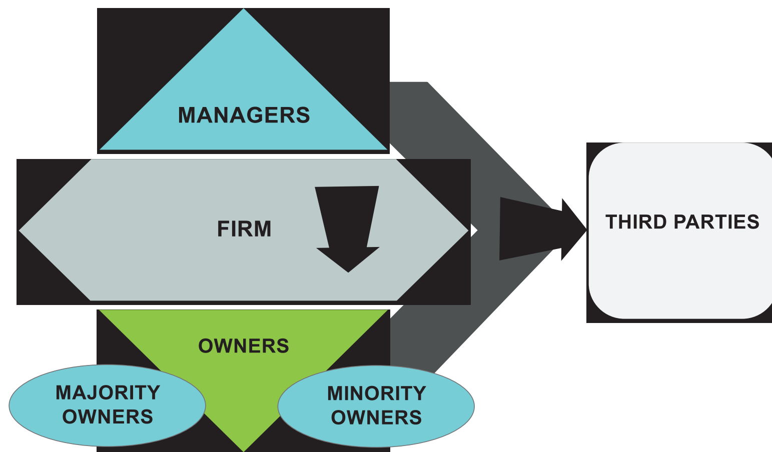


The issue is neatly summarised in an example provided by Bainbridge:

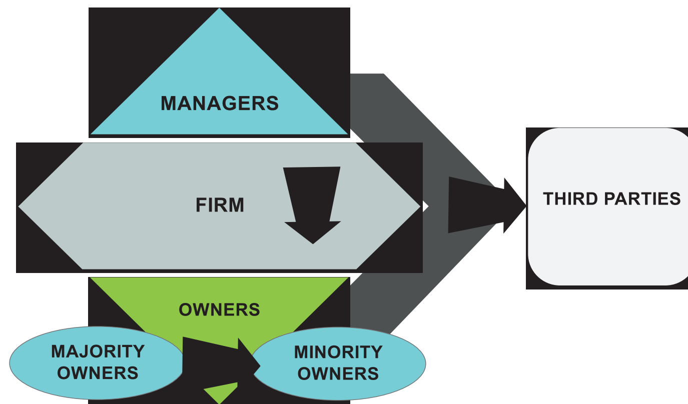
> Suppose the board of directors of Acme, Inc., is musing over the following question: 'I can either spend $100 million on a new corporate jet or I can distribute the $100 million to the shareholders by increasing the size of the dividend.' Can anyone doubt that some board will buy the jet?[80]

[79] Kraakman and others, *Anatomy of Corporate Law* 1, 29–31.
[80] SM Bainbridge, *The New Corporate Governance in Theory and Practice* (OUP 2008) 6.

Therefore, managers acting in their own interests, at the expense of the owners, represents an agency cost suffered by the owners. Within the category of the owners there is a further agency cost. If there is more than one owner, a complication is added:



In such circumstances there is a risk that any imposition of authority is undertaken by the majority for their own ends and to the detriment of the minority. Thus, the third category of agency costs exists between the majority and the minority:



Displaying Costs in this manner helps show the impact of the classic formulation of Costs in firms. Third parties have one form of Cost to which they may be subject (externalities from the firm), as do the majority owners (from managers). Minority owners, however, experience two categories of agency costs: in their capacity as owners from managers; and in their capacity as a minority from the majority. Minority owners are the only category of actors who experience such double Costs.

Calling agency costs and externalities 'Costs' is a misnomer. The term 'Costs' is generally used in law and economics to denote actual, realised and quantifiable costs and/or

expenses.[81] There are costs of this type which fall within the above analysis: paying managers arms' length wages for managing the firm would be realised and quantifiable costs which would, on one level, be manager/owner agency costs. However, the above examples show that agency costs go further than this. Bainbridge is not concerned with the payment of agreed, reasonable, pay to managers; but rather that managers may use their position to their own advantage and the disadvantage of owners. Thus, the costs we are dealing with move away from being definable and quantifiable, towards being more ethereal. Bainbridge's example shows that the costs we are discussing actually concern the motivations people experience in certain situations. These motivations can arise as a result of legal stimuli (for example, the introduction of limited liability) or economic stimuli (if there is only one shareholder, or 100 shareholders each holding one share, there is no majority to create an agency cost against a minority. But if one owner holds 90 per cent of the firm and the rest is split evenly between 100 owners, there is a risk of majority/minority agency costs).

It is possible that Kraakman and others, include what should be externalities within agency costs for the connotations of agency costs: whilst the existence and resolution of externalities may depend on value judgment; agency costs are universally derided as inefficient.[82] It could be that by classifying these third-party costs as agency costs Kraakman and others are adopting a shorthand approach to refer to negative externalities which are not internalised. By inaccurately calling these costs 'agency costs' the debate is avoided as to whether these costs will (or could) in fact be internalised to provide an efficient outcome. Rather, it presumes that they will not be internalised and that these costs are suffered by third parties. The position of majority/minority costs is more complicated as they do not appear to fit neatly into agency costs or externality analysis: the minority have neither appointed the majority as their agent, nor are they third parties. Ultimately, majority/minority issues are agency costs as the majority are taking decisions which affect shareholders as a whole, of whom both the majority and the minority are part. The majority's decisions bind both the minority and the majority. They therefore do not meet Pigou's criteria for externalities: they are not the by-product of the majority rendering services to another person, but rather the

[81] For example, transaction costs. See RC Ellickson, 'The Case for Coase and Against Coaseanism' (1989) 99 The Yale Law Journal 611, 615.
[82] R Aguilera and others, 'Regulation and Comparative Corporate Governance' in in M Wright and others (eds), *The Oxford Handbook of Corporate Governance* (OUP 2014) 25 and M Roe, *Political Determinants of Corporate Governance: Political Context, Corporate Impact* (OUP 2003) 134.

costs suffered by person B for the services she received from person A. This makes them agency costs rather than externalities.

Agency costs and externalities are both important as they are costs suffered by the recipient (the principal or third party). There are links between the two as both are motivations that one experiences when placed in certain situations. For a director, the decision is whether to take the jet or recommend a dividend; for a business, the decision is whether to pollute the local environment or adopt a more costly but cleaner manufacturing process. In each case, the decision by the 'cost generator' is a rational economic decision. In any event, both agency costs and externalities raise issues for the sufferer. Each is also a two-step process. First, there must be the legal and factual matrix which allows the potential for the Cost to exist: the motivations highlighted above. From the externality perspective, this generally means the ability to externalise risk to third parties, and for owner/manager agency costs this usually means strong, centralised agents acting for weak, de-centralised owners.[83] This potential, however, is not enough: we also need to consider the ability of the putative Cost causer to actually generate that Cost. There will be no agency cost under Bainbridge's example if there are mandatory caps on methods of executive travel. Similarly, there will be no externalities under the pollution example if there is a mandatory prohibition on polluting. In other words, it becomes necessary first to examine the incentives which create the potential Costs, and second, to examine the Cost causer's ability actually to manifest those Costs. For example, limited liability might result in an externality between the firm and third parties (ie, an incentive which creates the Cost), but a company selling a faulty asset to a third party and distributing the proceeds of the sale would be a manifestation of such externality (ie, the method by which the cost causer manifests the Cost). Law provides two potential routes to lower Costs: in this example it could provide unlimited recourse to any manager of a firm for any losses caused by third parties, which would lower the incentive element of the externality. Alternatively, it could provide limitations on distributions which would help mitigate the manifestation of this externality.

We can consider two categories of manifestation. Firstly, *direct manifestations* of agency costs/externalities are those that arise directly from the decision-making actor to the recipient of the agency costs/externalities. Thus, the example above shows how externalities between the firm and third parties can manifest directly. Similarly, Bainbridge's jet provides an example of a direct manifestation of manger/owner Costs. A majority owner voting in favour

[83] MJ Roe, *Strong Managers Weak Owners: The Political Roots of American Corporate Finance* (Princeton University Press 1994).

of a preferential buyback of only her own shares (and not those of the minority) is an example of a direct manifestation of Costs between majority and minority owners.

Second, we can identify *indirect manifestations* of agency costs. These occur where agency costs between actors are not manifested directly between the relevant actors. For example, a director of company A who owns all of company B, may want company A to contract with company B on preferential terms. This enriches the director at the expense of the owners (and is therefore an owner/manager agency cost) but it manifests between the company and third parties. Owner/manager agency costs can manifest indirectly through third parties – these manifestations arise from an owner/manager relationship but do not manifest from the manager qua manager. Indirect manifestation also occurs between the majority and the minority. In every type of firm which acknowledges a difference between managers and owners,[84] it is usual for the owners to select the managers.[85] It is possible, therefore, for majority/minority agency costs to be indirectly manifested as agency costs from the managers. This can arise either because the majority instruct the managers to act in a certain way which benefits them, or the managers act in such a manner anyway to keep the majority happy. It is not possible for externalities to manifest indirectly: a third party experiences these directly from the firm only – whether the pollution is sanctioned by the shareholders or by the directors, the third party still receives negative externalities from the firm. From three Costs, we can therefore identify five manifestations of Costs:

1. Direct manifestation of externalities between the firm and third parties;
2. Direct manifestation of agency costs between owners and managers;
3. Direct manifestation of agency costs between the majority and the minority;
4. Indirect manifestation of agency costs between owners and managers; and
5. Indirect manifestation of agency costs between the majority and the minority.

[84] Being the LP, private company, public company, and publicly traded company.
[85] For example, see the Model Articles for Private Companies (The Companies (Model Articles) Regulations 2008 SI 2008/3229 Sch 1) and Companies Act 2006, s168 (the '**Model Articles**').

Reviewing these manifestations will allow us to establish whether the law reacts uniformly to both Costs and their manifestations. In turn, this analysis will allow us to gain insights into of the interaction between the law's treatment of agency costs/externalities.

It has been argued that law's role in firms lies in minimising and mitigating agency costs,[86] in that 'agency costs destroy…value'.[87] By including externalities within their analysis, it is to be assumed that Kraakman and others extend the analysis to externalities. It therefore appears that it is law which should reduce these Costs. There are two linked elements to this: does the Cost exist; and can it be acted upon to the detriment of the sufferer. To examine law's general response to Costs, we therefore need to follow a two-step process: first, identify the situations generating the Costs; and, second, identify the manifestations of those Costs. Only if there is a situation creating such a Cost, and an ability for this Cost to be manifested, will there be actual detriment to the sufferer. Should both be present, the detriment can be alleviated either by neutralising the situation, or by mitigating the manifestation. We begin by discussing situations generating Costs across our three categories: first, externalities between a firm and third parties; second, owner/manager agency costs; and third, majority/minority agency costs.

2.4. Situations Generating Externalities

We first examine the externalities experienced by third parties in the different types of firm. Partnerships do not enjoy limited liability. Externalities between the partnership and third parties are therefore minimised as there is no incentive to use the partnership form to externalise any risk: any third party has recourse to the assets of the individual partners. This means that partners obtain no personal asset-shielding from using this corporate form.[88] The LP introduces partial limited liability, and therefore produces a higher risk of externality than a partnership. However, general partners remain liable for the debts of the LP. The unlimited liability of the general partners means that general partners tend to be special purpose vehicles with very few assets which are set up specifically to be general partners.[89] General partners, therefore, have no incentive to create such externalities as they risk being held personally liable. Limited partners are excluded from the management of the LP.[90] The result is that externalities are also minimised for LPs: those with an incentive to create

[86] For example, M Roe, *Political Determinants* 134.
[87] Aguilera and others, 'Regulation and Comparative Corporate Governance' 25.
[88] Hansmann and Kraakman, 'The Essential Role of Organizational Law' (2000) 110 Yale Law Journal 387.
[89] R Ambery and S Bowmer, 'The use of limited partnership special purpose entities in property securitisations' [2001] Journal of International Banking Law 153 at 155.
[90] Limited Partnerships Act 1907, s 6(1).

externalities have no ability to do so; those with the ability to create externalities have no incentive.

All other vehicles provide for limited owner liability. This means that externalities are higher in the case of LLPs, private companies, public companies, and traded companies. How high these externalities are depends on the ability of the owners to withdraw their investment from the firm: if owners can withdraw their money at will, externalities will be higher (as, at the margins, owners are encouraged to make the firm undertake risky transactions and withdraw their funds) than if owners are not able to withdraw their funds. These are known as capital maintenance rules. It becomes more difficult for owners to withdraw their capital from the firm the more complicated the type of entity the firm is. Thus, each partner is able to withdraw her funds at any time and determine the partnership by notice.[91] This is logical, as the lack of limited liability means that third parties have recourse to the assets of partners should there be a shortfall in partnership funds. Members of an LLP are also able to withdraw their capital should they so wish. Given the limited liability of members of an LLP, the risk of heightened externalities experienced by third parties is real. However, externalities are reduced by the 'clawback' rule: if the LLP becomes insolvent within two years after a payment to a member and that member knew, or ought to have known, that there was no prospect of the LLP avoiding insolvent liquidation, a court can order the member to repay the funds.[92] Unlike partnership firms, shareholders in companies cannot withdraw their capital due to capital maintenance rules developed by the English courts[93] and statute.[94] Rock and Wachter consider this a core characteristic of the company: it enables shareholders to invest jointly in an asset which is more important to the business than its value in isolation suggests.[95] This allows creditors and future shareholders to be more confident about committing their resources to a vehicle from which other shareholders are not likely to withdraw funding.[96] Shareholders in a private company are generally prohibited from withdrawing their capital[97] other than in certain, exceptional circumstances.[98] It is generally held that this makes it easy for private companies to redeem capital.[99] This is correct.

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[91] Partnership Act 1890, s 26.
[92] Insolvency Act 1985, s 214A (5).
[93] *Trevor v Whitworth* (1887) 12 App Cas 409.
[94] Companies Act 2006, s 641(1).
[95] See EB Rock and ML Wachter, 'Waiting for the Omelette to Set: Match-Specific Assets and Minority Oppression' in RK Morck (ed), *Concentrated Corporate Ownership* (University of Chicago Press 2000).
[96] Rock and Wachter, 'Waiting for the Omelette' 209, 219.
[97] Companies Act 2006, s 658(2).
[98] ibid s 709.
[99] Gower and Davies, para 13-12.

However, to achieve this end requires shareholder agreement by way of majority resolution:[100] so giving the majority a veto over the redemption process.

Public companies have minimum capital requirements. Thus a plc must have share capital of at least £50,000,[101] of which at least a quarter of the nominal value and all of the premium must be paid up.[102] This rule helps lower externalities as the plc must have a minimum capitalisation, which a private company need not have. There are further capital maintenance requirements such as a prohibition on purchasing or redeeming the company's own shares from its capital;[103] a prohibition on reducing its capital using a solvency statement;[104] and a public company is more restricted as regards issuing shares for non-cash consideration than a private company.[105] If the assets of a public company fall below half of its issued share capital, the directors must call a general meeting.[106] This provides even tighter capital maintenance rules than exist for private companies and, in turn, lowers externalities. In addition, the Takeover Code applies to plcs – even those not actually traded.[107] Traded companies are subject to the same requirements, but also to additional capital maintenance requirements. Consequently, the Listing Rules provide that shares can only be traded on the main market if their market value (at the time of listing) is expected to be at least £700,000,[108] so offering initial comfort to third parties as to the quantum of the assets the firm owns.

These capital maintenance rules have the effect of lowering externalities in that they ensure that (in the case of private companies) funds cannot be withdrawn and will be available for use by the firm, and (in the case of public and traded companies) consist of a minimum amount. This restricts the incentive for generating externalities, as funds remain trapped in the firm. As a result, the third party has recourse to those funds if externalities do manifest.

We can, therefore, identify differences in the externalities between firms within this category. Those firms without limited liability present a lower risk than those with limited liability. In those firms with limited liability, third parties are protected by capital

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[100] For example, Companies Act 2006, s 694(2)(b).
[101] ibid s 763(1).
[102] ibid s 586.
[103] ibid s 709.
[104] ibid ss 642–644 (unlike private companies).
[105] ibid s 593.
[106] ibid s 656.
[107] ibid Part 28 and the City Code on Takeovers and Mergers, 12th edn available at <http://www.thetakeoverpanel. org.uk/wp-content/uploads/2008/11/code.pdf?v=8Jan2018> A3(a) (accessed on 5 December 2019) (the '**Takeover Code**').
[108] Listing rule 2.2.7(1).

maintenance or clawback rules. The protective effect of these rules escalates as one moves further along the spectrum of complexity of firms.

2.5. Situations Generating Agency Costs between Managers and Owners

The next category is agency costs arising between managers and owners. Both partnerships and LLPs have only one category of corporate actor, and therefore there is no difference between managers and owners and so no possibility of agency costs arising in these categories of firm. In the case of LPs, owners and managers are separated to an extent: a partner does not enjoy the protection of limited liability unless she agrees to opt-out of management. The practice of general partners being special purpose vehicles with no assets (to avoid risks of a lack of limited liability) means that the general partner does not wish to acquire assets to which third parties will have recourse. Thus, while in theory this category of agency costs exists for LPs, in practice the Costs are minimised.

Companies have a formal separation of roles between directors and shareholders.[109] This increases owner/manager agency costs making these Costs higher than in partnerships or LLPs (where there is only one category of actor and so no such agency costs can arise), and LPs (where the personal liability of the manager for the debts of the vehicle as a whole mitigates this category of agency costs). As regards differentiating between the different types of company, private companies are more likely to be closely held, and it is generally held that closely held companies have lower agency costs in this category because unity among the owners allows them to exert greater control over the managers.[110] Conversely, publicly traded companies with wide shareholder bases have high owner/manager agency costs.[111] Agency costs between management and owners are therefore likely to be high in traded companies given the power disparity between centralised management and diverse, small shareholders. The result is that traded companies experience a wider separation of ownership and control,[112] and managers become more powerful as it is more difficult for owners to collectivise and therefore exert any of their rights against managers.

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[109] Companies Act 2006, ss 11–12.

[110] FH Easterbrook and DR Fischel, 'Close Companies and Agency Costs' (1986) 38 Stanford Law Review 271.

[111] See LA Bebchuk, 'Limited Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments' (1989) 102 Harvard Law Review 1820; and LA Bebchuk and A Hamdani, 'Optimal Defaults for Corporate Law Evolution' (2002) 96 Northwestern University Law Review 489.

[112] AA Berle and G Means, *The Modern Corporation and Private Property* (rev edn, Harcourt, Brace & World, Inc 1967).

To an extent, this risk is mitigated by the public market for shares which gives shareholders dissatisfied with management an opportunity to exit the vehicle. This is, of course, preferable to being an investor in a private company. The result tends to be that shareholders express their opinions by exit rather than voice.[113] Should sufficient people be unhappy with the management of the vehicle, the share price will be driven down. This can be minimised in practice through the use of dividend policies.[114] The use of such techniques by managers to keep owners happy has the potential to keep a check on owner/manager agency costs – but these techniques are not universally used. Indeed, the exercise by a dissatisfied owner of exit over voice, may resolve the agency cost experienced by that specific owner, but offers no solution for the firm as a whole.

We can therefore see that agency costs within this category generally rise the further along the spectrum of complexity one goes. Although LLPs have lower risks in this category than LPs as the former have only one category of actor whereas the latter divides the actors into management and passive investors.

2.6. Situations Generating Agency Costs between the Majority and the Minority

The final category of situations giving rise to agency costs are those between the minority and the majority. The close nature of the partnership creates the potential for this to arise, in that majorities are more likely to form.[115] Once again, agency costs in this category are reduced where owners are able to exit the firm. Partners are able to fix a set period for their firm, or if no period is set, they are able to determine the partnership at any time and withdraw their investment.[116] This provides a minority partner with an opportunity to withdraw her capital from the firm at any time, which lowers majority/minority agency costs. The ability to exit a firm prevents agency costs suffered by the minority: the majority have no incentive to abuse their dominant position, as this would result in having to liquidate the firm to return funds to the minority should they feel disenfranchised.

[113] See AO Hirschman, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organisations, and States* (Harvard University Press 1970).
[114] See BR Cheffins, *Corporate Ownership and Control: British Business Transformed* (OUP 2010) 77.
[115] Easterbrook and Fischel, 'Close Companies' (1986) 38 Stanford Law Review 271; C O'Kelley, 'Filling Gaps in the Close Corporation Contract: A Transaction Cost Analysis' (1992) 87 Northwestern University Law Review 216.
[116] Partnership Act 1890, s 26,

2.6.1. LP Costs

LPs cannot be dissolved at the will of a limited partner.[117] Unless the partnership agreement stipulates otherwise, the consent of the general partner(s) is required to transfer a limited partner's share to another party.[118] Therefore, unlike in the general partnership, a limited partner does not have a way of exiting the partnership. This gives rise to the potential for agency costs to arise in this category, but once again they are mitigated by practice: limited partners are excluded from management, and therefore cannot manage the LP in a way adverse to the interests of a limited partner. We have seen that market practice (responding to legal stimuli) means that general partners do not have sufficient capital invested in the LP to secure a sufficiently dominant ownership stake to create this form of agency costs. They have unlimited liability for the debts of the LP and, therefore, any asset, including a valuable stake in the LP, can be recovered by the LP's creditors. As a result, those with dominant ownership have no management rights, and those with management rights have no incentive to form a majority. Thus the form of the limited partnership creates the potential for agency costs to arise in each category of agency costs, but the practical effects of using this form reduces these Costs.

2.6.2. LLP Costs

A member of an LLP cannot dissolve the LLP at will. However, LLPs have no capital maintenance rules and so members are able to withdraw capital from the LLP[119] subject to the clawback rules noted above. This means that minority interests are able to exit their investment subject to the LLP agreement. These rules have the effect of lowering majority/minority agency costs. However, they also increase externalities between the LLP and third parties, as third parties are at risk if all members withdraw their capital. This can be seen as an example of a displacement of an agency cost: attempts to reduce Costs in one category, result in increased Costs elsewhere. These, in turn, require mitigation by way of the clawback regime.

2.6.3. Company Costs

Shareholders in private companies, however, are open to the risk of an agency cost within this category due to the likely concentrated ownership of the vehicle creating the risk of an

[117] Limited Partnership Act 1907, s 6(5)(e).
[118] ibid s 6(5)(b).
[119] Lindley and Banks, para 2-41.

owner majority. Agency costs within this category are higher than within traded and non-traded public companies as there is not (and cannot be) a secondary market on which to sell their shares. The absence of a liquid market and the inability to withdraw capital means that there is no easy way for minority shareholders to exit the company and recoup their investment if the majority acts in a way which generates agency costs. Easterbrook and Fishel argue that this is not the direct harm it appears to be:

> Consider the extreme case in which a majority shareholder appropriates 100% of the firm's income for himself. Even if a minority stockholder had an unrestricted ability to sell his shares, nobody would buy them. Illiquidity is not the problem.[120]

Instead, they identify four main problems inherent in closely held firms: valuing the residual claim becomes difficult; the absence of an easy exit means that investors who need cash may push for distribution rather than exit; an investor cannot rely on the monitoring power of the market which helps constrain and align managers' interests to those of the vehicle; and it prevents future capital raising by preventing people from valuing the stake they should receive in exchange for an established investment.[121] The result of these is to increase agency costs for minority shareholders in private companies. These costs do not exist in isolation: majority shareholders normally exercise control over the composition of the board of directors.[122] Accordingly, agency costs in this category can manifest in two ways: directly between majority and minority shareholders; and between (minority) shareholders and managers. The latter can be seen as an indirect manifestation of an agency cost arising between majority and minority shareholders.

Rock and Wachter offer three examples. First, a minority and majority shareholder are both employed by a close company. The majority of value extraction is by salary. The majority shareholder sacks the minority shareholder, leaving her without income from the investment, with no ability to leave, and with little value remaining for dividends. Second, a majority shareholder encourages the company to buy back its own shares but not those of the minority shareholders. Third, a majority shareholder sells its stake in the company without bringing the minority shareholder along with it.[123] Other examples of this indirect manifestation can

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[120] Easterbrook and Fischel, 'Close Companies' (1986) 38 Stanford Law Review 271, 275.
[121] ibid 275–276.
[122] Companies Act 2006, s 168 contains a statutory right for a shareholder majority to remove a director, and the ability to appoint directors is contained in the articles of association (Gower and Davies, para 14-24). The default position is for appointment by majority (see Model Articles), but if not even the majority are able to amend the articles of association.
[123] Rock and Wachter, 'Waiting for the Omelette' 202–203.

be easily imagined: timing dividends and corporate transactions to suit majority shareholders, and a myriad of other decisions by management which are, directly or tacitly, influenced by the preferences of a majority shareholder. Empirically, majority shareholders receive greater financial reward than is justified by their proportion of equity holding.[124] It has been argued that this is a trade-off: minority shareholders allow majority shareholders to receive private benefits in exchange for undertaking advanced monitoring of the firm.[125] However, in light of what has been said above, it is a further manifestation of agency costs within this category.

Agency costs between majority and minority shareholders in public companies are lower than in private companies because of the application of the Takeover Code.[126] This provides that when a shareholder hits an ownership threshold (currently 30%) she must make an offer for all shares issued by the vehicle.[127] This discourages shareholders from reaching the thirty per cent threshold and obtaining a majority. Accordingly, to generate agency costs, a shareholder would need to negotiate with other shareholders to form a coalition. However this would have to be done on a case-by-case basis to avoid the coalition being seen to be shareholders acting in concert and, therefore, to be deemed jointly to have triggered the threshold.[128] It is possible for a comparative majority to create costs in this category. For example, if one shareholder holds 29.9 per cent of the shares in a public limited company and all other shareholdings are held in amounts of 0.1 per cent, then the 29.9 per cent shareholder would be the most dominant shareholder. However, the collective ability of the other shareholders to override the dominant shareholder, means that agency costs within this category are lower than within the private limited company.

Traded companies within this category have even lower agency costs as shareholders are able to exit the company at the then-prevailing rate. Accordingly, although they are not able to withdraw their capital from the firm, they are able to exit their investment. If a dominant 29.9 per cent shareholder acts oppressively, smaller shareholders will exit so depressing the price of the traded vehicle. This acts as a disincentive for the dominant shareholder to act oppressively, which lowers the agency costs for trade companies in this category.

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[124] L Enriques and others, ‘The Basic Governance Structure: Minority Shareholders and non-shareholder constituencies’ in Kraakman and others, *Anatomy of Corporate Law* 79–80.
[125] RJ Gilson, ‘Controlling shareholders and corporate governance: Complicating the comparative taxonomy’ (2005) 119 Harvard Law Review 1641.
[126] See G Morse ‘Assessing the impact of the Takeover Panel’s Code Committee – Code Reform Institutionalised?’ [2003] Journal of Business Law 314
[127] Takeover Code D3 Rule 2.2.
[128] ibid D14 Rule 2.7.

Thus we see lowered agency costs for partnerships, LPs, LLPs, public companies, and traded companies within this category. However, we see a high risk of agency costs for private companies within this category by way of both direct manifestation (majority shareholders receiving financial benefits exceeding their pro rata shares) and indirect manifestation (management acting in the interests of the majority).

2.7. Conclusion

We have reviewed the situations which create Costs in different types of firm. They can be summarised as follows:

Entity Type	**Externalities**	**Owner & Manager agency costs**	**Majority & Minority agency costs**
Partnership	Low (unlimited liability)	None (only one legal category)	Low (partners can determine partnership)
LP	Structurally lowered (exclusion of those with limited liability from management)	Structurally lowered (general partner has unlimited liability)	Structurally lowered (LPs excluded from management and GP has unlimited liability)
LLP	Lowered by clawback	None (only one legal category)	Lowered by ability to withdraw capital
Ltd	Lowered by capital maintenance	Lower than other companies due to likely shareholder strength	Highest and exacerbated by lack of ability to exit
Plc	Lowered by higher capital maintenance requirements	High, but the analysis depends on the shareholder base	Lowered by mandatory takeover code

		(whether akin to ltd or traded)	
Traded	Lowered by even higher capital maintenance requirements	Highest	Lowered by mandatory takeover code and exit

Incentives for externalities are linked to limited liability. The LP provides partial limited liability, and through its structure the incentives for externalities are lowered. Situational risks for all types of company with limited liability are the same in this category, but are reduced by capital maintenance rules. Owner/manager agency costs are linked to whether there are separate categories within the firm, and the ability of the owners to collectivise their powers to keep managers in check. The traded company faces the highest potential agency costs within this category, although the ability of shareholders to exit freely is a limiting factor.

Majority/minority agency costs depend on the ability of a majority to form and the ability of a minority to exit. These costs are highest in private companies: shareholders are better able to form majority blocks, and minorities are unable to exit. We can therefore see two areas of high agency costs within UK firms: between owners and managers in traded companies; and between the majority and the minority in private companies.

The foregoing identifies the Cost-generating situations which can arise. However, this does not tell the entire story in that it fails to reflect any restraints there may be on these costs manifesting. Strong management and weak, diverse ownership alone, or a shareholder owning 51 per cent of the shares in a company while her fellow 3,000 shareholders each owns a single share, does not in and of itself create a problem for the owners or minority respectively. The existence of a situation giving rise to a Cost does not mean that such Cost will automatically manifest – this depends on whether there are legal restraints to the actual manifestation of the cost in question: the legal rules governing the five manifestations of the three Costs identified. Accordingly having established the likely Costs across different types of firm, it is necessary to establish legal responses to manifestations of these Costs. The mere existence of situations causing these Costs is not sufficient: there needs to be an opportunity for the Cost generator to actually manifest the Cost to create a concern.

CHAPTER 3

3. PROTECTING AGAINST MANIFESTATIONS OF COSTS IN FIRMS

3.1. Introduction

It is one thing to have incentives to create Costs, and another thing to be able to act on such situations in a way which manifests these Costs. We have already examined structural incentives which create the potential for Costs within firms and have established that the most common situations giving rise to the potential for Costs stem from the owner/manager agency cost for traded companies and the majority/minority agency cost for private companies. It is therefore necessary to explore manifestations of Costs.

Manifestations of Costs can only occur when a firm does something: if firms remain passive, asset-holding vehicles there is no opportunity for Costs to manifest. It is only when decisions are taken – and activity undertaken – that these Costs can manifest. We have further seen that the potential for Costs is created by situational incentives. Costs will therefore be manifested in any manner in which the actors can manifest them. Five methods of manifestation have been identified. However, as Costs are intangible there is limited value in trying to explore an exhaustive list of specific manifestations between the categories of actors or the legal response to these manifestations. Instead, we need to undertake a broader analysis to understand what can be deduced as regards legal responses to the manifestation of Costs. The best way to analyse manifestations of Costs is to explore the laws applicable whenever a firm does anything. This chapter, therefore, examines the rules applicable within firms when they attempt to do something. It explores three categories of rules used within firms: rules relating to the capacity of the firm; protection for third parties when dealing with the firm; and governance rules in respect of the firm. We then turn to the types of rules which may be used in any given situation. These rules vary, depending on the level of optionality available to the participants, from those that do not apply unless the parties opt-in (permissive rules), those that apply unless the parties opt-out (default rules), those with which parties must either comply or explain their non-compliance (comply-or-explain rules) and lastly, those rules which parties cannot opt out of (mandatory rule). This chapter then examines how these rules are used in firms. This will result in a matrix which clarifies the types of rules used within different categories of firm. This matrix has columns setting out the different categories of costs and rows outlining the different types of rules. Populating this matrix will provide a pathway to an analysis of rule usage: we can see when different types of rules are used in different categories of rules across different types of firm. By

mapping this matrix to Costs, we can identify which types of rules are used in different circumstances and why.

3.2. Categories of Rule

Before acting, the firm must first decide to undertake the activity concerned. Whenever the firm does anything, there are rules which provide who can bind the firm and act in its name. We can discern three subcategories of rules.

Capacity rules dictate whether a firm may undertake the activity proposed at all. For example, a rule which allows participants to state that their legal entity is only entitled to undertake certain activity, and for the firm to not be bound outside this activity, is a capacity rule. If an action is within the capacity of the firm, the participants need to establish whether the firm wishes to undertake such activity. *Governance rules* are internal rules in that they do not involve any external interaction or activity; they dictate the internal mechanics when an entity decides to do something. These can be contrasted with *third-party protection rules*, which lay down protection for third parties whenever a firm undertakes any activity. The third-party protection rules we consider are those that apply whenever there is doubt as to whether the vehicle has performed an action, or whether one of the actors for the vehicle acted in a manner outside her authority for which the vehicle should not be held responsible. In other words, third-party protection rules regulate how a firm interacts with third parties. Third-party protection rules proceed from the premise that the action itself may be undertaken by the firm.

There are additional rules which dictate what any firm can do. These are *external rules* which govern the activities of any entity. Thus, criminal law imposes centrally-established punishments if activity breaches these rules; tort/delict provides a bilateral remedy for wronged parties if activity breaches the rules; and contract law provides a bilateral remedy for a wronged party if activity breaches obligations undertaken by the breaching party. As external rules apply equally across the full range of legal persons, they are not included under capacity rules. Rather, we concentrate on the rules which limit the capacity of the firm specifically. These types of rules also map on to Costs more generally: governance rules cover owner/manager, and majority/minority interactions, whereas third-party protection rules cover interactions between the firm and third parties. Capacity rules govern interactions between the firm and third parties, but also between managers and owners.[129] The rest of

[129] Although, as we shall see, the ability of capacity rules to influence manager/owner agency costs has diminished over time and is now limited.

chapter analyses the governance, third-party protection, and capacity rules applicable to key firms under UK law. It also maps them on to responses to manifestations of Costs. In order to analyse rules applicable within each category, it is also necessary to establish what choice of rules are available within any category of rules. We can then establish discernible trends as to the application of different types of rules to the different categories of rules across different legal entities. These categories of rules, consequently, provide the columns in the matrix of rule type.

3.3. Types of Rule

How do we classify the types of rules deployed within our three categories? Law has historically provided several taxonomies of legal rules. Analysis of law and economics in the 1980s,[130] divided rules into property rules (where a party had a right which she could bargain away), liability rules (where a party had to pay an objectively-calculated amount if she injured another) and inalienable rules (which could not be deviated from).[131] However, this taxonomy has become less relevant over time, as law and economics consider there to be little economic merit in either of the final two options: if ability to injure is established then there are limited arguments in favour of the amount to be paid for such injury being set by a third party rather than the injured party, and taking matters one step further, economic orthodoxy indicates that one should be able to alienate such rights as one desires in exchange for whatever one sees fit. The result is that the property rule element has become the dominant tool for theorists, so rendering the taxonomy of limited worth.[132] This narrowing of focus created analytical space for a new taxonomy of rules to be created in the context of corporate law: that between permissive rules,[133] default rules, 'comply-or-explain',[134] and mandatory rules.[135]

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[130] See EA Posner, 'Economic Analysis of the Law after Three Decades: Success or Failure?' (2002) 112 The Yale Law Journal 829.
[131] See G Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harvard Law Review 1089, 1092.
[132] See RA Epstein, 'A Clear View of the Cathedral: The Dominance of Property Rules' (1997) 106 The Yale Law Journal 209.
[133] See BR Cheffins, *Company Law Theory, Structure and Operations* (OUP 2008) 227–263, and discussion in Hardman, *The Duomatic Principle* para 2.1.3.
[134] See Gower and Davies, para 14-78.
[135] Also known as 'immutable' rules – see I Ayres and R Gertner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 The Yale Law Journal 87; or 'inalienable' rules. – see G Calabresi and A Douglas Melamed, (1972) 85 Harvard Law Review 1089.

Permissive rules are those to which parties can opt-in. They are therefore generally stated to enable pre-established frameworks of otherwise 'doubtful legal validity' which the law creates expressly to allow such activity – for example, the framework for limited liability.[136] This analysis applies equally to parties opting-in to apply specific contractual terms which have been previously tested by the courts.[137] For example, if courts have previously held that a certain type of discretion accorded to one counterparty must be applied reasonably,[138] then including that type of discretion in a contractual arrangement between two parties 'opts-in' to that legal regime.

Default rules are rules which parties are able to elect not to apply should they wish. Default rules can be regarded as 'opt-out' rules. For example, laws of intestacy provide a default set of rules for the division of someone's estate, which the individual can alter if she wishes.[139] Similarly, the transfer of title in goods is subject to default rules which can be amended by express or implied agreement.[140] Default rules have, therefore, been said to be 'gap fillers' in contracts;[141] they exist until and unless expressly excluded.

'Comply-or-explain' is the tool under which market participants can choose either to comply with a provision, or to explain their non-compliance. The aim of the tool is to encourage disclosure of sub-optimal behaviour,[142] which in turn allows the market to react appropriately to such disclosure. Fear of such negative reaction, it is hoped, will discourage such sub-optimal behaviour. As such, the approach may only produce results for shareholders and not for wider stakeholders.[143] It has been stated, however, that the principle offers 'maximum flexibility to extremely diverse fields of activity, incentives and strategies'.[144] This approach has been criticised as encouraging a tick-box exercise which can ignore the reasons behind non-compliance and not sufficiently analyse the quality of

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[136] Cheffins, *Theory, Structure and Operations* 250–256.
[137] See TD Rakoff, 'Social Structure, Legal Structure, and Default Rules: A Comment' (1993) 3 Southern California Interdisciplinary Law Journal 19.
[138] See R Hooley, 'Controlling Contractual Discretion' (2013) 72 The Cambridge Law Journal 65.
[139] See AJ Hirsch, 'Default Rules in Inheritance Law: A Problem In Search of its Context' (2004) 73 Fordham Law Review 1031. This analysis avoids the Scottish complication of the 'legal rights' to moveable estate enjoyed by close family members under Scots law, but the general principle is illustrative. See H MacQueen and Lord Eassie (eds), *Gloag and Henderson on the Law of Scotland* (14th edn, W Green 2018) paras 38.08–38.15.
[140] Sale of Goods Act 1979, s 18.
[141] See R Barnett, 'The Sound of Silence: Default Rules and Contractual Consent' (1992) 78 Virginia Law Review 821.
[142] K Sergakis, 'Deconstruction and Reconstruction of the "Comply or Explain" Principle in EU Capital Markets' [2015] Accountancy, Economics and the Law 233, 239.
[143] I-M Esser, I MacNeil and K Chalaczkiewicz-Landa, 'Proposed revisions to the UK Corporate Governance Code: a step forward in recognising a company's responsibilities towards wider stakeholders?' [2018] Company Lawyer 254, 255.
[144] Sergakis, [2015] Accountancy, Economics and the Law 233, 256.

compliance.[145] The ‘comply-or-explain’ approach is described as a ‘Pascalian Wager’ to be used by policy makers: either the policy achieves compliance or it causes no harm and so is worth trying.[146] Comply-or-explain displays similar characteristics to default rules, in that the actors are able to opt out. However, the purpose of comply-or-explain is to discourage opting out: in order to opt out, actors must disclose why they have opted out to the market. This means that comply-or-explain forms its own sub-type of rule: it is a deliberate attempt to make actors more likely to follow the rule than if it were a pure default rule and, therefore, is a ‘stickier’ rule than a default rule.[147]

Mandatory rules are those that cannot be contracted out of. They therefore always apply regardless of intention. Parties cannot, for example, contract out of criminal law. These rules are commonly designed to protect parties who may not be yet be known or knowable – general torts and criminal law act to discourage behaviour which may result in future damage to the public, rather than to protect specific, known individuals. In addition, they can be used to protect against known risks which are not otherwise adequately protected.

When examining the manifestation of Costs, we need to evaluate whether mandatory, permissive, comply-or-explain, or default rules should be used in firms. Having done so, we examine how these types of rules are used within the categories of governance, third-party protection, and capacity rules in UK commercial law: they form the rows of our matrix.

3.4. What type of rules should be used

Which of these rules should apply to firms? The modern consensus is that corporate law consists of a series of default rules which can be varied by market participants.[148] This matches the conception of the company as a ‘nexus of contracts’,[149] with market participants able to choose the rules that best apply to their corporate form.[150] If this is the case, then rules should primarily be default rules.

Cheffins strengthens this analysis by highlighting two main weaknesses in mandatory rules. Firstly, it is difficult to get a mandatory rule correct. Law makers either tend to impose rules

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[145]ibid 271.
[146] J-C Duhamel, ‘The "Comply or Explain" Approach as a Pascalian Wager’ [2015] Accountancy, Economics and the Law 289.
[147] BH McDonnell, ‘Sticky Defaults and Altering Rules in Corporate Law’ (2007) 60 SMU Law Review 383.
[148] Cheffins, *Theory*, *Structure and Operations* 218–221.
[149] Jensen and Meckling, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 305
[150] FH Easterbrook and DlR Fischel, *The Economic Structure of Corporate Law* (HUP 1991).

which all corporate participants would anyway apply – so what is the point – or to impose inefficient rules which market participants would not otherwise adopt. Neither of these is good for the corporate market. Secondly, when a mandatory rule is inefficient (either by design or following supervening events) it is difficult to update it. Limited bandwidth of law makers means that market participants may be stuck with rules which they do not want for prolonged periods. Accordingly, Cheffins concludes that corporate law should proceed on the basis of default rules rather than mandatory rules.[151]

Gordon, however, offers five potential reasons for corporate law to proceed on a mandatory basis:

(a) to protect investors. Managers are likely to have more information than investors, and therefore mandatory rules have a role in protecting investors from victimisation by managers;

(b) to provide certainty. If each company proceeds on entirely different rules, then the participants in the marketplace may not be aware of how their particular arrangement will be construed. If all companies proceed on the same, mandatory set of rules, those rules are more likely to be tested in the courts and so offer greater certainty;

(c) to provide a public good. Contractual freedom between participants in the corporate venture will result in externalities for third parties (including creditors and other stakeholders) which can be avoided by way of a mandatory form;

(d) to improve the innovation of the rules governing companies. This can be seen as related to point (b) above: if all companies are subject to the same mandatory rules then debates about improving those rules will be centred on one set of rules. Applying minds to the same set of rules is likely to improve those rules; and

(e) to prevent opportunistic amendment by dominant stakeholders at different points in the lifecycle of the company.[152]

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[151] Cheffins, *Theory*, *Structure and Operations* 262.
[152] JN Gordon, 'The Mandatory Structure of Corporate Law' (1989) 89 Columbia Law Review 1549, 1556–1585.

Gordon's analysis is based on the notion that mandatory rules act to protect those who will invest, weaker stakeholders, and those with less knowledge. Gordon's argument is epitomised by his final bullet point: default rules allow for opportunistic amendment by dominant parties. There is, therefore, a place for mandatory rules in protecting interests within a firm. This can, however, sit with Cheffins's argument that rules should be default if this is reformulated to provide that default rules should be used unless the interests of any category of actor need to be protected. The interests which require to be protected map on to our three Cost-generating situations. The way to protect those interests is to mitigate against our five manifestations of Costs. This protection can also be achieved via the comply-or-explain route encouraging best practice within the firm. Comply-or-explain works by requiring disclosure of the reasons for opting out of rules. This can only be effective in achieving policy goals if the act of disclosure has an effect on the business entity. In any untraded company, the most important effect of such disclosure – that on the price of issued shares in the company – is eliminated. The other effect of failing either to comply with a provision of the UK Corporate Governance Code or explain non-compliance, is that the traded company breaches the listing rules if it is listed on the main market.[153] This may, in turn, bring sanctions on the company. Thus, when faced with no market to react to negative disclosure, and no regulator to force compliance or disclosure, it seems that moving 'comply-or-explain' to a non-traded firm will offer little benefit.

Proponents of a default-rule approach emphasise the contractual flexibility the approach offers: when faced with a default rule, those who value it will observe it, whilst those who do not will be able to bargain it away.[154] That mandatory rules have any place within this analysis is disputed as geographical flexibility as to jurisdiction of incorporation means that, ultimately, no rules are mandatory: companies can be incorporated globally according to rules they prefer[155] so making every rule optional. This approach is frequently criticised: involuntary creditors (ie, tort victims) cannot price any interaction and so cannot be defended by a default rule,[156] imperfect information between the parties may result in the bargain being ineffectively struck,[157] and the disparity in bargaining power between those who need protection and those who would oppress means that the market for default rules does not

[153] The listing rules are contained in the Financial Conduct Authority Handbook, available at https://www.handbook.fca.org.uk/handbook/LR.pdf accessed on 5 December 2019 (the '**Listing Rules**'). See Listing rule 9.8.6R(6)(b).
[154] Easterbrook and Fischel, *Economic Structure of Corporate Law* 50–52.
[155] See Romano, (1989) 89 Columbia Law Review 1599.
[156] H Hansmann and R Kraakman, 'Towards Unlimited Shareholder Liability for Corporate Torts' (1991) 100 Yale Law Review 1879.
[157] Cheffins, *Theory*, *Structure and Operations* 127.

operate in the way proposed.[158] In addition, we have seen that when it comes to selecting a business entity, choice is actually illusory, and that the 'menu' approach means that once business characteristics have been chosen, there is no choice of business entity. It may therefore be that there is less flexibility within the market, and that mandatory elements play a larger role than initially envisaged by Cheffins.

Accordingly, our theoretical proposition is that rules should be default rules unless there is a high Cost which needs to be mitigated, in which case alternative solutions should be found. Does this match how rules are used in practice within the UK? In order to establish this, we shall now review the types of rules which are used across capacity, third-party protection, and governance rules across different types of firm in the UK. This will enable us to populate our matrix and see when different types of rules are used across different categories of rules in different types of firms.

3.5. Capacity Rules

Capacity rules dictate whether the firm can undertake an activity. There are very few capacity rules which apply to partnerships. Generally, anything that an individual can do a partnership can do. There are, however, two key limitations. Firstly, a partnership must be formed with a view to making a profit. This includes 'every trade, occupation or profession',[159] and need neither be repeated nor endure for a prolonged period.[160] This has been interpreted permissively, including issues that are not generally regarded as those of a business.[161] The two or more people do not all need to be active in the business for a partnership to exist,[162] and they do not need to be carrying on the same business – provided there is some form of mutuality between them.[163] The important thing is the intention to make a profit, rather than actually realising that profit.[164] The second limitation relates to illegal partnerships.[165] This is an extension of the general rule that illegal contracts are unenforceable.[166] Thus, when one highwayman sued another highwayman for his share of

[158] WW Bratton, 'Game Theory and the Restoration of Honour to Corporate Law's Duty of Loyalty' in Lawrence E Mitchell (ed), *Progressive Corporate Law* (Westview 1995).
[159] Partnership Act 1890, s 45.
[160] Lindley and Banks, para 2-02.
[161] *Smith v Anderson* (1880) 15 Ch D 247.
[162] Lindley and Banks, para 2-06.
[163] ibid para 2-07.
[164] ibid para 2-09.
[165] ibid ch 8.
[166] ibid para 8-01.

the spoils of their joint adventure, the court held that no valid partnership existed.[167] However, there is no presumption of illegality in a partnership – the party alleging illegality must prove it.[168] The two capacity rules outlined above are mandatory. They are, however, couched widely – every opportunity to deem a partnership as falling within the test of partnership is taken. Conversely, illegality must be proved. Accordingly, the mandatory capacity rules for partnerships are set in a broad way.[169] This approach is the same for LPs.

An LLPs' capacity is unlimited.[170] The explanatory notes to the Act introducing LLPs state that an LLP 'will, therefore, be able to undertake the full range of business activities which a partnership could undertake'.[171] Actually, an LLP's capacity is wider than that of a partnership: there are certain, albeit limited, circumstances in which a putative partnership would not be a valid partnership. However, the position is different for an LLP – once a certificate of registration of an LLP has been issued, it serves as conclusive proof that the LLP exists.[172] The courts have been quick to hold that the law applicable to partnerships does not apply to LLPs unless specifically enacted otherwise.[173] It is true that an LLP requires more than one member on its incorporation, and that these members must carry on a lawful business with a view to a profit.[174] This, therefore, appears to correspond to the requirements for a partnership. However, once an LLP is incorporated this test has been passed. If the membership of an LLP falls below two, the effect is not that the separate personality and incorporated nature of the LLP fall away. Rather, after six months the sole member becomes liable for the debts of the LLP on a *joint and several* basis with the LLP.[175] This means that the LLP retains unlimited capacity, but the sole member acquires liability for such debts in addition to the liability of the LLP. This places the LLP in line with the LP and the partnership as having mandatory capacity rules. However, as opposed to partnerships, the LLP's capacity rules contain no protection for its members to argue that the LLP is not bound.[176] Accordingly, the LLP's mandatory rule is more difficult to avoid than the broadly-couched mandatory rules for the partnership and the LP.

[167] ibid para 8-09.
[168] *Ward v Newalls Insulation Co Ltd* [1998] 1 WLR 1722; Lindley and Banks, para 8-01.
[169] See also discussion para 3.6 in the context of third-party protection rules.
[170] Limited Liability Partnerships Act 2000, s 1(3).
[171] Explanatory note to Clause 1 of the Limited Liability Partnerships Act 2000, available at https://publications.parliament.uk/pa/cm199900/cmbills/108/en/00108x--.htm accessed on 5 December 2019.
[172] Limited Liability Partnerships Act 2000, s 2(4).
[173] *Moto Self Drive (UK) LLP v Revenue and Customs Commissioners* [2010] UKFTT 142 (TC) and *Sword Services Ltd v Revenue and Customs Commissioners* [2016] EWHC 1473 (Admin).
[174] Limited Liability Partnerships Act 2000, s 2(1)(a).
[175] ibid s 4A(2).
[176] Partnership Act 1890, s 5.

We have seen that capacity rules are linked to externalities, and that LLPs have a higher situational risk of externalities due to the presence of limited liability. It is, therefore, logical that an LLP has wider capacity than an unincorporated partnership, which aligns to our theory that default rules should be used unless there is an interest to protect which should be covered by other types of rules – in this case, mandatory rules. Capacity rules also link to protection against owner/manager agency costs, although this is irrelevant in the partnership and the LLP which each only has one category of actor.

Capacity rules in companies have a long history.[177] The concept of a company not being able to enter into an arrangement because matters were *ultra vires* was transported from public law.[178] Nyombi flags that its initial purpose was twofold: to protect investors by limiting corporate activity to matters expressly provided for in the constitution; and to protect third parties from companies overstepping the activities they were created for, each of which maps neatly to the owner/manager agency costs and externalities respectively. However, once members were able to ratify ultra vires acts, the protection for third parties decreased.[179] Indeed, this changed the concept of an agreement being set aside on the ground of a lack of capacity from something which protected third parties, to something which actively hindered them – they could no longer prevent a company from acting on the ground that the action fell outside its constitution.[180] This rule left third parties exposed; whilst they were entitled to assume that any procedural requirements in the company's articles had been met, a company would not be bound if the matter fell entirely outside its capacity. This increased the direct manifestations of externalities to a higher level than the protective function served by using rules in this category to mitigate direct and indirect manifestations of agency costs between owners and managers. As a result, the Companies Act 1989 added a new provision which stated:

> [T]he validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum.[181]

This formulation remains in the Companies Act 2006 but with a slight amendment – the word 'memorandum' has been expanded to 'constitution'.[182] This means a company has

[177] C Nyombi, 'The gradual erosion of the ultra vires doctrine in English company law' (2014) 56(5) International Journal of Law and Management 347.
[178] *Colman v Eastern Counties Railway Company* [1846] 10 Beav 1.
[179] Nyombi, (2014) 56(5) International Journal of Law and Management 347, 348.
[180] *Mills v Northern Railway of Buenos Aires Co* [1870] 5 Ch App 621.
[181] Companies Act 1989, s 108.
[182] Companies Act 2006, s 39.

unlimited capacity vis-á-vis third parties.[183] However, whilst a company cannot evade liability on the basis of its own incapacity,[184] shareholders may use the courts to restrain an action by the directors which is outside the company's powers,[185] and directors have duties to act in accordance with the company's constitution.[186] Accordingly whilst action in breach of the constitution will still stand unless specifically injuncted,[187] it may have consequences for directors. For our purposes, it suffices to note that from the perspective of a third party, the capacity of a company is unlimited. This is therefore a mandatory rule of the same type as for an LLP, but is more difficult for the vehicle to use to escape liability than the mandatory rules which apply to partnerships more generally. This formulation of the capacity rule, therefore, provides greater protection for third parties dealing with a company and so mitigates manifestations of externalities arising from companies opportunistically attempting to escape agreements. Its ability to mitigate manifestations of owner/manager agency costs also remains via the rights of owners to act against managers. Capacity rules have, however, changed over time from narrowly-construed means by which to protect shareholders from owner/manager agency costs, to widely-construed means of protecting third parties when the harm they suffer from the application of the former approach outweighs the benefits.

The same general framework applies to public companies.[188] However, there are additional restrictions, including the prohibition on a public company providing financial assistance in respect of its own shares. Financial assistance means giving or loaning money to, guaranteeing the debts of, waiving or releasing rights, or otherwise reducing assets[189] of a public company, in each case to help someone acquire shares in the assistance provider.[190] Prohibitions on financial assistance have a long provenance under UK law, but have been watered down over time. The Companies Act 1985 permitted financial assistance by private companies if a certain procedure – known as a 'whitewash' procedure – was followed.[191] This procedure triggered the start of the private equity boom in the UK.[192] The Companies

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[183] Hardman, *Granting Corporate Security* para 2-09.
[184] See Gower and Davies, para 7-15 more generally.
[185] Companies Act 2006, s 40(4).
[186] ibid s 171.
[187] ibid s 40(4) specifically provides: 'But no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company.'
[188] The section reviewed above applies to all companies.
[189] Companies Act 2006, s 677(1).
[190] ibid s 678.
[191] Companies Act 1985, ss 155–158.
[192] C Kerrigan, 'Private equity and regulation' (2010) 7 Journal of International Banking and Financial Law 400.

Act 2006, removed this procedure but only prevented public companies and their subsidiaries from providing financial assistance.[193] The precise effect of breaching this provision has been debated. It was initially held that the only effect of a breach was punishment of the officers involved, and so the unlawful financial assistance remained effective.[194] Gower and Davies refer to these decisions as 'calamitous' and now 'accepted to be heretical'.[195] The current position, confirmed by the House of Lords, is that unlawful financial assistance is unenforceable by either party.[196] This also applies to other parts of transactions which cannot be severed from the unlawful financial assistance.[197] The prohibition on financial assistance for plcs therefore limits the activity that they can undertake compared to private limited companies. This would appear to increase the risk of externalities manifesting by providing categories of action which can be ex poste declared void. However, in substance this prevents a firm's resources from being diverted to, ultimately, its shareholders. Accordingly, it acts to keep funds within the firm and helps protect third parties and, further, illustrates the purpose of capacity rules. These capacity rules apply equally to traded firms.

Capacity, therefore, provides us with our first insight into the operation of rules. All capacity rules reviewed are mandatory. We can, however, see a shift in their focus over time: for companies, these rules initially helped investors to protect against manifestations (both direct and indirect) of agency costs suffered by owners. But, given that this resulted in increased manifestations of externalities, these protections were removed and replaced with rules which protect third parties. All capacity rules are currently couched in wide terms. All act to mitigate Costs: primarily those suffered by third parties, but also those suffered by owners in certain situations. Within these mandatory rules we can see differentiation. For most matters, partnerships and LPs will find it easier to allege that the action sat outside their capacity under the mandatory rules applicable to them, than will LLPs and companies. These differing levels correspond to the Cost risk identified for third parties: they are lower for partnerships (and, to a slightly lesser degree, LPs) as some or all partners are subject to unlimited liability. This means that third parties have wider recourse to the owners of the firm. Accordingly, there is less of a need to protect third parties from externalities and so the mitigation of manifestations can be lower. Capacity rules are all mandatory rules, which

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[193] Companies Act 2006, s 678.
[194] *Victor Battery Co Ltd v Curry's Ltd* [1946] Ch 242 and *Selangor United Rubber Estate Ltd v Cradock (No 3)* [1968] 1 WLR 1555.
[195] Gower and Davies, para 13-57.
[196] *Brady v Brady* [1989] AC 755.
[197] *South Western Mineral Water Co Ltd v Ashmore* [1967] 1 WLR 1110. For full discussion, see Gower and Davies, paras 13-44 to 13-59.

mitigate externalities, with the level of obligation depending on the degree of externality that they mitigate.

3.6. Third-Party Protection Rules

We turn now to third-party protection rules. These are rules which dictate when a third party has contracted with the firm in question. Within partnerships, the starting point is that every partner is an agent of the firm and is able to bind the firm in its ordinary business – unless the partner in question is not entitled to do so under any relevant partnership agreement, *and* the third party is aware of that lack of authority, or does not believe that the person in question is a partner.[198] This has been analysed as a two-limb test – generally a partner is able to bind the firm in its ordinary business, and only if that proves to be incorrect, is the second limb necessary.[199] This is reinforced by a provision which states that if the partners agree that one (or more) of them cannot do something, then any act by a partner in breach of such restriction is not binding on someone who knows of the restriction.[200] Similarly, if the partner only purports to undertake activity in her own name and not the name of the partnership, the partnership will not be bound.[201] The partnership is not liable if one partner, without the authority of the others, pledges 'the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business'.[202] The emphasis falls on the ordinary course of the partnership rather than on the role each partner usually fulfils within the firm;[203] but this is a matter of fact for which guidelines are very difficult to formulate.[204] A partnership cannot itself decide to amend the effect of acts by its partners on third parties. It is therefore not possible for partnerships to decide that third parties acting in good faith are not bound by one partner acting in the course of the partnership's business. This makes the rule mandatory. However, the mandatory rule is rather 'firm-friendly' – the 'binding' test applies only to activities within the ordinary course of the partnership's business. Any third party takes a risk that her interaction with the partnership is not in the ordinary course of the partnership's business and, therefore, that her only recourse lies against the individual partner with whom she contracted rather than against the partnership (and the assets of partners). Accordingly, despite being a mandatory rule, there is maximum flexibility for

[198] Partnership Act 1890, s 5.
[199] *Bank of Scotland v Henry Butcher & Co* [2003] EWCA Civ 67.
[200] Partnership Act 1890, s 8.
[201] *British Homes Assurance Corp Ltd v Paterson* [1902] 2 Ch 404.
[202] Partnership Act 1890, s 7.
[203] Lindley and Banks, para 12-12.
[204] ibid paras 12-14 to 12-18 for a full discussion.

partnerships to pick their 'ordinary course of business'. This corresponds to a lower risk of externality experienced by third parties and in terms of our theoretical framework, a lower need to use mandatory rules to protect third parties against manifestations of externalities.

Third-party protection rules for LPs are based on those for partnerships. General partners can bind the LP whereas limited partners cannot.[205] Lindley and Banks identify two natural extensions – admissions by a limited partner are not evidence against the firm; and notice to a limited partner is not automatically extended to the firm.[206] They also state that a limited partner may be expressly authorised to act on behalf of the firm in the same way as any party can be an agent. This, however, risks the limited partner 'taking part in management' and so losing her limited liability.[207] This may be correct, but is misleading. In order to enjoy such decision-making authority it must have been expressly conferred upon the limited partner by the general partners. Therefore, the underlying decision-making process sits with the general partners rather than the limited partners and the limited partners have no greater general ability to bind the LP than would a putative agent for any natural person. The rules governing the ability of general partners to bind the LP also apply the rules of partnerships more generally.[208] Accordingly, the third-party protection rules as to who may bind the LP are mandatory, and are subject to the same conclusions applicable to general partnerships: it is easy for partnerships and LPs to avoid being bound on the ground that the activities of the relevant partner fell outside the scope of the activities of the partnership, which corresponds to lower externalities and so the less need to use mandatory rules to resolve their manifestations.

For LLPs, all members are agents of the LLP.[209] However the LLP is not bound by a member if she is not in fact authorised to take the action in question,[210] AND, the third party in question is aware of that lack of authority, or does not know or believe that she is a member of the LLP.[211] It has been held that this section is not sufficient to render an LLP liable for fraudulent misrepresentations by a member.[212] Members only bind the LLP if they are acting in the ordinary course of the LLP's business,[213] which ties in with the analysis provided in respect of partnerships more generally. Once again, members cannot opt out of these rules,

[205] Limited Partnerships Act 1907, s 6(1).
[206] Lindley and Banks, para 30-05.
[207] ibid para 30-06.
[208] ibid para 30-01.
[209] Limited Liability Partnerships Act 2000, s 6(1).
[210] ibid s 6(2)(a).
[211] ibid s 6(2)(b).
[212] *Kidd v Paull & Williamson LLP* [2017] CSOH 16.
[213] *Latchworth v Dryer* [2016] EWHC 3424 (Ch) para 153.

which makes them mandatory. This appears anomalous as the risk of externalities is higher in LLPs than other partnerships due to limited liability. However, we have seen that these are lowered by the presence of mandatory clawback rules if members of LLPs withdraw their funds.

A company's internal rules may provide for the point at which the company is bound.[214] Complications arise, however, when it comes to:

> [H]ow to deal with situations where either board or shareholders go beyond the powers conferred to them by the articles…. An immediate question thus arises: is the contract binding on the company if the board (or the shareholders) act outside the powers conferred upon them by the articles of association?... Overall, the development of the law in recent times has been….towards preserving third parties' reasonable expectations that the body purporting to contract as the company had power to do so, even if that power was restricted by the articles…The modern view is thus away from the notion that restrictions in the company's articles on the contracting powers of the board are something with which third parties are expected to familiarise themselves[215]

The change began in the 1800s. *Turquand's case* involved company articles which allowed the directors to exercise the borrowing powers of the company up to an amount set by the shareholders.[216] The company borrowed more than the authorised amount, and attempted to evade liability. Jervis CJ stated:

> We may now take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and the deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have a right to infer the fact of a resolution authorizing that which on the face of the document appeared to be legitimately done.[217]

This has been called the 'indoor management rule'[218] but did not apply to third parties who had constructive or actual knowledge of the lack of capacity.[219] This protection is now enshrined in statute. The Companies Act 2006 states that:

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[214] Gower and Davies, para 7-5.
[215] ibid. Hardman, *Granting Corporate Security* paras 3-9 to 3-25.
[216] *Royal British Bank v Turquand* (1856) 6 El & Bl 327.
[217] ibid 332.
[218] Gower and Davies, paras 7-7 to 7-8.
[219] *Wrexham Associated Football Club Ltd v Crucialmove Ltd* [2007] BCC 139 CA.

> [I]n favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company's constitution[220]

This framework applies to both public companies and traded companies.

Thus we see mandatory third-party protection rules. As with capacity rules, the level at which third-party protection rules are set rises in response to the potential for third parties to be exposed to externalities – as is also the case under capacity rules. Ultimately, mandatory rules in both the capacity and third-party protection categories are used, as Gordon suggested, to mitigate externalities; the higher the risk of externality, the higher the obligation under the mandatory rule.

3.7. Governance Rules

We have seen that modern mandatory capacity rules and third-party protection rules mitigate externalities. There are therefore four categories of manifestations of agency costs which are not affected by capacity or third-party protection rules: direct owner/manager manifestations; indirect owner/manager manifestations; direct majority/minority manifestations; and indirect majority/minority manifestations. These are all covered by governance rules. Governance rules dictate how a firm makes decisions – in short, they govern owners/managers, and majority/minority owner interactions.

3.7.1. Partnerships

For partnerships, the 1890 Act contains a set of rules for the internal governance of the partnership. However, each of these provisions states that it only applies in the absence of agreement to the contrary between the partners.[221] This agreement is not required on the establishment of the partnership, and can be varied at any time:

> The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing.[222]

Therefore, governance rules in respect of partnerships are default rules decided by the partners. Whilst default rules are provided, there is flexibility for the partners to follow them or to opt out. There is, however, a limitation on this flexibility as each partner owes fiduciary duties to each other partner. Indeed, Lord Bacon stated:

[220] Companies Act 2006, s 40(1).
[221] Partnership Act 1890, ss 24(1), 25 and 26.
[222] ibid s19.

> If fiduciary relation means anything I cannot conceive a stronger case of fiduciary relation than that which exists between partners. Their mutual confidence is the life blood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust each other that the business goes on.[223]

Accordingly, partners face limitations in their governance as they must act in a fiduciary manner towards each other. This fiduciary duty is particularly notable as it applies both to each partner's actions in respect of each other partner, and to the firm (unlike, the position for companies which is discussed later). Partnerships are noteworthy for their reduced risk of agency costs: they have a single category of actor. This removes both direct and indirect manifestations of owner/manager agency costs, and indirect manifestations of majority/minority agency costs.[224] Members have the ability to withdraw their capital, lowering risks of majority/minority costs. Therefore, the only manifestation to mitigate against is a direct manifestation of majority/minority agency costs, which is already lower. This means that the majority of rules can be default rules, with the only mandatory protection to mitigate manifestations of agency costs being the mandatory fiduciary relationship between the partners. The content of these fiduciary duties, however, can be adjusted by agreement between the partners.[225]

3.7.2. Limited Partnerships

In terms of the governance rules of LPs, general partners are treated as if they were normal partners in an unregistered partnership. This includes fiduciary duties between partners: even limited partners have a fiduciary duty to every other partner.[226] However, limited partners cannot take part in the management of the business.[227] This rule cannot be contracted out of and is therefore mandatory. LPs generally have only one general partner, which tends to be a special purpose vehicle with limited assets.[228] There is, currently, no cap on the number of general partners.[229] Should there be more than one general partner, a majority of general partners takes decisions on behalf of the firm.[230] This is a default rule which can be varied by express or implied agreement between the parties.[231] Accordingly, the governance rules

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[223] *Helmore v Smith* (1886) 35 Ch D 436, 444; Lindley and Banks, para 16-06.
[224] As without separate management, such agency costs cannot be triangulated.
[225] For example, the duty to not make a secret profit (Partnership Act 1890, s 29(1)) is not triggered if the profit is not secret, and similarly the duty to not compete with the firm has is not breached if such competition is undertaken with the consent of the partners. See *Pillans Brothers v Pillans* (1908) 16 SLT 611.
[226] *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners* [2011] Ch 296 para 11.
[227] Limited Partnerships Act 1907, s 6(1).
[228] Hardman, *Granting Corporate Security* para 2-38.
[229] Limited Partnerships Act 1907, s 4(2).
[230] ibid s 6(5)(a).
[231] ibid s 6(5).

of the general partners are also default rules. This leads to a situation in which the governance rules for limited partners and for the interaction between limited partners and general partners, are mandatory, whereas the governance rules for general partners are default rules. This can be reformulated to the proposition that the category of persons entitled to make decisions is a mandatory rule, but how such decisions may be taken by those entitled to do so is a default rule.

As with general partnerships, those who make decisions have fiduciary duties to their partners. To cast this in the light of manifestations of agency costs, an LP has different categories of managers and owners which introduces the potential for direct and indirect manifestations of owner/manager agency costs and indirect manifestations of majority/minority agency costs. The agency costs between these parties, however, are lower than those in corporate vehicles, and are mitigated by the requirements for fiduciary relationships – this mitigates both direct and indirect manifestations of owner/manager agency costs. The likely majority are limited partners, for the reasons set out above which are, structurally, disenfranchised in an LP, lowering the risk of majority/minority agency costs.

Nevertheless, mandatory rules are used to mitigate these further by two key methods. Firstly, mandatory fiduciary duties mitigate the remaining agency cost in respect of management of LPs by their general partners (which is already lowered by the unlimited liability of general partners), and dominance by the majority. This mitigates both direct and indirect manifestations of each type. Secondly, preventing limited partners from involvement in management of the firm prevents financially dominant limited partners from directing the will of the firm. Furthermore, the unlimited liability of general partners provides a structural disincentive to general partners obtaining a financially dominant stake in the LP. This lowers the risk of such agency costs.

3.7.3. *Limited Liability Partnerships*

The governance rules for LLPs are contained in regulations made under the 2000 Act.[232] These are, however, subject to any other agreement between the members.[233] Accordingly, the governance rules for LLPs are default rules.[234] LLPs do not apply partnership rules,

[232] Limited Liability Partnerships Regulations 2001 (SI 2001/1090).
[233] See Limited Liability Partnerships Act 2000, s 5(a); Limited Liability Partnerships Regulations ibid reg 7.
[234] See also JJ Henning, 'Partnership law review: The joint consultation papers and the Limited Liability Partnership Act in brief historical and comparative perspective' [2004] Company Lawyer 163 and 169.

which has been held to mean that there is no fiduciary duty between one member and another.[235] We can here again see responses to manifestations of agency costs. As with partnerships, there is only one category of actor, removing owner/manager costs and indirect manifestations of majority/minority agency costs from the equation. Also as with partnerships, there are no restrictions on the withdrawal of capital (subject to a clawback rule), which lowers majority/minority agency costs as the minority are able to exit, even though they do not benefit from fiduciary duties. As our two categories of agency costs are lower, there is no need to mitigate their manifestations and so default rules can be used.

3.7.4. Companies: General

There are two key governance bodies in any company. Shareholders receive the residual value in the company[236] and their financial input is limited. When exercising their decision-making powers, shareholders are generally entitled to vote entirely in their own interests.[237] Conversely, directors owe fiduciary duties to the company and the company only.[238] This is an important difference from the position in partnerships. In partnerships, this fiduciary duty is owed to each individual partner, which means that the fiduciary relationship protects each partner, including the minority who receive the benefit of this fiduciary duty and have recourse to any breach of it by another partner. However, for companies this duty is owed to the company itself. This is of more than theoretical importance in that it is fairly easy to conceive of a situation in which the actions of a director can cause harm to an individual shareholder as a way of meeting her fiduciary duties owed to the company. This is not the case in partnerships, as partners owe fiduciary duties to the firm AND to every other partner. Duties to the company translate, during solvency, as the success of the company for the benefit of the members as a whole,[239] and any breach of this fiduciary duty can be ratified by the shareholders.[240] Kershaw and Schuster have pointed out that the success-of-the-company provision in the Companies Act 2006 is, in fact, subject to the proviso that it can be replaced by the interests of parties other than the members as a whole. It is, however, unclear who has the authority to exercise this ability to orchestrate the shift.[241]

[235] *F&C Alternative Investments (Holdings) Ltd v Barthelemy* [2011] EWHC 1731 (Ch).
[236] As on a winding up, any surplus after paying off the creditors is distributed to the shareholders.
[237] *North-West Transportation Co v Beatty* (1887) 12 Appeal Cases 589. See further the discussion in para 6.3.
[238] Companies Act 2006, s 172.
[239] ibid s 172(1).
[240] ibid s 239(2).
[241] D Kershaw and E Schuster, 'The Purposive Transformation of Company Law' (unpublished, on file with the author) 5–9.

Interactions between shareholders and directors are a matter of construction of the articles of association.[242] Thus, whilst the UK is generally seen as a jurisdiction which embraces a form of shareholder primacy,[243] it is impossible to

> make general statements about the typical division of authority between shareholders and the board and management, because that is, in the main, open to be tailored to suit the individual company in question,[244]

In general, however, articles of association confer wide powers on the board.[245] Given that owner/manager interaction is a key area of Costs, this is the first manifestation of high Costs which are not subject to a mandatory rule. Whilst partnerships have no mandatory rules, the risk of Costs within this category is lower than in private companies. Articles are adopted by the shareholders,[246] and thus shareholders retain the power to redress any power imbalance they may perceive. Whilst this may mitigate a direct manifestation of owner/manager agency costs, it exacerbates the risk of indirect manifestations of majority/minority agency costs. Apart from being removed from office, the directors may be stripped of their powers if they act in a manner of which a dominant shareholder does not approve. This threat, or the perception of such a threat, is likely to 'encourage' directors to act in the interests of majority shareholders. These two powers enjoyed by shareholders – to remove directors and to shift powers of the company to the shareholders – therefore constitute the twin exacerbations of indirect majority/minority agency costs. This approach is illogical. Whilst, as we have seen, third parties enjoy protection when dealing with directors as agents of the company, there is no equivalent protection for third parties interacting with shareholders as agents of the company. Whilst third parties are able to rely on statutory provisions as to when a company acting through a director will be bound to a contract, it is unclear at what point a third party can be assured that shareholders are able to bind the firm. In addition, articles generally provide that directors have all the powers of the company and so, in the normal course, shareholders are excluded from acting on behalf of the company. A company is free to choose its articles of association on incorporation and at

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[242] Gower and Davies, para 14-3.

[243] Which means that the shareholders are the primary organ of the company. See A Keay, 'Shareholder Primacy in corporate law: Can it survive? Should it survive?' [2010] European Company and Financial law Review 369. This can be contrasted with the 'director primacy' which is argued to exist in the US whereby directors are the primary organ. See Stephen M Bainbridge, *The New Corporate Governance in Theory and Practice* (OUP 2008) 63, and 'stakeholder primacy', which no jurisdiction fully embraces although there are frequent normative claims that all stakeholders in a company should have equal claims to primacy. See JEO Abugu, 'Primacy of shareholders' interests and the relevance of stakeholder economic theories' [2013] Company Lawyer 202.

[244] Gower and Davies, para14–5.

[245] Cheffins, *Theory*, *Structure and Operations* 603; Hardman *Granting Corporate Security* para 3-02.

[246] Companies Act 2006, s 21(1).

any stage thereafter. Unless the company elects to have different articles on incorporation, the model articles of association set down by the Secretary of State from time to time will apply.[247] The current model articles provide for all powers of the company to be exercised by directors.[248]

3.7.5. *Companies: Directors and Shareholders*

From the above, the need emerges to examine the decision-making rules of each organ of the company. The articles will generally dictate how directors take decisions within their competence.[249] Should the articles be silent, the position is governed by various common-law rules.[250] Certain matters can never form part of directors' decision-making competence. For example, ratification of a breach of duty by a director requires shareholder approval.[251] In addition, if a director of a company, or someone connected with her, enters into a transaction with the company for a 'substantial non-cash asset', shareholder approval is required.[252] An asset qualifies as a substantial non-cash asset if its value: (i) exceeds ten per cent of the company's asset value and is more than £5,000; or (ii) exceeds £100,000.[253] A similar regime applies to loans to, and guarantees of the debts of directors.[254] These provisions mean that there are elements of mandatory rules in the otherwise default regime we have outlined. These mandatory rules aim to prevent the directors from acting in a manner which would enrich them at the expense of the company. All these mandatory rules concentrate on directors acting in their own interests, and so prevent direct manifestations of owner/manager agency costs. Mandatory rules also govern directors' conflicts of interest – they must declare transactional conflicts of interest to the other directors, and any situational conflicts of interest must be authorised by the other directors or by the shareholders.[255] When ratifying any breach by directors, any shareholder connected with the director is excluded from the decision-making process.[256] However, the definition of those connected to a director is restricted to those personally linked to the director[257] – if a director breaches her duties on the instructions of the majority shareholder (who is otherwise unconnected to the director), that shareholder would not be 'connected' and therefore would be able to vote for

[247] ibid s 20.
[248] The Companies (Model Articles) Regulations 2008 SI 2008/3229 Sch 1, art 3.
[249] ibid art 9.
[250] Hardman, *Granting Corporate Security* para 3-06.
[251] Gower and Davies, paras 16-117 to 16-120.
[252] Companies Act 2006, s 190.
[253] ibid s 191.
[254] ibid s 197.
[255] ibid ss 175–182.
[256] ibid s 239.
[257] ibid s 252.

such ratification. These mandatory rules mitigate against directors being interested in third parties involved with the company, and therefore against indirect manifestations of owner/manager agency costs. We have seen with the indirect manifestation of majority/minority agency costs that a risk to minority shareholders may arise as a result of directions (or informal pressure or, most dangerously, a desire by directors to avoid any informal pressure) from majority shareholders that the shareholders will assume the powers of the company or remove the directors. Mandatory rules in respect of directors' conflicts of interest protect shareholders as a whole against direct and indirect manifestations of owner/manager agency costs, but they do not protect the minority shareholder against the risk of indirect manifestation of these costs. The conflict-of-interest regime provides strong protection against owner/manager manifestations, which means that the additional powers conferred upon shareholders to exercise the powers of the company or remove directors are not required. Indirect manifestations of majority/minority Costs contain no legal mitigations, but are exacerbated by these unnecessary powers given to shareholders. It therefore appears that, analogously with historical capacity rules for companies, the harm inflicted by the ability for shareholders to adopt these additional powers outweigh the harms they seek to avoid. It should be noted that there are certain protections for the minority: they have remedies if the firm is run in an unfairly prejudicial manner;[258] and in certain limited situations they are able to institute action in the name of the company.[259] These provide ex post remedies rather than ex ante restrictions, and are discussed further in Chapter 6 of this thesis.

Unless the articles or statute provide differently, shareholders take decisions termed ‘ordinary resolutions’ by simple majority.[260] There are also ‘special resolutions’ which require a 75 per cent majority and are mandatory for matters such as amending the company’s articles of association,[261] or re-registering a private company as a public company.[262] Therefore, a special resolution is required where a major change is proposed by the company. In addition, articles can contain provisions that require a percentage higher than 75 per cent – these are referred to as ‘entrenched’ articles that can set their own requirements for amendment.[263] When it comes to the form of decision making by shareholders in private companies, there is an option of either a written resolution by the

[258] ibid s 994(1) and see para 6.4.
[259] ibid s 260 and see para 6.4.
[260] ibid s 281(3).
[261] ibid s 21(1).
[262] ibid s 90(1).
[263] ibid s 22(1).

shareholders[264] or a resolution adopted at a shareholders' meeting. Written resolutions cannot be used to remove a director[265] or the company's auditors.[266] The Companies Act 2006 prescribes technical requirements as to the written resolution procedure, but these can be varied by the articles of association.[267] However, any provision in the articles of association which prevents written resolutions is void.[268] Meetings of shareholders are termed general meetings of the company, and are convened for private companies on fourteen clear days' notice,[269] although the articles can stipulate a longer period.[270] Shareholders can consent to a shorter period if 90 per cent (or such higher number as the articles may provide to a maximum of 95 per cent) of shareholders agree to such shorter period.[271] Failure to meet this period results in the invalidity of the meeting, and of all matters decided there.[272] These rules act to require an element of formality for decision making amongst shareholders, which can protect minority shareholders from the overt and direct actions of the majority[273] – in other words, from direct manifestations of majority/minority agency costs. However, they do not protect against indirect manifestations of the majority/minority agency costs seen in private companies.

3.7.6. Conclusion

The governance rules of private companies are a mixture of default rules and mandatory rules: the division of decision-making power between shareholders and directors is, in the main, default, with some mandatory elements which protect against conflicts of interest by directors. The methods by which directors make decisions are default rules, but the methods by which the shareholders make decisions are primarily mandatory rules with some default rules included. This means that governance rules provide mandatory mitigations against direct and indirect manifestations of owner/manager agency costs. The mandatory use of formality in shareholder decision making acts to mitigate direct manifestations of majority/minority agency costs. However, indirect manifestations of majority/minority

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[264] ibid s 288.
[265] ibid s 288(2)(a).
[266] ibid s 288(2)(b).
[267] The period for agreeing to a written resolution is 28 days unless the articles provide otherwise (Companies Act 2006, s 297(1)), and members can requisition a written resolution if requested by 5% of the members or such lower percentage as the articles may prescribe (Companies Act 2006, s 292(5)).
[268] Companies Act 2006, s 300.
[269] This excludes the date of the circulation of the notice and the date of the meeting. See Companies Act 2006, s 360.
[270] Companies Act 2006, s 307(3).
[271] Companies Act 2006, s 307(6)(a).
[272] For example, *Woolf v East Niger Gold Mining Co Ltd* (1905) 21 TLR 660.
[273] R Simmonds, 'Why must we meet? Thinking about why shareholders meetings are required' (2001) 19 Company and Securities Law Journal 506; Hardman, *The Duomatic Principle* 23–27.

agency costs in private companies – which we identified as one of the highest risks of Costs – are unmitigated: indeed they are further exacerbated by unnecessary protections designed to further mitigate already mitigated manifestations of owner/manager agency costs.

There are additional mandatory rules which apply to companies listed on the main market. When a company enters into a related-party transaction with a director or shareholder, the company's sponsor must confirm that it is fair and reasonable.[274] This has the effect of further mitigating direct and indirect manifestations of owner/manager agency costs. Having identified in Chapter 2 that owner/manager agency costs are very high for this type of firm, it is important to note the higher levels of comply-or-explain and mandatory rules used to mitigate their direct and indirect manifestations. These rules also mitigate direct manifestations of agency costs arising between the majority and the minority. Listed companies are also under additional obligations to act independently of any of their controlling shareholders – ie, shareholders who hold more than 30 per cent of shares in the firm.[275] This means that, even if a majority does form, there are limitations on its activities. In addition, any controlling shareholder must enter into a legally binding agreement to ensure that its interactions with the firm are at arms' length, as well as limitations as to the resolutions it may bring.[276] This involves requiring the shareholder to show that she does not exercise improper control over the firm, including influencing it outside of normal governance structures.[277] This, in turn, has the effect of entirely removing any indirect manifestation of majority/minority agency costs. The majority are not able to influence the firm, nor can they circumvent proper governance structures. More importantly, the majority's inability so to act means that the directors need not be concerned that they might do so. This reduces the risk of directors acting in a manner designed to appease the majority.

The base analysis for governance rules in plcs is the same as in private companies. The division of responsibility between directors and shareholders is also a default rule.[278] However, there are differences when it comes to the mandatory procedural rules. Whilst private companies must allow shareholders to make decisions by way of written resolution, this is not possible for public companies.[279] There are also additional requirements for a plc compelling it to hold an annual general meeting,[280] lay its accounts before the general

[274] Listing rule 11.
[275] Listing rule 9.2.2.
[276] Listing rule 6.5.4.
[277] See guidance issued in respect of listing rule 6.5.3.
[278] See The Companies (Model Articles) Regulations 2008, Sch 3.
[279] Companies Act 2006, s 288.
[280] ibid s 336.

meeting,[281] have a company secretary,[282] and have at least two directors – whereas private companies may only have one director.[283] These mandatory rules act to increase formality in shareholder decision making which, when coupled with the Takeover Code restricting the percentage holding that a major shareholder may have, further mitigates all manifestations of agency costs when compared to majority/minority agency costs in private limited companies. The starting point is that the framework applicable to plcs also applies to traded companies. In addition, however, the listing rules[284] provide that the UK Corporate Governance Code also applies to listed companies,[285] on a comply-or-explain basis. This means that the company does not have to comply with the UK Corporate Governance Code if it can explain why it has failed to do so. The Code adds different obligations in respect of the corporate governance of the listed company. Thus, there should be a balance between executive and non-executive (including independent) directors,[286] with at least half the board[287] and its chairman being independent.[288] To engage the workforce, the board should allow the workforce to appoint their own director, and appoint a formal panel, or designate a non-executive director to liaise with them.[289] All directors should be subject to annual re-election,[290] and the chair should cease to be chair after nine years from her initial appointment.[291] The Code mandates appointment of an audit committee[292] and a remuneration committee which sets director remuneration,[293] each of which must consist of independent, non-executive directors. This role of independent directors in this sphere further mitigates direct and indirect manifestations of owner/manager agency costs.[294] In the UK, the primary application of comply-or-explain arises for listed companies under the listing rules in respect of the UK Corporate Governance Code. Thus, the annual financial report of a listed company[295] must contain various statements, including a statement as to

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[281] ibid s 437.
[282] ibid s 271.
[283] ibid s 154.
[284] Contained in the Financial Conduct Authority Handbook, available at https://www.handbook.fca.org.uk/handbook/LR.pdf (the '**Listing Rules**') accessed on 5 December 2019.
[285] Financial Reporting Council, July 2018, available at https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF accessed on 5 December 2019.
[286] UK Corporate Governance Code, Principle F
[287] ibid Provision 11.
[288] ibid Provision 9.
[289] ibid Provision 5.
[290] ibid Provision 18.
[291] ibid Provision 19.
[292] ibid Provisions 24–26.
[293] ibid Provisions 32–34.
[294] See M Martynova and L Renneboog, 'An International Corporate Governance Index' in M Wright and others (eds) *Oxford Handbook of Corporate Governance* 111–112
[295] Companies Act 2006, s 415.

how the company has applied the Code's principles[296] and various additional confirmations. The company must either state that it has complied with the Code in full, [297]or, if it has not, the time period of and reason for non-compliance.[298] This encourages compliance as non-compliance is publicly announced and the announcement affects the share price of the vehicle.

3.8. Conclusion

We have seen different types of rules being used in our different categories. Thus the rules governing third-party protection and capacity rules are all mandatory. Within governance rules, a hybrid approach is followed. We can now complete our matrix reflecting rule function and rule type. We see:

	Capacity	**Third Party Protection**	**Governance**
Permissive	None	None	None
Default	None	None	All partnership provisions other than the presence of fiduciary elements All GP decision making provisions within an LP other than the presence of fiduciary elements LLP decision making Division of powers between shareholders and directors in companies Methods of decision making by directors subject to fiduciary elements.
Comply-or-Explain	None	None	Board structure, composition and role in listed companies Director's pay in listed companies
Mandatory	Partnerships	Partnerships	Partners' and director's fiduciary duties[299]

[296] Listing rule 9.8.6R(5).
[297] Listing rule 9.8.6R(6)(a).
[298] Listing rule 9.8.6R(6)(b).
[299] The presence of the duties is mandatory, but their content can be varied by consent.

	LPs LLPs Private Companies PLCs Traded	LPs LLPs Private Companies PLCs Traded	Exclusion of limited partners from LP business Minimum requirements as to shareholder voting mechanics in all companies Limitation on director self-dealing in all companies Limitation on conflicts of interest in all companies Listing rules preventing related party transactions Listing rules governing controlling shareholders agreements

As proposed by Gordon, the mandatory rules are those designed to protect. Therefore, all third-party protection and capacity rules are mandatory, and mitigate manifestations of externalities. Within governance rules, default rules generally map on to areas which were considered to have low – or lower – risks of generating Costs, whereas mandatory rules generally map onto areas with higher Costs. Comply-or-explain also fulfils a protective function, but only within listed firms (firms with markets which can react to disclosure). This analysis reflects the theory outlined above – default rules are the 'rule of thumb' unless there is an interest which needs to be protected.

We can map this analysis on to our Costs analysis. First, we can note that default rules do not provide much protection against Costs as they are subject to opting out, whereas mandatory or comply-or-explain rules can potentially mitigate manifestations of Costs. We can now establish correlations between mitigants to Costs and the Costs themselves. By adding the possible manifestations of Costs and their mitigations to our previous matrix, the following picture emerges:

Firm	Third Party	Direct Owner/Manager	Indirect Owner/Manager	Direct Majority/Minority	Indirect Majority/Minority
Partnership *Potential for Cost:*	*Low*	*None (only one category)*	*None (only one category)*	*Low*	*None (only one category, so indirect manifestation not possible).*
Mitigant:	Mandatory rules, set at a firm-friendly level	None	None	Mandatory fiduciary duties prevent minority oppression	None
LP *Potential for Cost*	*Structurally low.*	*Structurally low*	*Structurally low*	*Structurally low*	*Structurally low*

LP *Mitigant:*	Mandatory rules, set at a firm-friendly level	Mandatory fiduciary duties	Mandatory fiduciary duties	Mandatory split between LPs and GPs means that the majority LPs cannot direct the firm, and mandatory fiduciary duties mean that their actions are limited	Mandatory split between LPs and GPs means that the majority LPs cannot direct the firm, and mandatory fiduciary duties mean that their actions are limited
LLP *Potential for Cost:*	*Lowered by claw-back*	*None (only one category)*	*None (only one category)*	*Lowered by ability to withdraw capital*	*None (only one category, so indirect manifestation not possible)*

LLP *Mitigant:*	Mandatory rules	None	None	None	None
Ltd *Potential for Cost:*	*Lowered by capital maintenance*	*Lowered by shareholder strength*	*Lowered by shareholder strength*	*High and exacerbated.*	*High and exacerbated.*
Mitigant:	Mandatory rules	Mandatory limitation on director self-dealing Mandatory director fiduciary duties	Mandatory limitation on director conflicts of interest Mandatory director fiduciary duties	Mandatory formality in decision making	None
Plc *Potential for Cost:*	*Lowered by capital maintenance*	*High*	*High*	*Lowered by the takeover code*	*Lowered by the takeover code*

Plc *Mitigant:*	Mandatory rules	Mandatory limitation on director self-dealing Mandatory director fiduciary duties	Mandatory limitation on director self-dealing Mandatory director fiduciary duties	Mandatory formality in decision making	None
Traded *Potential for Cost:*	*Lowered by capital maintenance*	*High*	*High*	*Lowered by the Takeover Code*	*Lowered by the Takeover Code*
Mitigant:	Mandatory rules	Mandatory limitation on director self-dealing Mandatory director fiduciary duties Comply-or-explain governance requirements	Mandatory limitation on director self-dealing Mandatory director fiduciary duties Comply-or-explain governance requirements	Mandatory formality in decision making Mandatory rules on related party transactions	Mandatory formality in decision making Mandatory control over controlling shareholder agreements

		Mandatory rules on related party transactions	Mandatory rules on related party transactions		

We can draw certain conclusions from this matrix. Firstly, almost every category of manifestation in respect of which of Costs were high, has a rule which is not a default rule. These are most commonly mandatory rules, but for listed vehicles comply-or-explain rules are also used. Generally, the higher the Cost, the higher the protection for the potential victims of that Cost. Mandatory protections also increase the more complicated the vehicle becomes: a partnership has fewer protections than exist for a traded firm. There is, however, one exception to both of these rules. There is no consistent protection against majority/minority agency costs.

Each partner in a partnership enjoys the benefit of fiduciary duties owed by their fellow partners. This reduces direct manifestations of agency costs within the majority/minority category. There is only one category of actor and this removes the risk of indirect manifestations. Within LPs, there is a mandatory division of power between the two actors which, when coupled with mandatory fiduciary duties, mitigates against both direct and indirect manifestations. Within LLPs, there is only one category of actor, which excludes the possibility of indirect manifestations. The minority is able to withdraw its capital from each of the partnership firms at will, which provides it with an exit option. At the other end of the spectrum, traded companies experience lower risks of agency costs in this category as the ability to form majorities is reduced. In addition, minorities have the ability to exit at any time, and there are mandatory rules restricting related-party transactions which protect against direct manifestations of majority/minority agency costs and, in the case of controlling shareholders, protect against indirect manifestations. Plcs are also subject to the Takeover Code, which limits the possibility of majorities forming.

Minorities in private companies, however, enjoy little protection under the rules examined so far. We saw in Chapter 2 that they experience higher Costs because they cannot unilaterally withdraw capital, majorities can form, and these majorities control the composition of the board. Minorities' primary protection against direct manifestations appears to be formality in decision making. Whilst it may be better for minorities to have the benefit of formality than not, fundamentally it will not prevent a majority from acting in a certain way. Indeed, the rules we have examined appear to exacerbate this agency cost for the minority in the private company – the division of powers is default, which enables the majority to remove powers from the board whenever they wish. In addition, shareholders are able to remove directors at will. Each of these exacerbates an indirect manifestation of

the majority/minority agency cost, as these rules make it more likely that directors will act to appease the majority. The minority in private companies are also disadvantaged not being able to exit the company and by a lack of fiduciary duty from the majority.

This category is, therefore, an exception: we have identified that minorities in private companies are exposed to high Costs within a category, yet these are neither minimised by structure, nor are their manifestations mitigated. The primary protection shareholders appear to enjoy against directors in private companies is against the directors' self-dealing and conflicts of interest. Whilst these are efficient at mitigating the direct and indirect manifestations of owner/manager agency costs, they do not mitigate indirect manifestations of majority/minority agency costs. Subjecting directors to fiduciary duties has the potential to do so, however, these duties are owed to the company rather than the shareholders. Further, the interests of the company equate to the interests of the shareholders, and any breach of these duties can be ratified by the majority (see Chapter 6 for further discussion). Accordingly, these protections are also subject to capture by the majority which increases the risk of indirect manifestation of majority/minority agency costs. This can be contrasted with the other high category of agency costs identified (those between owners and managers in traded companies), which use a series of mandatory and comply-or-explain rules to mitigate direct and indirect manifestations of such Costs. Therefore, indirect manifestations of majority/minority agency costs in private companies do not fit into the conceptual framework for the use of rules aimed at mitigating Costs across UK commercial firms.

This is interesting but somewhat abstract. The theoretical proposition may be sound, and this is what is tested in the remainder of this thesis. To this end, we engage historical, comparative, doctrinal, and empirical methods. In order to explore this further, we review the history of company law to establish whether it confirms our theoretical proposition, and the history of our 'twin exacerbations' of indirect manifestations of majority/minority agency costs in private companies. Has company law always provided mandatory rules to mitigate Costs and their manifestations? Why are these twin exacerbations – division of power and the ability to remove a director – structured as they are? Is it deliberate, and do their benefits outweigh the harm for the minority in private companies? If company law history, in general, can be said to support the theoretical proposition that high Costs have been mitigated by mandatory rules, then this theoretical proposition must be verified.

Having reviewed these, we then review the modern law of majority rule, and the twin exacerbations of indirect manifestations of agency costs – control over board composition

and the ability to exercise the rights of the company – in order to establish in further details the current issues and comparative position. We review these comparatively: have they been resolved in other jurisdictions? We then undertake doctrinal analysis to establish whether other areas of company law adequately mitigate these manifestations. The legal analysis reviews whether:

1. the substance of directors' duties;
2. rules in respect of shareholder voting;
3. rules in respect of minority protection more generally; and/or
4. other soft-law responses,

act effectively to mitigate these exacerbations. We then undertake empirical research to establish whether the market provides an adequate response to the twin exacerbations. This takes the form of quantitative empirical research to establish whether companies have themselves undertaken any action to mitigate the exacerbations of indirect manifestations of majority/minority Costs.

CHAPTER 4

4. HISTORY OF COMPANY LAW

4.1. General

What relevance does the history of corporate law have for a modern study of the Costs? In his history of UK company law, du Plessis makes two key arguments. Firstly, he argues that:

> It cannot be disputed that corporate law cannot be understood without a proper knowledge of the historical context in which it developed.[300]

In other words, the historical development of the legal framework for corporate law is important to understanding the current framework of the legal system. Secondly, he argues that:

> In corporate law history… it has been observed that 'in every stage of social evolution there are particular needs which have to be met, and particular tendencies in human character which call either for repression or stimulus'.[301]

By this, du Plessis is arguing that the historical development of corporate law is linked to the perceived 'particular needs' of any given time. In other words, different historical contexts create differing aims for company law within those contexts. Put together, the two propositions mean modern corporate law is a function of historical contexts and the peculiar ills of the specific ages which law makers were trying to remedy. We can track this onto our theoretical analysis to establish which Costs law makers were interested in resolving at different times, and the responses they identified to such Costs. Whilst focus on Costs has not been an explicit policy debate over the history of company law, there has been an implicit focus on them. Only by analysing these developments can we establish why the current legal framework exists as it does. In addition, a finding that company law has resolved Costs by the application of mandatory rules, will confirm the theoretical position advanced in previous chapters.

To trace the role of Costs in the history of company law, we identify the origins of the modern-day company and the non-legal pressures which dictated its development. Unfortunately, the pre-history of company law is not seemingly based on any discernible

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[300] J du Plessis, 'Corporate law and corporate governance lessons from the past: Ebbs and flows, but far from the "end of history": Part 1' [2009] Company Lawyer 43.
[301] J du Plessis, 'Corporate law and corporate governance lessons from the past: Ebbs and flows, but far from the "end of history": Part 2' [2009] Company Lawyer 72, 73.

Cost. Originally, use of the corporate form was linked to public good: it was expected that a company would act for the benefit of society rather than its members.[302] This, however, changed with the rise of monopolies during the Elizabethan era. The government linked the granting of the corporate form to a grant of a monopoly which could be exploited for the benefit of the corporation's members.[303] The result was that:

> Through the system of monopolies there thus came a change in the purpose of incorporation. The Elizabethan monopolies had encouraged the idea of a public purpose latent in private economic advantage.[304]

The company form moved from being inextricably linked to public good, to be inextricably linked to private gain. At the time, incorporation was granted by the Crown on a case-by-case basis.[305] As a result of the power of the government in the process and its link to private wealth for corporators, some form of personal gain was extracted by government officials – for example, the South Sea Company gave stock and favourable loans to members of Parliament and Lords to secure its incorporation.[306] Indeed, this was the 'custom of the times'.[307] The comingling of the grant of corporate status with the grant of a monopoly for a certain industry, was abolished in 1623 with the abolition of monopolies.[308] The value which government officials could extract from private corporators dropped as new charters no longer guaranteed monopolistic returns. In response, government officials began to tighten the geographic, temporal or industrial terms of charters. By doing so 'parliament could increase the value of charters'[309] as they were able to grant more charters which, through specificity, appeared to offer monopolistic advantages. Unless limited by time, a charter could not be withdrawn. An unforeseen outcome was that a second-hand market in the re-sale of existing charters grew. This took money out of government coffers (as charters could be acquired from their owners rather than purchased/bribed from the government) and, unsurprisingly, government moved to restrict such re-sale. At the same time, several government-supported charters–including the South Sea Company – became concerned that there was undue competition for investment from other companies. As a result, in the early

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[302] C Mackie, 'From privilege to right – Themes in the emergence of limited liability' [2011] Juridical Review 294, 300; CA Cooke, *Corporation, Trust & Company* (Manchester University Press 1950) 51.
[303] Cooke *Corporation, Trust & Company* 53–54.
[304] ibid 54.
[305] M Patterson and D Reiffen, 'The Effect of the Bubble Act on the Market for Joint Stock Shares' (1990) 50 Journal of Economic History 163.
[306] WR Scott, *The Constitution and Finance of English, Scottish and Irish Joint Stock Companies to 1720* vol 3 (Cambridge University Press 1911) 332.
[307] ibid 344.
[308] Statute of Monopolies 1623, s 1.
[309] Patterson and Reiffen, (1990) 50 Journal of Economic History 163, 165.

1700s there was pressure to limit access to the corporate form. This pressure, however, arose not as a result of a desire to lower Costs, but rather to maximise personal income for those with the power to decide the form of the legal framework.

Partnerships could not compete in capital markets as partners' ability to withdraw capital undermined their attractiveness as investment vehicles.[310] The difficulty and costs associated with securing a charter from the government, created the need for a third type of business form and the joint stock company emerged. This entity did not have a charter, but was rather an unincorporated association managed by directors which held assets in trust for its shareholders – a hybrid charter company and partnership.[311] This joint stock company was competition for charter companies, something which the holders of charters were unhappy about and which undermined the value of charters (and therefore the private gain that lawmakers could extract from the process). As a result, the Bubble Act of 1720[312] was adopted. The official purpose of the Bubble Act was to:

> [R]estrain the extravagant and unwarrantable practice of raising money by voluntary subscription for carrying on projects dangerous to the trade and subjects of the UK.[313]

These lofty goals appear to map neatly to Costs, particularly owner/manager Costs. However, it is more likely that the Bubble Act was introduced to increase the value of charters, and so also the value that could be extracted by governmental officials.[314] Alternatively, it has been argued that the Bubble Act was a political attempt to control the actions of private individuals by a government increasingly seeking to control private associations.[315] In either case, it was not introduced to reduce Costs. The Act achieved its aim by providing that an organisation which 'presumed to act as a corporation' was a public nuisance[316] and declared as illegal:

> [S]ubscriptions, assignments, transfers and other things for furthering such undertakings; the acting or presuming to act as a corporate body; the raising of

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310 ibid 166.
311 Cooke, *Corporation, Trust & Company* 70–72.
312 Royal Exchange and London Assurance Corporation Act 1719.
313 AB Du Bois, *The English Business Company after the Bubble Act, 1720-1800* (Octagon 1938) 2.
314 Patterson and Reiffen (1990) 50 Journal of Economic History 167.
315 Paul G Mahoney, 'Contract or Concession? An Essay on the History of Corporate Law' (2000) 34 Georgia Law Review 873.
316 Du Bois, *English Business Company* 3.

> transferable stock, or the assigning of such stock without authority either by act of parliament or by charter.[317]

The promoters and brokers of any company not registered by charter were penalised.[318] The Bubble Act stopped legal entities other than those incorporated by charter, from allowing the free transferability of shares. The practical effect was that joint stock companies started to allow the transfer of shares only with the consent of other shareholders.[319] In practice, this meant that the deed of settlement of joint stock companies did not allow for the creation of freely-transferable shares.[320]

Accordingly, and contrary to popular belief, the Bubble Act was not introduced because a bubble had collapsed, but rather because the rise in unincorporated entities acting as if they were incorporated, hurt the private incomes of government officials.[321] This analysis shows that the issues which the Bubble Act – described as the first 'attempt at a Companies Act'[322] – was attempting to resolve had nothing to do with Costs as envisaged in twenty-first century legal analysis. It was instead an attempt by officials to protect their income streams. The value of Bubble Act as insight into Costs is, therefore, somewhat limited. The general structure of 17th century companies was to have a court of proprietors known as a 'general court', and a court of directors which had executive power and was elected by the general court.[323] The court of directors dealt with day-to-day matters, whilst the general court was responsible for major policy changes.[324] It is here that we see the origins of majority rule (which enables the creation of majorities in the first place). Scott states:

> As a general rule, up to 1620 and for some years afterwards, no special arrangements had been made in the charters as to the relation of the votes to the shares. In most cases the usual clause, which gave the companies powers to make bye-laws, was held to provide for the determining of the amount of the qualification. The charter granted in 1604 to the society of Mines Royal was an exception to this rule, since, in it, it is stated 'the voice of everyone, having a quarter part, is to be held as of great account as the voices of two others, having but half-quarter parts a piece, and so the voice of any other, having a greater part than a quarter, to be esteemed of as great force as so many several other persons, having but a half-

[317] William Searle S Holdsworth, *A History of English Law* vol 8 220, as quoted in Patterson & Reiffen, (1990) 50 Journal of Economic History 169.
[318] Royal Exchange and London Assurance Corporation Act 1719, s 18.
[319] Patterson and Reiffen, (1990) 50 Journal of Economic History 169.
[320] ibid 170.
[321] ibid 163.
[322] PL Davies, *Gower's Principles of Modern Company Law* (6th edn, Sweet & Maxwell 1997) 25.
[323] Du Bois, *English Business Company* 287–288.
[324] ibid 291.

> quarter a piece'. It was the practice of the East India company to decide questions, where there was a difference of opinion, by a show of hands amongst those present at the meeting, and the same method was adopted by the Virginia company up to 1619.[325]

Companies, therefore, adopted majority voting out of necessity given to the large number of shareholders – it was the only method by which shareholders as a whole could make decisions.

The Bubble Act retarded development of joint stock companies.[326] It has been said of the Bubble Act:

> The history of the business corporation or joint stock company in England during the one hundred and fifty years following the statute of 1720 is the story of an economic necessity forcing its way slowly and painfully to legal recognition against strong commercial prejudice in favour of 'individual' enterprise, and in the face of determined attempts of both the legislature and the courts to deny it.[327]

Joint stock companies still flourished based on the concept of 'trust' – members paid their subscription funds into a trust managed by the directors. As a result, directors of joint stock companies at this time were seen as agents of the shareholders.[328] It is from this form that we start to see the rise of fiduciary duties by directors in their capacity as trustees of the members' funds – by transposition of law rather than by deliberate action to remedy Costs. Once again, there is little evidence from this period that company law was concerned with Costs.

The Bubble Act was repealed in 1825. The repeal was unexpected, and arose after the Equitable Loan Company's promoters were prosecuted under the Bubble Act at a time when the Charter was being extensively debated in Parliament and seen as likely to be granted.[329] The case, which focused attention, concerned interpretation of the deed of settlement in respect of the Equitable Loan Company, but: 'Lord Eldon astonished Counsel by turning his attention from the content and interpretation of the deed to the question of the legality of

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[325] Scott, *Constitution and Finance* vol 1 163.

[326] M Freeman, R Pearson & J Taylor, 'Law, politics and the governance of English and Scottish joint-stock companies, 1600-1850" (2013) 55 Business History 636; Mahoney, (2000) 34 Georgia Law Review 873.

[327] BC Hunt, *The Development of the Business Corporation in England 1800 – 1867* (Russell & Russell 1969) 3.

[328] S Watson, 'The significance of the source of the powers of boards of directors in UK company law' [2011] Journal of Business Law 596.

[329] *Kinder v Taylor* (1825) 3 LJOS Ch 68.

the company altogether.'[330] As a result, a private members' Bill to repeal the Bubble Act was introduced by a director of the Equitable Loan Company who was also an MP. The House of Lords appeared to favour retaining the Bubble Act to protect government bonds, but the private interests of MPs won.[331] The private members' Bill was avoided on a technicality, but the Bubble Act was ultimately repealed on legal grounds. The Attorney General stated that the Bubble Act's 'meaning and effect were all together unintelligible'.[332] Lord Eldon, who was also Lord Chancellor, indicated that he would instruct judges that the subject matter was anyway prohibited by the common law. Ultimately, Harris states that '[i]deological considerations played only a minor role in the process that led to the repeal of the Bubble Act'.[333]

Accordingly, the implementation and repeal of the Bubble Act, is of little of relevance to our study of Costs. Political considerations regarding access to public markets, together with personal rent-seeking, were the key considerations: for the government in maximising charter revenue for the introduction of the Bubble Act; and for MPs whose business interests were harmed by Eldon's broad interpretation of the Bubble Act for its repeal. Whatever ideological considerations may have played a minor role in the repeal of the Bubble Act, they were not related to Costs. Such considerations first appeared in a report into partnership law delivered by Bellenden Ker in 1837. This report also included joint stock companies in its ambit, and expressly refers to them as a 'type of partnership'.[334] In particular, the report examined difficulties in litigating against large numbers of partners. It also considered whether limited partnerships, based on continental forms, should be introduced.[335] Bellenden Ker concluded that the problem with the crash of the South Sea Company was that investors wanted to be able to withdraw their investment, which created a necessity of free transfers of stock held by members. The issue arose when the transfer of shares itself became a trade (known as stock-jobbing), which created a speculative market unconnected to the underlying economic performance of the company.[336] This harmed investors. One of Bellenden Ker's main considerations, therefore, was protection of the shareholders: the first consideration of Costs.

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[330] R Harris, *Industrialising English Law: Entrepreneurship and Business Organization, 1720-1844* (Cambridge University Press 2000) 243.
[331] R Harris, 'Political economy, interest groups, legal institutions, and the repeal of the Bubble Act in 1925' [1997] Economic History Review 675.
[332] ibid 690.
[333] ibid 692.
[334] H Bellenden Ker 'Report on the Law of Partnership' 1 March 1837 5.
[335] ibid 1.
[336] ibid 5.

Bellenden Ker considered it important to note that limited liability would not be accorded to such companies and, accordingly, no minimum capital requirements would be necessary.[337] Bellenden Ker's key considerations, therefore, could be the protection of shareholders against agency costs on the ground that externalities were lower than they would be if faced with limited liability. The report went on to note that there was public support for the concept of limited liability (although not LPs based on a French model), and that there was no evidence that charter companies having limited liability hurt creditors.[338]

The Bellenden Ker Report was followed in 1844 by a report specifically into joint stock companies chaired by Gladstone (the '1844 Report').[339] The 1844 Report noted some issues which had arisen with joint stock companies since the repeal of the Bubble Act in 1825. These fell into three categories:

1. some joint stock companies were being set up with no financial viability at all – which links to agency costs suffered by shareholders against managers and externalities;

2. some joint stock companies were being mismanaged – which links to owner/manager agency costs suffered by shareholders against managers; and

3. some fraudulent joint stock companies were being set up with the sole aim of creating a second-hand market (ie, for the purpose of stock jobbing) – which links to owner/manager agency costs.[340]

The 1844 Report's recommendation to resolve points 1 and 3, was mandatory publication of names of directors, deeds of settlement, and the amount of capital that each company had.[341] In other words, the 1844 Report proposed mandatory rules to resolve Costs: supporting the theoretical proposition advanced in this thesis. The 1844 Report considered that category 2 issues arose because:

> The directors themselves are often indifferent and careless, trusting too much to their officers, shareholders purchase on the strength of their names, without inquiry,

[337] ibid 9.
[338] ibid 23.
[339] 'First Report of the Select Committee on Joint Stock Companies' 16 February 1844 (the '**1844 Report**') 19th Century House of Commons Sessional Papers, 1844, vol VII 1.
[340] ibid iv.
[341] ibid v; du Plessis 'Corporate law and corporate governance lessons from the past: Ebbs and flows, but far from the "end of history": Part 1' [2009] Company Lawyer 43.

> and thus confer factitious support, so that one set of persons relying upon another set, the delusion is sustained for a longer space of time.[342]

For the 1844 Report, the solution to category 2 was therefore to increase mandatory governance requirements for joint stock companies,

> … by the periodic holding of meetings, by the periodic balancing, audit and publication of accounts, and by making Directors and officers more immediate responsible to the shareholders, which may probably be accomplished by facilitating and improving the remedies available to Joint Stock Companies and their shareholders inter se.[343]

These concerns were, therefore, all linked to mandatory protections to limit manager/shareholder Costs. Indeed, the activities of directors were under general scrutiny at this time. Du Bois flags the personal advantage that directors took (ie, a direct manifestation of owner/manager Costs):

> The eighteenth century director, even by twentieth century standards, was adept in the art of using the mechanics of the company for his own best interest… then, as now, the only limitation of many seemed to be the avoidance of possible penalties inflicted by courts or legislature.[344]

In addition, the 1844 Report noted that appointing directors for life was 'probably a common characteristic of the worst kind of cases, and is always liable to the disadvantage of inducing a want of care and attention on the part of the persons in whose favour it is made'.[345] This is a clear reference to a Cost arising between management and owners due to security of tenure for directors. There are two key proposals for our purposes in the 1844 Report. Firstly,

> that due provision be made for defining and declaring the duties of the several officers of the Company, to such extent at least as is usually provided by Acts of Parliament and Charters for the incorporation of Companies, that the remedies of shareholders against directors, for abuse and excess of their functions, be declared and facilitated; and that generally the legal and equitable remedies available to Joint Stock Companies, and their directors, officers and shareholders, inter se, be facilitate and improved.[346]

The 1844 Report clearly considered that 'defining and declaring' the duties of the company's officers would be in the interests of shareholders as regards reducing owner/manager Costs.

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[342] 1844 Report v.
[343] ibid v; du Plessis 'Part 1' [2009] Company Lawyer 43, 50.
[344] Du Bois, *English Business Company* 297.
[345] 1844 Report viii.
[346] ibid xiii.

It would allow delineation between shareholders and directors and clarify shareholders' remedies against directors. Secondly, it was proposed that,

> [i]t is expedient that the accounts of every such Company be open to the inspection of the shareholders; and that the annual balance-sheet, together with the reports of the auditors thereon, be registered.[347]

The purpose of this provision is clearly to provide shareholders with insight as to the nature of the business into which they have invested and its finances. This clarity is important to reduce Costs experienced by shareholders due to their increasingly passive investment in the business vehicle. It also provides a public point of reference for third parties, protecting them from externalities. We can therefore see further support in the 1844 Report for the proposition that high Costs should be mitigated by mandatory rules. These requirements were implemented and remained substantially unaltered until, following a governmental review,[348] the Companies Act 1929 added the requirement of publishing profit and loss accounts. The substance has only since been altered by the requirement that consolidated group accounts[349] and a cash flow statement also be published. This latter amendment was aimed at flagging risks of Enron-esque profitable businesses with net assets, becoming insolvent by running out of cash and so causing externalities.[350] The 1844 Report's recommendations were incorporated in the Joint Stock Companies Act 1844.[351] The 1844 Act for the first time permitted companies to be created by registration alone, and evidences that legislation has followed the theoretical proposition advanced. It required, at risk of a penalty, the registration of the joint stock company with the centralised register,[352] complete deeds of settlement to be registered,[353] and that six-monthly returns of changes and additions to members to be filed.[354] The rights of shareholders were also suspended until they were reflected as shareholders in the return,[355] and shareholders' rights were restricted prior to signing the deed of settlement.[356] In addition, transfer of shares had to be stamped and

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[347] Ibid.
[348] Companies Act 1929, s 123 as discussed in C Napier, 'The History of Financial Reporting in the United Kingdom' ch 13 in G Previts, P Walton and P Wolnizer (eds), *A Global History of Accounting, Financial Reporting and Public Policy* (Emerald 2010) 243–273.
[349] Companies Act 1948, s 150.
[350] See G North, 'Listed company disclosure and financial market transparency: Is this a battle worth fighting or merely policy and regulatory mantra?' [2014] Journal of Business Law 484.
[351] Du Plessis, 'Part 1' [2009] Company Lawyer 43, 49.
[352] Joint Stock Companies Act 1844 ss 4–6.
[353] ibid s 8.
[354] ibid s 11.
[355] ibid s 13.
[356] ibid s 26.

transfers had to be undertaken using a specific form.[357] These provisions made 'stock-jobbing' more difficult as a shareholder actually had to sign the company's deed of settlement before selling her rights on, which complicated speculative investment in companies incorporated by registration. The 1844 Act also stated that the deed of settlement had to include what constituted a 'majority' for the purposes of shareholder votes,[358] and provided protections against directors. It allowed the exclusion of directors from voting if they were interested or concerned in a contract with the company (the contract had to be ratified by general meeting), and provided the automatic removal of directors if they become bankrupt or insolvent or were declared 'a lunatic'.[359] The first limb of this test is the first statutory provision for the protection of shareholders from direct and indirect manifestations of owner/manager Costs. The 1844 Act also made acts or omissions by directors in breach of the Act misdemeanours,[360] and provided for personal liability for directors if they allowed a dividend or loans to members when they knew that the company was insolvent.[361] This mitigated externalities. The 1844 Act also required production of accounts[362] and appointment of auditors.[363] In order to meet the first of the 1844 Report's proposals, the 1844 Act required a company to have bye-laws, and for those bye-laws to be registered.[364] Certain items were required to be included in the deed of settlement: principally the mechanics for appointment and retirement of directors.[365]

Overall, the 1844 Act and the reports on which it was based existed to protect shareholders from owner/manager Costs and (to a lesser degree) third parties from externalities, by publication of information about a company. However, there were no minimum capital requirements with externalities rather being resolved by mandatory publication. Further protection was unnecessary: the Act retained the unlimited liability of shareholders by providing that judgments against the company could be individually enforced against shareholders.[366] However, it did flag that the bankruptcy of the company does not automatically result in bankruptcy of the members.[367] Whilst this is clearly a logical result of separate legal personality created by registration under the 1844 Act, it also introduced

[357] ibid s 54.
[358] ibid s 7, Schedule A para 9.
[359] ibid s 29.
[360] ibid s 31.
[361] Du Plessis 'Part 2' [2009] Company Lawyer 72, 74.
[362] Joint Stock Companies Act 1844, ss 34–36.
[363] ibid ss 39–41.
[364] ibid ss 47 and 48.
[365] ibid s 7 and Appendix AII, para 12.
[366] ibid s 22.
[367] ibid Part 2, s 2.

the separation of the company's financial wellbeing from the financial wellbeing of its shareholders. Neither the Bellenden Ker report, nor the 1844 report, nor the 1844 Act contained protections for – or even reference to protections for – minority shareholders as regards majority/minority Costs.

It was difficult to comply with the 1844 Act's filing requirements. Watson has stated that '76% of companies were abandoned before completing registration in the period between 1844 and 1856'.[368] The 1844 Act was consolidated in 1845 into a more thematic approach. The 1845 Act also applied to companies incorporated by Act of Parliament as well as joint stock companies registered under the 1844 Act. The 1845 Act prescribed requirements for general meetings. The concept of minority protection was included by way of scaled voting:

> At all general meetings of the company every shareholder shall be entitled to vote according to the prescribed scale of voting, and where no scale shall be prescribed every shareholder shall have one vote for every share up to ten, and he shall have an additional vote for every five shares beyond the first ten shares held by him up to one hundred, and an additional vote for every ten shares held by him beyond the first hundred shares; provided always, that no shareholder shall be entitled to vote at any meeting unless he shall have paid all the calls then due upon the shares held by him.[369]

It also made majority rule statutory – in addition to the scaled voting element, decisions by the shareholders as a whole were taken by majority vote**.**[370] This provision provided a clear solution to majority/minority Costs by restricting a dominant investor's number of votes. This, in turn, mitigated direct and indirect manifestations of such Costs. Other key Costs which were ignored in the 1844 Act were included in the 1845 Act – in particular, mandatory provisions in respect of directors, who were to be appointed by the body of shareholders, required a director to hold shares in the company and provided for mandatory rotation and re-election of directors.[371] The 1845 Act, therefore, reduced Costs by mandatory legislation: verifying the theoretical proposition advanced in Chapters 2 and 3 above.

The 1845 Act also changed the rules regarding a company's bye-laws.[372] These bye-laws moved from being mandatory under the 1844 Act, to being optional under the 1845 Act. The bye-laws envisaged by the 1845 Act related to the carrying out of matters which had been

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[368] S Watson, 'How the Company became an Entity' [2015] Journal of Business Law 120, 124.
[369] Companies Clauses Consolidation Act 1845, s 75.
[370] ibid s 76.
[371] ibid ss 81–89.
[372]ibid ss 124–127.

devolved to the board of directors. They thus were limited to the interaction between the board of directors and employees/officers of the company. Once again, the primary Cost under consideration under the 1845 Act was that between shareholders and managers. Courts were keen to hold contracts with a company in which a director was directly or indirectly interested, automatically void,[373] which provided a non-statutory, mandatory rule to mitigate against direct and indirect manifestations of shareholder/director Costs. The lack of limited liability meant that externalities were limited: a wronged third party could obtain a judgment against the company and then, if the company could not pay, against the shareholders directly. Minorities were protected by a staggered voting requirement which gave them a higher vote per share than the majority enjoyed.

The legislative framework was complicated by the introduction of limited liability in 1855. The 1855 Act was 'a significant building block in the formation of the legal framework of the modern company'.[374] It marked a very significant change for a company: previously, limited liability required to be separately provided to a company by Act of Parliament or by charter, with not all charters conferring limited liability. Each of these routes was political and time consuming. The 1855 Act reframed the acquisition of limited liability – it moved from a privilege to an automatic right.[375] At the time, companies had started to introduce 'limited liability' clauses in contracts. Courts had held that a clause purporting to provide limited liability was valid against a voluntary creditor who had signed up to a contract with such a provision in it,[376] and also that contractual limited liability between shareholders in their capacity as such was binding on shareholders who had voluntarily agreed to it.[377] However, such a provision could not have any affect vis-à-vis a third party who had not expressly agreed to a contract limiting the liability of shareholders.[378] Indeed, it had been expressly stated that the rights of creditors were 'wholly extrinsic to any' limited liability agreements between the shareholders.[379] Accordingly, legal engineering could provide limited liability for companies only if expressly agreed to by counterparties. In the absence of their express agreement, the courts would apply unlimited liability. A Royal Commission was established in 1854 to look into limited liability amongst other questions, such as

[373] *Aberdeen Railway Company v Blaikie Brothers* (1854) 17 D (HL) 20.
[374] L De Koker, 'The Limited Liability Act of 1855' [2005] Company Lawyer 130.
[375] C Mackie 'From privilege to right – Themes in the emergence of limited liability' [2011] Juridical Review 294.
[376] *Halket v The Merchant Traders' Ship, Loan and Insurance Association* (1849) 13 Queen's Bench Reports 960.
[377] *Hallett, Gooden, Clark, Allan and Hatfield v Dowdall* (1852) 18 Queen's Bench Reports 2.
[378] *Walburn v Ingilby* (1833) 39 ER 604.
[379] *Greenwood's Case (In the Matter of the Sea Fire and Life Assurance Company)* 43 ER 180, 187.

whether the law of separate legal personality and company law more generally should be unified within the UK.[380] Of the eight members of the Royal Commission, it was decided five to three against introducing limited liability for companies.[381] But the 1855 Act did so anyway, increasing externalities within the general company form.

The 1855 Act was denounced as a 'rogue's charter' by the *Law Times* on the ground that it would increase the use of the corporate vehicle as a way to defraud third parties.[382] On the other side of the debate were arguments, such as those advanced by John Stuart Mill that limited liability would allow for middle- and lower-class investors to invest in companies. The argument ran that by creating limited liability for shares, they became divorced from the creditworthiness of their shareholders, and therefore fungible. In a world of unlimited liability poor shareholders were discouraged as they lowered the price of shares held by wealthier shareholders (on the ground that on the insolvency of the company, a wealthier shareholder was more likely to be called upon to make up the deficit).[383] The latter appears to have won the day against a fertile political environment–particularly, unhappiness at the established social structures in the light of the Crimean war.[384] The arguments in favour of limited liability became politically popular with the growing middle class as it would also allow diversification, competition between smaller and bigger investors, and an escalation in legal fees which benefitted middle-class professionals.[385] The 1855 Act contained several conditions which had to be met in order for the shareholders of a company to obtain limited liability: the company needed at least 25 members;[386] minimum paid up capital of £50; and each individual share had to have a minimum nominal value of £10.[387] Such a company needed to have an approved auditor,[388] had to include 'limited' in its name,[389] and be publicly declared to enjoy limited liability.[390] Accordingly, these provisions were designed to provide

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[380] 'First Report of the Commissioners appointed to inquire and ascertain how far the Mercantile Laws in the different parts of the United Kingdom of Great Britain and Ireland may be advantageously assimilated and also whether any and what alterations and amendments should be made in the law of partnership as regards the question of the limited or unlimited responsibility of partners' 19th Century House of Commons Session Papers, 1854, Vol XXVII p445 (the '**1854 Report**').

[381] 1854 Report 6.

[382] De Koker, [2005] Company Lawyer 130.

[383] See various arguments raised as a way to use limited liability to improve working and middle class finances by Donna Loftus, 'Capital and community: limited liability and attempts to democratize the market in mid-nineteenth-century England' (2002) 41 Victorian Studies 93.

[384] Mackie, [2011] Juridical Review 294, 298.

[385] ibid; du Plessis, 'Part 2' [2009] Company Lawyer 72, 72.

[386] Limited Liability Act 1855, s 1(4). This number seems to have been taken from the definition of a large partnership in the 1844 Act. See Mackie, [2011] Juridical Review 294, 296.

[387] Limited Liability Act 1855, s 1(4).

[388] ibid s 14.

[389] ibid s 1(2).

[390] ibid s 1(1).

some certainty for third parties when dealing with the company to ensure that it is a financially viable entity, and to publicise to third parties that the company enjoys limited liability. In other words, whilst granting limited liability to companies increased the risk of externalities, the effect was mitigated by higher mandatory capital requirements[391] and mandatory disclosure of the risk to third parties that they are dealing with companies whose liability is limited. Nevertheless, the introduction of limited liability complicated the analysis by introducing another Cost. In addition to the need to protect shareholders from agency costs (primarily from the actions of rogue managers and directors), it also became necessary to protect third parties from externalities arising from the actions of companies with limited liability.

The 1844 Act and the 1855 Act did not speak to each other, and therefore the concepts of limited liability and separate legal personality by registration operated separately. This proved untenable, and the two were restated in 1856 in a single Act in which the two concepts were linked. This has been the approach ever since, leading to Gower describing the 1856 Act as the first of the modern Companies Acts.[392]

Many of the safeguards provided under the 1855 Act were removed in the 1856 Act – there was no longer a minimum paid-up capital requirement,[393] the minimum number of shareholders was dropped to seven,[394] and the appointment of auditors became voluntary. This meant that a lot of the mandatory protections against externalities were reduced or fell away. It has been stated that:

> Within a matter of a few months the official stance on the granting of limited liability changed and pre-conditions that were regarded as vital safeguards in 1855 were abandoned. This change is probably reflective of the progress of laissez-faire in Victorian England.[395]

This principle of laissez-faire also occurred elsewhere throughout the Act, in that various protections which were previously mandated by statute moved to become voluntary. Thus, the 1856 Act was the first Act to include reference to a company having 'articles of association'.[396] It was also the first to include a default set of articles of association which

[391] £50 is not high by today's standards, but on an inflationary basis this would be £4,590 as at 2018, and comparative to the economy as a whole, it would be the equivalent of £147,500 in 2018 according to https://www.measuringworth.com/calculators/ppoweruk/ accessed 29 October 2019.
[392] De Koker, [2005] Company Lawyer 130.
[393] ibid.
[394] Joint Stock Companies Act 1856, s 39.
[395] De Koker [2005] Company Lawyer 130.
[396] Joint Stock Companies Act 1856, s 7.

were appended to the Act as 'Table B'.[397] After incorporation, articles could only be amended[398] by the new invention – a 'special resolution', a new term which referred to a resolution passed by three quarters of the company's shareholders in number and value.[399] The special resolution definition supplanted the concept of scaled voting, but also required a three quarters majority to approve it, meaning that it replaced one minority-protection device with another. There was no definition of an 'ordinary' resolution this being left to the articles of association.

This basic framework has been restated on several occasions. The Companies Act 1900 introduced the concept of a certificate of incorporation as prima facie evidence that the company exists,[400] the provisions in respect of the register of charges,[401] and requirements as to prospectuses.[402] The latter were implemented against the background of an 1890 Act which introduced personal liability for directors for damage suffered by shareholders as a result of inaccurate prospectuses.[403] This is obviously less relevant for private companies, but nonetheless provides evidence of the protection of shareholders from agency costs arising from directors once more increasingly taking place on a mandatory basis. Subsequent amendments in 1929, 1948, and 1985 made changes to the specific terms governing company law[404] but did not vary dramatically from the 1856 Act in their general approach to mitigating Costs (with the possible exception of changing to accounting aspects noted above). However, the protection of minority shareholders continued to shrink: the requirement that special resolutions be passed by 75 per cent of shareholders by number and value was replaced by the concept of their being passed by a 75 per cent majority, with a split analysis for 75 per cent by shareholders (voting on a show of hands) and 75 per cent by share votes (voting on a poll).[405] This formula persists today.[406]

In conclusion, in line with the theoretical analysis, since 1844 legislation in respect of companies has been a response to the Costs which are unmitigated at the time. This verifies and reinforces the theoretical analysis advanced in Chapters 2 and 3. Thus, the initial joint stock companies Acts and companies Acts provided protection for shareholders from agency

[397] ibid s 9.
[398] ibid s 32.
[399] ibid s 34.
[400] Companies Act 1900, s 1.
[401] ibid ss 13–18.
[402] ibid ss 9–11.
[403] Director Liability Act 1890.
[404] In the Companies Act 1929; the Companies Act 1948; and the Companies Act 1985, respectively.
[405] Companies Act 1929, s 117.
[406] Companies Act 2006, s 283.

costs generated by management. Some protection for third parties was included but the bar was not set very high: shareholders could not hide behind the corporate form. Once limited liability was included in 1855, externalities became more of a consideration. Thus we see third-party protection against externalities arising from the use of the corporate form becoming the key element considered, to the exclusion of some forms of protection shareholders had previously enjoyed. There are two key outcomes to note from this analysis. First, Costs have developed over time and with them responses to Costs have developed. Second, those responses have, primarily, involved mandatory application under statute, unless the market itself has responded to the Cost in question. Against this backdrop, it is worth examining the historical development of the twin exacerbations – if company law has typically provided mandatory responses to Costs, how is it that we still have unresolved Costs in the form of the twin exacerbations?

4.2. Division of Powers between the Majority and the Minority

4.2.1. Introduction

We have established that the history of company law has depended on the Costs that arose in respect of companies from time to time, and that the response to these agency costs and externalities has traditionally been mandatory intervention in the absence of action by the market. It is therefore necessary to review the history and development of the two exacerbations of indirect manifestations of majority/minority agency costs: specifically, the division of responsibility between shareholders and directors, and the ability of shareholders to remove directors. We first examine the history of the legal framework governing the division of responsibility between directors and shareholders. The issue underpinning this exacerbation is that directors may act in a manner which they perceive to reflect the wishes of the dominant shareholder to avoid shareholders exercising their right directly to usurp the powers of the board.

4.2.2. The Initial Division: the 1844 Act

In line with the 1844 Report, the 1844 Act provided expressly for the powers of directors:

> That with regard to the Powers and Duties of Directors it shall be lawful for the Directors of any Joint Stock Company registered under this Act,
>
> 1. To conduct and manage the Affairs of the Company according to the Provisions and subject to the Restrictions of this Act, and of the Deed of Settlement, and of any Bye Law, and for that Purpose to enter into all such

Contracts and do and execute all such Acts and Deeds as the Circumstances may require; and also,

2. To appoint the Secretary, if any; and also,

3. To appoint the Clerks and Servants; and also from Time to Time, as they see fit,

4. To remove such Secretary, Clerks, and Servants, and to appoint others, as the occasion shall require; and also,

5. To appoint other Persons for special Services as the Concerns of the Company may from Time to Time require; and also,

6. To hold Meetings periodically and from Time to Time as the Concerns of the Company shall require; and also,

7. To appoint a Chairman to preside at all such Meetings, and in his Absence to appoint a Chairman at each such Meeting; Subject nevertheless to the Provisions and Restrictions of this Act, and to the Provisions of the Deed of Settlement of the Company or other special Authority, but not so as to enable the Shareholders to act in their own Behalf in the ordinary Management of the Concerns of the Company otherwise than by means of Directors:

Provided always, that it shall not be lawful for the Directors to purchase any Shares of the Company, nor to sell any such Shares, except Shares forfeited on the Non-payment of Calls or Instalments, nor to lend to any one of their Number, or to any Officer of the Company, any Money belonging to the Company, without the Authority and Sanction of a General Meeting of Shareholders duly convened.[407]

This, therefore, shows that the first statute to provide for incorporation by registration included express mandatory powers for the directors. Power 1 was an express ability to conduct and manage the affairs of the company. Powers 2 to 7 provided for procedural powers to achieve this end and, therefore, should be seen as subservient to power 1. There were mandatory limitations on the powers of directors: they had to act in accordance with the terms of the 1844 Act itself, as well as in accordance with the provisions of the deed of settlement and any bye-law. This allowed the company's constitutional documents to contain a restriction on what the directors were able to do, although the restriction was not obligatory. There were also further mandatory limitations – primarily, that the company could not lend to directors without shareholder approval. These mandatory limitations can be seen as mitigations of manifestations of director/shareholder agency costs.

The 1845 Act retained the mandatory and statutory division of powers between directors and shareholders. Thus, section 90 provided for the powers of directors:

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[407] Joint Stock Companies Act 1844, s 27.

> The directors shall have the management and superintendence of the affairs of the company, and they may lawfully exercise all the powers of the company, except as to such matters as are directed by this or the special Act to be transacted by a general meeting of the company; but all the powers so to be exercised shall be exercised in accordance with and subject to the provisions of this and the special Act [i.e. any act incorporating a specific company]; and the exercise of all such powers shall be subject also to the control and regulation of any general meeting specially convened for the purpose, but not so as to render invalid any act done by the directors prior to any resolution passed by such general meeting.[408]

This provision included a subtle shift from the version in the 1844 Act. Whilst the directors retained general power subject to the act, rather than to the bye-laws or deed of settlement, these powers were subject to two qualifications. First, anything which was 'to be transacted' by the general meeting could not be transacted by the board; and second, the directors' powers were subject to the 'control and regulation' of any general meeting. This appears to have given shareholders control over the exercise of directors' powers rather than themselves directly usurping any powers. Thus it would appear to enable the shareholders to restrain the directors from acting in a specific way, or instruct them to perform certain actions, but not to themselves undertake activity on behalf of the company.[409] This analysis is supported by the reference to matters being subject to the 'general meeting' and the list of powers of the general meeting in a separate section:

> Except as otherwise provided by the special Act [i.e. any act incorporating a specific company], the following powers of the company, (that is to say,) the choice and removal of the directors, except as herein-before mentioned, and the increasing or reducing of their number, where authorized by the special Act, the choice of auditors, the determination as to the remuneration of the directors, auditors, treasurer, and secretary, the determination as to the amount of money to be borrowed on mortgage, the determination as to the augmentation of capital, and the declaration of dividends, shall be exercised only at a general meeting of the company.[410]

This clause is non-exhaustive in that it provides a list of matters which may only be transacted at a general meeting, but not a definitive list of what could be transacted at a general meeting. Nonetheless, when coupled with section 90, the position is clear: the directors had the power to undertake all activities of the company save for those mandated to be transacted by the general meeting under section 91. In exercising those powers, the directors were subject to certain constraints that the general meeting could impose. The wording was perhaps slightly unclear in that section 90 purported that the general meeting

[408] Companies Clauses Consolidation Act 1845, s 90.
[409] S Watson, 'The significance of the source of the powers of boards of directors in UK company law' [2011] Journal of Business Law 596.
[410] Companies Clauses Consolidation Act 1845, s 91.

should ‘transact’ matters, rather than ‘decide’ matters in accordance with section 91. If ‘transact’ were replaced with ‘decide’ then the statutory provision would be clear as to division between the board of directors and the shareholders, and this exacerbation would have been mitigated.

The issue of the balance between the powers of the board and the shareholders under this statutory framework was tested in *Isle of Wight Railway Company v Tahourdin.*[411] A railway company was not performing well, and certain shareholders requisitioned a general meeting to, firstly, appoint a committee to examine the working and general management of the company and authorise the directors to implement its recommendations; and secondly, to remove directors if necessary. The directors summoned a meeting only in respect of the first element. The relevant shareholders noted that this meeting did not cover all that they had asked, and so exercised their right to hold a meeting anyway.[412]

The directors brought an action in the name of the company to restrain the shareholders' meeting. In first instance, the court held that the appointment of a committee was an illegal transfer of power from the directors to the shareholders, and that the second limb was too vague. Accordingly, at first instance, Kay J granted the injunction. This was appealed. On appeal the decision was reversed. A lot of the discussion in the case is of relevance to the interaction between the board of directors and the general meeting. Cotton LJ began the judgment with:

> We are of opinion that this injunction ought not to have been granted. It is a very strong thing indeed to prevent shareholders from holding a meeting of the company, when such a meeting is the only way in which they can interfere, if the majority of them think that the course taken by the directors, in a matter which is intra vires of the directors, is not for the benefit of the company.[413]

The second sentence contains two linked concepts. The first is that such a general meeting is ‘the only way’ in which the shareholders are able to ‘interfere’ in the management of the business. For this to be the case, it must be necessary for 'power to act' to sit exclusively with the directors. The second is that shareholders may only interfere through the general meeting if:

1. a majority of those shareholders attending the meeting;

[411] *Isle of Wight Railway Company v Tahourdin* (1884) LR 25 Ch D 320 (per Cotton LJ).
[412] Only matters expressly included in the notice could be transacted at general meetings under the Companies Clauses Consolidation Act 1845, s 69.
[413] *Isle of Wight Railway Company v Tahourdin* (1884) LR 25 Ch D 320, 329 (per Cotton LJ).

2. consider a course of action taken by directors;

3. which the directors are able to do;

4. is not for the benefit of the company.

The second point implies that it is for directors to propose matters, and for the shareholders to attempt to restrain them from undertaking such action if they disagree with that course. Under this limited formulation, therefore, it may not be open to the shareholders to mandate the directors to use their powers to do certain things. The rest of the judgment carefully side-stepped the issue by deciding that the precise wording of the first object of the meeting was only to authorise the directors to implement the terms of the committee's report, not to mandate that they do so, or delegate the power to the committee to run the company. On the latter point Cotton LJ stated:

> I do not mean to give any opinion upon the question whether it would be legal to give to a committee power to do the things mentioned in the notice, it is unnecessary in my opinion to decide that question, as I am clear that such is not the object of the notice, for a scheme which the committee were intended to carry into effect of their own authority would not have been spoken of as 'recommendations of the committee.'[414]

The fourth point is that shareholders are only able to exercise this right if they consider the directors' proposed course of action not to be for the benefit of the company.

Lindley LJ considered the case to be 'very much more important than at first sight appears. It raises a question of the utmost possible consequence as to the management of railway and other companies.'[415] Lindley LJ used the line of cases that shareholders may not sue directors in the name of the company (also known as the rule in *Foss v Harbottle*[416]) as evidence that the court has

> constantly and consistently refused to interfere on behalf of shareholders, until they have done the best they can to set right the matters of which they complain, by calling general meetings. Bearing in mind that line of decisions, what would be the position of the shareholders if there were to be another line of decisions prohibiting meetings of the shareholders to consider their own affairs? It appears to me that it must be a

[414] *Isle of Wight Railway Company v Tahourdin* (1884) LR 25 Ch D 320, 331 (per Cotton LJ).
[415] ibid 331 (per Lindley LJ).
[416] *Foss v Harbottle* 67 ER 189.

> very strong case indeed which would justify this Court in restraining a meeting of shareholders.[417]

This echo's Cotton LJ's analysis: under the 1845 framework, the general meeting was the only way for shareholders to have their say in the activities of the company and, therefore, the court should be reticent to prevent such a meeting being held. No attention was paid to the ability of shareholders to bind the company after such meeting, or actively require directors to do anything.

4.2.3. An Unexpected Change: the 1856 Act

The 1856 Act did not replicate the position adopted under the 1845 Act. Instead, the Act was silent as to the division of powers between directors and shareholders. Such a division did, however, appear in the default articles of association provided as Table B to the 1845 Act. The relevant article of association in Table B was:

> The business of the company shall be managed by the directors, who may exercise all such powers of the company as are not by this Act or by the articles of association, if any, declared to be exercisable by the company in general meeting, subject nevertheless to any regulations of the articles of association, to the provisions of this Act, and to such regulations, being not inconsistent with the aforesaid regulations or provisions, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made.[418]

This is framed in a very similar tone to section 90 of the 1844 Act, but with two very key differences. First, the emphasis is changed from the general meeting being able to provide 'control or regulations' over the actions of directors, to the general meeting being able to prescribe regulations. This difference is more than semantic and creates an implication of increased passivity on the part of shareholders – under the 1844 formulation, the general meeting could exert control over the directors, whereas under the Table B formulation they could prescribe regulations for the directors to comply with when taking decisions.

This moves the role of shareholders in decision making from being able to exert substantial direct control in respect of the management of the vehicle, to a position whereby they are able to set limits on what directors are able to do (and/or how they do it). The second change, however, was much more fundamental and negates this: the division of powers moved from

[417] *Isle of Wight Railway Company v Tahourdin* (1884) LR 25 Ch D 320, 331 (per Lindley LJ).
[418] 1844 Table B, art 46.

mandatory application (under the statute itself) to default application under Table B.[419] Watson states:

> The conferring of powers on boards through the articles of association rather than by means of the statutory instrument, which remains the position in the UK today, originated in the [1856 act]. Certainly the source of the powers of boards was original and undelegated in earlier forms of the corporation. Prior to the [1856 act], boards derived their powers from the statutory instrument or equivalent. Corporations created by charter have existing in the UK at least since medieval times. The source of the powers of chartered corporations was the Crown through the charter. Statutory power being bestowed on boards was once of the incidences of corporations given to companies by registration under the Joint Stock Companies Act 1844, the earliest UK act permitting incorporation by registration. Section 27 of the [1844 Act] stated that directors would have the powers to 'conduct and manage the affairs of the company'. Shareholders could not take part in the management of companies 'otherwise than by means of directors'.[420]

This is therefore a major change in that it became legally possible for this division of powers between shareholders and directors to be varied by special resolution. Moving this provision from statute to the articles of association, and allowing the shareholders of the company to vary the articles of association, created the ability for shareholders to assume the management power of the company themselves. There is limited evidence of shareholders having done so in the nineteenth century,[421] but the threat of doing so forms the exacerbation of the extant indirect manifestation of the majority/minority agency cost – that directors may act in a way which they consider the dominant shareholder wishes to avoid their powers being usurped by the general meeting. Indeed, the historical lack of evidence that shareholders HAVE usurped such powers could be seen as evidence that boards have acted in such a manner. Such a change from powers being a matter of statute to being a matter of default application under the articles of association, was a major shift which has not altered since 1856. When drafting the 1856 Act, the drafters started with Table B: the usual terms of the deed of settlement for joint stock companies were converted into Table B, and the statute covered matters which were thought not covered in Table B. However, a pre-1844 joint stock company and a company incorporated in 1856 were very different creatures: in the former, shareholders were settlers and beneficiaries of a trust managed by the directors.[422] Ability to take control of the management of the vehicle was, therefore, effectively a method of unwinding the trust. However, by 1856, the company was its own

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[419] Watson [2011] Journal of Business Law 596, 605–606.
[420] ibid 610.
[421] ibid 607.
[422] Cooke, *Corporation, Trust & Company* 86–88.

separate person, providing limited liability to shareholders and from which shareholders were unable to withdraw their capital. It is therefore a mistake to consider that matters normally considered in the deed of settlement of the former, would be automatically suitable to be left to the articles of association of the latter. The way in which the 1856 Act was drafted means that the mistake was not even deliberate – Watson has identified that the move of the powers of directors to a default position rather than a mandatory application, was accidental rather than philosophically driven.[423] The move from powers being mandatory to default rules has been deemed an 'accidental oversight'.[424] Whether this was a mistake or accidental, it is this change that has created the potential for the one of the exacerbating factors in the indirect manifestation of majority/minority agency costs.

4.2.4. Judicial Development

Initially, courts presumed that companies would act through their directors, even though a private company was not obliged to have directors until 1948.[425] Thus Cairns LJ stated in 1866 that '[t]he company itself cannot act in its own person, for it has no person; it can only act through directors'.[426]

At the start of the twentieth century the courts began taking an interest in the balance between shareholders and directors. *Automatic Self Cleansing v Cuninghame*[427] was a case which involved a company with the standard article giving the directors the power to manage the company. It had a dominant shareholder who, with his friends, held a majority of shares. That dominant shareholder negotiated and tabled a contract to sell the business and assets of the company to another company in which he was involved, and proposed a resolution to a general meeting which provided:

> That the company do sell the assets specified in the contract which has been produced to the meeting at the price and on the terms therein mentioned and contained and that the directors be and they are hereby directed to cause the common seal of the company to be affixed thereto within seven days and to carry the same into effect.[428]

At the general meeting this resolution passed by 1,502 votes (consisting of the dominant shareholder and his friends) for and 1,198 votes against. The directors did not think that such

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[423] Watson, [2011] Journal of Business Law 596, 611.
[424] LA Walcott, 'The conundrum: Resolving the statutory contract in the Commonwealth Caribbean' [2017] Company Lawyer 248.
[425] Introduced in Companies Act 1948, s 176.
[426] *Ferguson v Wilson* (1866-67) LR 2 Ch App 77, 89.
[427] *Automatic Self Cleansing v Cuninghame* [1906] 2 Ch 34.
[428] ibid 36.

a sale would be in the interests of the company as a whole. The dominant shareholder sued the directors. At first instance, Warrington J summed up the issue as:

> The effect of this resolution, if acted upon, would be to compel the directors to sell the whole of the assets of the company, not on such terms and conditions as they think fit, but upon such terms and conditions as a simple majority of the shareholders think fit. But it does not rest there. Article 96 provides that the management of the business and control of the company are to be vested in the directors. Now that article, *which is for the protection of a minority of the shareholders*, can only be altered by a special resolution, that is to say, by a resolution passed by a three-fourths majority, at a meeting called for the purpose, and confirmed at a subsequent meeting[429] (emphasis added).

The italicised phrase illustrates that the strong powers held by directors are judicially recognised as existing for the protection of the minority. Warrington J found in favour of the directors. This was appealed. The Court of Appeal indicated that the matter before the court was not one of universal application, but rather depended on the articles of the company in question. The dominant shareholder attempted to argue that the directors were the servants of the shareholders and, therefore, had to do the bidding of the shareholders. The Master of the Rolls responded with:

> It has been suggested that this is a mere question of principal and agent, and that it would be an absurd thing if a principal in appointing an agent should in effect appoint a dictator who is to manage him instead of his managing the agent. I think that that analogy does not strictly apply to this case. No doubt for some purposes directors are agents. For whom are they agents? You have, no doubt, in theory and law one entity, the company, which might be a principal, but you have to go behind that when you look to the particular position of directors. It is by the consensus of all the individuals in the company that these directors become agents and hold their rights as agents. It is not fair to say that a majority at a meeting is for the purposes of this case the principal so as to alter the mandate of the agent. The minority also must be taken into account. There are provisions by which the minority may be over-borne, but that can only be done by special machinery in the shape of special resolutions. Short of that the mandate which must be obeyed is not that of the majority—it is that of the whole entity made up of all the shareholders. If the mandate of the directors is to be altered, it can only be under the machinery of the memorandum and articles themselves. I do not think I need say more.[430]

This analysis develops Warrington J's analysis that provisions providing power to the board exist to protect minority shareholders. However, whilst the Master of the Rolls identified the issue, he did not adequately resolve it. If it is not fair for a majority to use its bare majority

[429] ibid 38.
[430] ibid 42–43.

in a general meeting to alter the mandate of the directors, why would it automatically become fair for a special resolution to alter such mandate? Consider a case where an 80 per cent shareholder was proposing a resolution to transfer all the assets of the company from the existing company to a new company wholly owned by her for £1 (considerably below the value of the assets). Under the Master of the Rolls' logic, this would clearly be an unfair use of the dominance of the majority shareholder, and a direct manifestation of a majority/minority agency cost. However, under his judgment, this outcome could be achieved if the shareholders proposed, by special resolution, to reserve the ability to conduct sales on behalf of the company to the general meeting. In such a situation it is arguable that a minority shareholder would be in even greater need of protection from dominant shareholders. This leads to the conclusion that the protections afforded by *Automatic Self Cleansing* are inadequate. Nevertheless, the minority were afforded some protection: for the majority to assume the powers of directors, they must use the mechanisms provided for in the relevant articles and Companies Act.

The approach taken in *Automatic Self Cleansing* is, therefore, that directors are only powers delegated from the general meeting by the articles, with the implication being that in the absence of such delegation such powers sit with the general meeting. *Marshall's Valve Gear Company, Limited v Manning, Wardle & Co Limited*[431] involved a company with the standard 1862 Table B articles. The company had four directors who were also shareholders. A held the majority but less than 75 per cent of the shares. The directors fell out, with A on one side and the other three directors on the other. The company had a patent, and the three directors were interested in a company which had a competing patent. A alleged that this other company infringed on the rights of their company, and attempted to raise an action to restrain the infringement through the board. The three objecting directors voted against the action, but A anyway commenced action in the name of the company. Neville J pointed out that the three directors were somewhat conflicted.[432] Neville J stated:

> Prior to the decision in [*Automatic Self Cleansing*] the matter, I think, would have presented little difficulty, because I think in several cases…the principle has been acted upon that in the absence of any contract to the contrary the majority of the shareholders in a company have the ultimate control of its affairs.[433]

Neville J, therefore, distinguished *Automatic Self Cleansing* on the ground that the shareholders had, under the articles in *Automatic Self Cleansing*, bound themselves to only

[431] *Marshall's Valve Gear Company, Limited v Manning, Wardle & Co, Limited* [1909] 1 Ch 267.
[432] ibid 271.
[433] ibid 272.

take direct action by way of extraordinary resolution, which there was not in the case of *Marshall*. This is a logical extension of the *Automatic Self Cleansing* case – shareholders can, if they use whatever procedural hoops the articles may contain, take control of the affairs of the company. However, it is flawed for the same reasons as noted above. It is worth noting that the issues in *Automatic Self Cleansing* were that shareholders were trying to use their powers to further their own interests, whereas in *Marshall* it was directors who were abusing the corporate form to further their own interests. In other words, in both instances the court reached a decision which protected some shareholders against agency costs from putative wrongdoers: in *Automatic Self Cleansing,* this protected the minority from direct manifestations of agency costs from the majority, and in *Marshall* it protected the shareholders from indirect manifestations of agency costs from the directors.

Defence of directors' powers only applies where the board of directors is working effectively but in a manner disapproved of by the shareholders. Another line of authority has developed to cover situations where the directors are unable, or unwilling, to act. The court has stated:

> If directors having certain powers are unable or unwilling to exercise them—are in fact a non-existent body for the purpose—there must be some power in the company to do itself that which under other circumstances would be otherwise done. The directors in the present case being unwilling to appoint additional directors under the power conferred on them by the articles, in my opinion, the company in general meeting has power to make the appointment.[434]

This line of authority has been used where the board were in deadlock about which of two candidates should be appointed as the managing director of the company. The court held that this meant that the shareholders could choose, stating:

> From a business point of view it seems to me that there are only two persons who are possible managing directors, and the board has been reduced to the position that it is unable, owing to internal friction and faction, to appoint anybody as a managing director.[435]

These two lines of authority appear to coexist neatly: there is strict deference to the constitutional split of powers between directors and shareholders unless the directors are unable to act, in which case the general meeting is entitled to assume the board's powers. However, the precise point at which this switch occurs is very unclear. If the directors keep having votes on the same subject matter which are increasingly entrenched in their deadlock then this is straightforward. However, does this right apply if the directors delay taking a

[434] *Barron v Potter* [1914] Ch 895 Ch D.
[435] *Forster v Forster* [1916] 1 Ch 532 Ch D 551.

decision? Does the analysis change if the decision is one for which time is of the essence? Who should decide whether the directors are able to make a decision? In what circumstances does inaction count as exercising their powers, or does action alone count?

The balance between the powers of directors and shareholders was unchanged in the Companies Act 1929,[436] but it was under this Act that the *Automatic Self Cleansing* line of authority became entrenched. *Shaw v Shaw*[437] involved a company with the standard article in respect of the division of powers between shareholders and the board of directors. It was managed by three brothers (the Shaws). The company was heavily indebted due to mismanagement by the Shaws. It was agreed that each of the brothers would acknowledge a debt to the company (to be established by an independent accountant), that two independent directors would be appointed as permanent directors, and the articles would be altered so that the Shaws could have no control over, or right to vote in respect of, the debts due by any of them. An accountant was appointed to establish their liability. The articles were amended and such an agreement drawn up, which provided that the debt would be payable in twenty years. The agreement was signed by the brothers in their personal capacities, with a clause stating that the company would be bound by it when the agreement was approved in a general meeting. The approval of the general meeting was considered a formality and so the accountant started working and drew up the balance sheet showing that the Shaw brothers owed a lot more than they had thought. The general meeting passed the terms of the agreement but the brothers refused to sign it.

The newly-appointed independent directors held a directors' meeting to sue the brothers for recovery of amounts they owed the company. A meeting of shareholders was convened which passed a resolution to stop the company from suing the brothers. The resolution passed on the brothers' votes. One of the issues before the court was whether the permanent directors were able to commence proceedings against the brothers in the name of the company on the ground that the decision had been taken at a board meeting which the brothers had not attended. The Court of Appeal undertook a textual analysis of the bespoke articles allocating responsibility between the 'ordinary' directors and the 'permanent' directors. The court held that commencing such litigation was within the sole powers of the permanent directors and, therefore, that the commencement of the action was valid. It then turned its attention to the effect of the shareholders' resolution to restrain the action, stating:

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[436] 1929 Table A, art 67.
[437] *John Shaw & Sons (Salford) Ltd v Shaw* [1935] 2 KB 113.

> I think the judge was also right in refusing to give effect to the resolution of the meeting of the shareholders requiring the chairman to instruct the company's solicitors not to proceed further with the action. A company is an entity distinct alike from its shareholders and its directors. Some of its powers may, according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles in the directors is by altering their articles, or, if opportunity arises under the articles, by refusing to re-elect the directors of whose actions they disapprove. They cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders.[438]

The argument advanced is very similar to that used by the Master of the Rolls in *Automatic Self Cleansing*. However, it is couched in even stronger language – whilst the Master of the Rolls in *Automatic Self Cleansing* described altering mandates given to the directors, the Court of Appeal in *Shaw* described shareholders usurping the rightful power of directors. Once more, however, the analysis appears inconsistent: why should it be anathema for shareholders to 'usurp' powers using certain techniques, but acceptable for them to 'usurp' powers using other techniques? In both *Automatic Self Cleansing* and in *Shaw* the judicial opinion identified a wrong – which in each case was a manifestation of majority/minority agency costs – and prevented that wrong from taking place. However, in each case they then stated that the wrong could be achieved by the shareholders merely attempting to undertake the same activity in a slightly different way. This approach clearly gives effect to the articles as a contract between the members,[439] and is consistent with the legislative framework in which the courts were operating. However, it presents a clear method by which the policy concerns that the court had identified could be simply avoided by a majority.

The interaction between shareholders and directors was further examined in in *Salmon v Quin & Axtens, Limited*.[440] In this case, two similar articles were included in the company's articles of association. Firstly, the general article stated:

> 75. The business of the company shall be managed by the board, who may pay all expenses of or incident to the formation, registration, and advertising of the company, and the issue of its capital. The board may exercise all the powers of the company, subject, nevertheless, to the provisions of any Acts of Parliament or of these articles, and to such regulations (being not inconsistent with any such provisions of these

[438] ibid 134.
[439] See Gower and Davies, paras 3-18 and 3-19 and authorities there cited.
[440] *Salmon v Quin & Axtens, Limited* [1909] 1 Ch 311.

> articles) as may be prescribed by the company in general meeting, but no regulations made by the company in general meeting shall invalidate any prior act of the board which would have been valid if such regulations had not been made.

The precise wording differs *slightly* from the then-default form. Article 76 supplemented this by further empowering the directors to sell, let, or otherwise dispose of any part of the property of the company. Article 80 was a more bespoke article:

> 80. No resolution of a meeting of the directors having for its object the borrowing of money, the entering into any contract the subject-matter of which shall be of a value exceeding 10 00l, the acquisition by purchase, lease or otherwise, or the sale, leasing, letting, mortgaging or charging of any hereditaments or premises, the renewal or extension of any existing lease or tenancy or the acquisition of any reversionary lease, the opening of any additional shop or branch of the company's business, the carrying on of any business or class of business not then carried on by the company, the convening of an extraordinary general meeting of the company other than a meeting convened pursuant to a requisition of shareholders undersection 13 of the Companies Act, 1900 , or any matter affecting the rights of either of them, the said William Raymond Axtens and Joseph Salmon, as holders of ordinary shares of the company shall be valid or binding unless not less than twenty-four hours' notice in writing by letter or telegram of the meeting specifying the business proposed to be transacted thereat, shall have been given to each of the managing directors, the said William Raymond Axtens and Joseph Salmon, and neither of them shall have dissented therefrom in writing before or at the meeting at which such resolution is put to the vote.

The articles were therefore slightly in conflict: articles 75 and 76 purported to give the directors wide powers, but article 80 limited the powers of a director in respect of certain transactions without prior approval of the general meeting and of specified individuals. The case involved the acquisition of a property in London for 20 00l (therefore above the threshold in article 80). A directors' meeting was held on 1 August to approve the acquisition of the property. Salmon dissented in writing to the proposal in accordance with article 80. A separate directors' meeting was held on 19 August to approve the letting of the company's existing offices and issue shares. Salmon again dissented in writing in accordance with article 80. The company requisitioned an extraordinary meeting of the company to consider the subject matter of the resolutions passed on 1 and 19 August by the directors. The matters passed the extraordinary general meeting due to Axtens' votes. Salmon sued to restrain the company from acting on the purchase and lease.

At first instance, Warrington J rejected the injunction on the ground that article 80 only referred to a ‘meeting of the directors’, and therefore did not restrain the general meeting from approving the matters and directing the company to do so. The Court of Appeal pointed

out that Salmon had dissented to the matters to be transacted in accordance with article 80. Farwell LJ noted that article 75 was subject to any provisions of the articles, which was taken to be subject to article 80.[441] It was also subject to any 'regulations (being not inconsistent with any such provisions of these articles) as may be prescribed by the company in general meeting'. If the extraordinary meeting could be taken to prescribe regulations for the company, then these were not consistent with article 80. The court also discussed the *Isle of Wight Railway Company* case. The court agreed with an observation in the eighth edition of *Buckley on Companies*[442] that the *Isle of Wight* decision was based on the Companies Clauses Act of 1845 which provided a statutory footing for the division between the board and shareholders, providing that the power of directors to run the company was subject to 'the control and regulation of any general meeting'.[443] As the division of powers was no longer mandatory, and no longer referred to 'control', the implicit logic of *Isle of Wight Railway* was no longer relevant, and the general meeting could no longer be held to exert implicit control over the board of directors, other than provided for in the articles of association.[444] Once again, this matches the logic of the transfer of the division of power from statute to the articles of association. However, once more the policy aims outlined can be avoided: shareholders can amend the articles of association. This must mean that shareholders are able to alter the division of power from statute to the articles of association. This clearly provides shareholders with *more* implicit control over the powers of the board of directors rather than less.

The House of Lords agreed with the Court of Appeal. Lord Loreburn stated, *obiter*, that: 'I should require a great deal of argument to satisfy me that the word "regulations" in this article does not mean the same thing as articles, having regard to the language.'[445] A similar issue arose in a tax case, *The Gramophone and Typewriter, Limited v Stanley*.[446] This case involved an English company which owned all of the shares in a German company. The issue was whether the German company's profits were liable to UK tax. Buckley LJ stated:

> [I]t is urged that the English company, as owning all the shares, can control the German company in the sense that the German company must do all that the English company directs. In my opinion this again is a misapprehension. This Court decided not long since, in *Automatic Self-Cleaning Filter Syndicate Co. Ld. v. Cunninghame*,

[441] ibid 318.
[442] Lord Buckley, *The Law and Practice under the Companies Acts: And the Life Assurance Companies Acts: Containing the Statutes and the Rules, Orders, and Forms to Regulate Proceedings* (8th edn, Stevens and Haynes 1902).
[443] Companies Clauses Consolidation Act 1845, s 90.
[444] *Salmon v Quin & Axtens, Limited* [1909] 1 Ch 311 at 319.
[445] *Quin & Axtens, Limited and Others v Salmon* [1909] AC 442, 444.
[446] *The Gramophone and Typewriter, Limited v Stanley* [1908] 2 KB 89.

> that even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles. Directors are not, I think, bound to comply with the directions even of all the corporators acting as individuals. Of course the corporators have it in their power by proper resolutions, which would generally be special resolutions, to remove directors who do not act as they desire, but this in no way answers the question here to be considered, which is whether the corporators are engaged in carrying on the business of the corporation. In my opinion they are not. To say that they are involves a complete confusion of ideas.[447]

This was quoted in *Salmon v Quin* with approval, with Farley LJ stating:

> Any other construction might, I think, be disastrous, because it might lead to an interference by a bare majority very inimical to the interests of the minority who had come into a company on the footing that the business should be managed by the board of directors.[448]

This therefore shows a further development of the analysis – if directors are entrusted with the powers of the company, there are limited ways of dispossessing them, even if all shareholders agree that a certain course of action be taken to do so. Yet again, this analysis acknowledges the issue underpinning this exacerbation of the indirect manifestations of majority/minority agency costs in private companies: shareholders may not have the best interests of all shareholders in mind when purporting to direct the company.[449] Buckley LJ appears to go further and acknowledge that even all shareholders acting unanimously may raise such an issue. However, his analysis has the same flaw evident in all the other judgments reviewed – whilst it clearly gives effect to the articles of association as a contract, what is the point in defending the board of directors' power to act against shareholders, and thus such contract, when the majority shareholders are able to amend the contract and alter the articles to assume such power themselves?

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[447] ibid 105–106.

[448] *Salmon v Quin & Axtens, Limited* [1909] 1 Ch 311, 319.

[449] There is, of course, a technical meaning of the 'interests of the company' that is discussed in further detail elsewhere. For the purposes of this chapter, we only require to acknowledge that there are 'interests of the company' and that these interests may conflict with the interests of any individual shareholder.

This position was unchanged in 1929 and 1948 and judicial deference to the split between directors and shareholders was retained when courts interpreted these provisions, including making the definitive statement that:

> It is established that directors, within their management powers, may take decisions against the wishes of the majority of shareholders, and indeed that the majority of shareholders cannot control them in the exercise of these powers while they remain in office.[450]

This statement is only true if it is accepted that 'within their management powers' should be taken to mean the powers that the shareholders delegate to the directors under the articles. Whilst this clarification renders the statement correct, it recasts the meaning to be that directors are able to take decisions that shareholders allow directors to take. This differs considerable from the apparent meaning of the text, which appears to embody restraint on shareholders interfering in powers of directors.

A version of the 1856 provision was retained in the Companies Act 1985. Table A gave directors power 'subject to the articles and any directions given by special resolution'.[451] The express reference to a special resolution was only introduced in 1985. Practically, this makes no difference to the analysis – shareholders could anyway change articles by special resolution. However, the change introduced a clear shift in tone: no longer did limitations on directors' power need to be formally included in the articles, instead, directors' power could be limited a resolution by the members. This re-opened the possibility for a short term, one-off resolution to be adopted by the shareholders, rather than structural change to the governance rules of the company. Under the formulations since 1856, directors' power has been limited only by the articles themselves and by regulations made under the articles (which Lord Loreburn held obiter to be synonymous with the articles themselves). The addition of the special resolution changed the analysis considerably. The formulation change in 1985 made this first exacerbation of the agency cost even worse, as it expressly opened the possibility for one-off resolutions to interfere with the powers of directors. The effect is that the directors would arguably have to act on notice of a special resolution providing that the company must act in a certain way. This change, therefore, altered the role of shareholders – as well as being able to veto a decision by the directors as to activity of the company ex poste, they also became able to initiate a decision to be taken by the company ex ante.[452] All the cases reviewed have flagged that their decisions were based entirely on

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[450] *Howard Smith v Ampol* [1974] AC 821 PC 837.
[451] 1985 Table A, art 70.
[452] Kraakman and others, *Anatomy of Corporate Law (*3rd edn, OUP 2018) 32.

the legal framework that existed when they were delivered. Accordingly, given the addition of the 'special resolution' in the 1985 Table A, the line of authority may not need to be followed if faced with such an article, and it may have become easier (if Table A is widely adopted) for shareholders to usurp the power of the directors and take control of the active management of the company.[453]

4.2.5. Conclusion

The first exacerbation of the indirect manifestations of the majority/minority agency cost in private companies emerged in 1856. Until this point, divisions of responsibility between the board and shareholders were set out in statutory provisions. The power of the shareholders to use the general meeting negatively to vote against decisions of directors, was clear. However, the *Isle of Wight Railway* case avoided deciding definitively whether the general meeting under that regime was capable of dictating that the board of directors take any specified course of action, however against the interests of the company it might be. The 1856 Act changed this regime entirely, and made the division of responsibility between directors and the general meeting a matter of default application. This happened either accidentally or mistakenly. The logic of *Isle of Wight Railway* was held to be irrelevant under the new regime. Courts under the 1856 (and subsequent) regimes have left holes in their analysis: they have more stridently defended the rights of directors to control the company, ostensibly mitigating the exacerbation of indirect manifestations of majority/minority agency costs in private companies. However, this analysis has developed alongside the shareholders' ability to change the articles to, it appears, assume the power of the company. The courts in *Automatic Self Cleansing*, *Shaw, Gramophone,* and *Salmon* have used increasingly strong language to describe the ills of shareholders 'usurping' the rightful power of directors (i.e. exacerbating such agency costs). Whilst all decisions clearly follow the legislative framework set out by statute, all such analysis is undermined as shareholders are, by law, entitled to amend the articles of association in a manner which allows them to do precisely the evil that the courts have identified. The response that shareholders should be entitled to do so if their actions are in accordance with the articles of association, rings hollow.

[453] R Hollington, *Hollington on Shareholders' Rights* (8th edn, Sweet & Maxwell, 2016) para 5-16.

4.3. Removal of Directors by Shareholders

4.3.1. Introduction

Having examined the first exacerbation of the indirect manifestations of majority/minority agency costs in private companies, and identified that it arose by historical accident and has unfortunate outcomes, it is necessary to examine the second exacerbation: the risk that directors will act in a way calculated to please the dominant shareholder to the exclusion of the minority shareholder, to avoid being removed from office by the dominant shareholder.

4.3.2. Initial Rules

The 1844 Report stated strongly that appointing a director for life had the potential to cause great ill to the company.[454] As a result, the 1844 Act mandated triennial retirement for directors, which was retained in the 1845 Act.[455] The 1845 Act also provided for automatic vacation of the office as director in certain circumstances, particularly if the director profited from the company or ceased to hold the relevant number of shares for a shareholding qualification.[456] As with large swathes of legislation, the provisions relating to director removal were moved to the articles of association under the 1856 Act. Under Table B, triennial retirement was retained (with a clarification that directors could be re-elected on their retirement),[457] and provided for automatic vacation of office if the director profited from the company or became bankrupt/insolvent.[458] Accordingly, whilst the move from a mandatory scheme to a default scheme also occurred in respect of the removal of directors, the terms on which the default regime proceeded were the same as those on which the mandatory regime operated – there was no option to remove directors under the default regime, merely automatic vacation from office if a prescribed event occurred.[459] The main purpose of these provisions was to protect against owner/manager agency costs – a director profiting, directly or indirectly, from the company resulted in automatic removal from position.

This remained the case until 1900, when a mandatory removal for failing to comply with any shareholding requirement in the company's articles within prescribed periods, resulted

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[454] 1844 Report, viii.
[455] Companies Clauses Consolidation Act 1845, s 88.
[456] Companies Clauses Consolidation Act 1845, s 86.
[457] 1856 Table B, arts 48 and 49.
[458] 1856 Table B, art 47.
[459] Shareholders could, of course, replace Table B with entirely bespoke provisions, but the default regime itself did not provide any optionality.

in the director automatically vacating her office.[460] This was the start of a return of removal of directors to the statutory sphere. The Companies Act 1929 did not expand on this and retained other aspects of director removal in the articles of association. However, the list of events which automatically resulted in vacation of office under the default articles of association was expanded: directors would be automatically removed for making profit from the company other than that approved by shareholders; if the director became bankrupt or subject to any of the mandatory provisions under the Companies Act; if they were declared to be a lunatic; if they resigned; or if they had a conflict of interest.[461]

4.3.3. The Statutory Test

The Companies Act 1948 made several provisions regarding the removal of directors mandatory. It introduced a mandatory retirement for directors at 70 years of age,[462] together with a linked obligation on them to disclose their ages to the company.[463] The Act retained statutory prohibitions on bankrupts serving as directors,[464] and empowered the court to prevent fraudulent persons from being directors.[465] However, a variety of protections remained in the articles. Thus, under the default regime, a director was automatically removed if she became bankrupt, or if she was subject to an order prohibiting her being involved in management, or if she resigned.[466] Table A retained the same provisions in respect of triennial resignation.[467] Table A also included a new provision which removed a director if she 'shall for more than six months have been absent without permission of the directors from meetings of the directors held during that period'.[468] Such an article could have been included in the articles at any time under the previous regime. However, it was a new addition to the default regime, and meant that the 1948 default regime created the possibility of directors removing directors: adding optionality to an otherwise automatic set of removal criteria within the default regime.

In addition, the 1948 Act introduced the second exacerbation: a statutory right for the shareholders to remove a director prior to expiry of her term by ordinary resolution.[469] A

[460] Companies Act 1900, s 11. This had previously existed within the default regime.
[461] Companies Act 1929, Table A, art 72.
[462] Companies Act 1948, s 185.
[463] ibid s 186.
[464] ibid s 187.
[465] ibid s 188.
[466] 1948 Table A, art 88.
[467] ibid art 89.
[468] ibid art 88(f).
[469] Companies Act 1948, s 184.

new concept of the 'special notice' was introduced as part of this process to provide directors with advanced notice of an intention to remove them.[470] Directors also had the right to make certain representations in their defence prior to the vote on their removal.[471] The aim of the introduction of this new right was to provide shareholders with 'greater powers to remove directors with whom they are dissatisfied'.[472] It was, therefore, designed to lower owner/manager agency costs.

The ambit of this new right was discussed in *Bushell v Faith*,[473] which involved a company with three shareholders, two of whom were directors. The company had 300 shares of £1 each issued, and each shareholder held 100 shares of £1 each. Article 9 of the company's articles of association provided that on any resolution of the shareholders to remove a director, each share held by the director counted as three votes. That meant that, on a motion to remove any director, that director would have a veto (as she would have 300 votes compared to 200 votes in total for the other two). A motion was introduced to remove a director – the challenged director voted against the motion whereas the other two shareholders voted in favour of it. The question before the court was, therefore, simple: had the director been removed (as on an unweighted vote, 200 of the 300 shares had voted in favour of his removal), or not (as, on a weighted vote, 300 of 500 votes had voted against his removal)? This turned on whether or not article 9 was a valid article.

At first instance, article 9 was held to be invalid as section 184 clearly referred to an ordinary resolution, which implied a simple majority of votes. The Court of Appeal overturned the first instance decision

> on the simple grounds that the Act of 1948 did not prevent certain shares or classes of shares having special voting rights attached to them and on certain occasions.[474]

The House of Lords upheld the validity of article 9. Lord Reid with 'some reluctance' agreed with the majority, despite noting that the effect of

> the extra voting power given by that article to a director, whose removal from office is proposed, makes it impossible in the circumstances of this case for any resolution for the removal of any director to be passed if that director votes against it.[475]

[470] ibid s 184(2).
[471] ibid s 184(3).
[472] D Prentice, 'Removal of Directors from Office' (1962) 32 Modern Law Review 693.
[473] *Bushell v Faith* [1970] AC 1099.
[474] ibid 1108B.
[475] ibid 1105.

Lord Upton said:

> When construing an Act of Parliament it is a canon of construction that its provisions must be construed in the light of the mischief which the Act was designed to meet. In this case the mischief was well known; it was a common practice, especially in the case of private companies, to provide in the articles that a director should be irremovable or only removable by an extraordinary resolution; in the former case the articles would have to be altered by special resolution before a director could be removed and of course in either case a three-quarters majority would be required. In many cases this would be impossible, so the act provided that notwithstanding anything in the articles an ordinary resolution would suffice to remove a director. That was the mischief which the section set out to remedy; to make a director removable by virtue of an ordinary resolution instead of an extraordinary resolution or making it necessary to alter the articles.[476]

Nonetheless, Lord Upton held that any such votes can have weightings attached to them under the company's articles. This is contradictory, and does not remedy the evil highlighted by Prentice. His evil which required to be remedied, was the shareholders (via the articles) requiring more than 50 per cent of shares voted to approve the removal of the director, but the outcome of the judgment enabled precisely that. Lord Upton attempted to square this circle by stating:

> Parliament has never sought to fetter the right of the company to issue a share with such rights or restrictions as it may think fit. There is no fetter which compels the company to make the voting rights or restrictions of general application and it seems to me clear that such rights or restrictions can be attached to special circumstances and to particular types of resolution. This makes no mockery of section 184; all that Parliament was seeking to do thereby was to make an ordinary resolution sufficient to remove a director. Had Parliament desired to go further and enact that every share entitled to vote should be deprived of its special rights under the articles it should have said so in plain terms by making the vote on a poll one vote one share. Then, what about shares which had no voting rights under the articles? Should not Parliament give them a vote when considering this completely artificial form of ordinary resolution?... I only raise this purely hypothetical case to show the great difficulty of trying to do justice by legislation in a matter which has always been left to the corporators themselves to decide.[477]

However, this does not clarify matters. If the evil was that companies were agreeing to include higher than 50 per cent requirements in voting to remove directors, then surely fettering a company's rights freely to choose this matter is precisely what Parliament was

[476] ibid 1108E- F.
[477] ibid 1109 E-H.

trying to do. To avoid falling into such confusion, Lord Donovan took a different approach. He stated that,

> the issue here is the true construction of s184 of the Companies Act, 1948: and I approach it with no conception of what the legislature wanted to achieve by the section other than such as can reasonably be deduced from its language.[478]

This is, clearly, a tacit repudiation of Upton's reasoning. Lord Donovan continued:

> Those who drafted it and enacted it certainly would have included among their numbers many who were familiar with the phenomenon of articles of association carrying 'weighted votes'. It must therefore have been plain at the outset that unless some special provision were made, the mere direction that an ordinary resolution would do in order to remove a director would leave the section at risk of being made inoperative in the way that has been done here. Yet no such provision was made, and in this Parliament followed its practice of leaving to companies and their shareholders liberty to allocate voting rights as they pleased. When, therefore, it is said that a decision in favour of the respondent in this case would defeat the purpose of the section and make a mockery of it, it is being assumed that Parliament *intended* to cover every possible case and block up every loophole. I see no warrant for any such assumption. A very large part of the relevant field is in fact covered and covered effectively. And there may be good reasons why Parliament should leave some companies with freedom of manoeuvre in this particular matter. There are many small companies which are conducted in practice as though they were little more than partnerships, particularly family companies running a family business; and it is, unfortunately, sometimes necessary to provide some safeguard against family quarrels having their repercussions in the boardroom.[479]

Lord Donovan's reasoning too, is not persuasive. His argument is that, effectively, section 184 did not exist to close off all loopholes, but instead to cover 'a large part' of the problem. If Parliament has identified a genuine evil (as Lord Upton appears to accept), it does not seem to follow automatically that they would have, without clarification or explanation, left such large loopholes which allowed the evil to be continued despite a mandatory protection to the contrary. However, it is of note that Lord Donovan highlights that requiring more than a bare majority for a vote in favour of a specific resolution to pass, it can be an important part of safeguarding the efficient running of the company. This line of analysis hints at the concept that the interests of the bare majority may not necessarily automatically align to the interests of the company, and their powers may at times have to be fettered in the interest of the company and/or the minority. However, Lord Donovan does not state this explicitly. Instead, despite his attempts to avoid the pitfalls in logic that he identified in Lord Upton's

[478] ibid 1110A.
[479] ibid 1110F–1111A.

judgment, his analysis also falls for different but similar reasons. Prentice is highly critical of the decision, stating:

> By giving mandatory effect to this type of provision the Court of Appeal has reduced section 184 to an empty rhetorical gesture as the draftsman can entrench against alteration the article conferring the special rights with respect to section 184 resolutions.[480]

Indeed, the formulation set out by the House of Lords does not protect shareholders against what it is purportedly designed to do. Worse than this, they have confused the situation by allowing the conflation of different capacities within the company: rather than weighted voting attaching only to shares, different weighted voting could apply to the same shares held by different shareholders, depending on the non-shareholder roles they held within the company.

When reviewing the decision, Scott J stated:

> There were shareholders who were not for the time being directors, and shareholders who were for the time being directors: the former had rights against the latter which the latter did not enjoy against the former. The two classes were identifiable not by reference to their respective ownership of particular shares, but by reference to the office held by the latter. But the rights of the former, and the obligations of the latter, required their respective ownership of shares in the company.[481]

The only coherently reasoned speech provided in the House of Lords was that of Lord Morris of Borth-y-Gest objecting to the decision. His view was clear: the wording of the Act referred to an 'ordinary' resolution and overrode any provision to the contrary in the articles. Accordingly, any article of association purporting to require a special resolution would violate the 1948 Act. The main problem with the article, he opined, was that,

> its unconcealed effect is to make a director irremovable. If the question is posed whether the shares of the respondent possess any added voting weight the answer must be that they possess none whatsoever beyond, if valid, an ad hoc weight for the special purpose of circumventing section 184. If article 9 were writ large it would set out that a director is not to be removed against his will and that in order to achieve this and to thwart the express provision of s184 the voting power of any director threatened with removal is to be deemed to be greater than it actually is. The learned

[480] Prentice, (1969) 32 Modern Law Review 693, 696.
[481] *Cumbrian Newspapers Group Ltd v Cumberland & Westmorland Herald Newspaper & Printing Co Ltd* [1987] 1 Ch 1, 17.

judge thought that to sanction this would be to make a mockery of the law. I think so also.[482]

Lord Morris's formulation would undoubtedly resolve the ill that each member of the House of Lords highlighted, as only this way can the shareholders (or the majority of them) remove directors who they wish to. By rejecting this analysis, the House of Lords neutralised the value of the statutory regime in protecting against owner/manager agency costs, as managers are able to use weighted voting, together with otherwise miniscule shareholdings, to avoid the policy aim of the statutory regime.

This regime, therefore, does not protect against the ill it was designed to protect against – owner/manager agency cost – and, in addition, actively exacerbates the concern of this thesis: majority/minority agency costs. It therefore not only fails to provide the intended benefit, it is actively harmful.

The ability of shareholders to remove directors by way of ordinary resolution was retained in the Companies Act 1985.[483] The 1985 Act went further, and provided increased protection for shareholders by the mandatory disqualification of directors,[484] limitations on eligibility of directors,[485] increased protections against directors taking financial advantage of their roles,[486] including protection in respect of share dealings by directors,[487] and mandatory shareholder involvement in granting loans to directors.[488] The 1985 Act was implemented fifteen years after *Bushell v Faith* was decided. If legislators had disagreed with the House of Lords' interpretation of the statutory regime, they would, therefore, have had ample opportunity to remedy the provisions in the 1985 Act. They decided not to. Such a decision must have been a blessing stemming from the *Bushell v Faith* decision and its reasoning. The same can be said of the statutory restatement of substantially the same formulation in the Companies Act 2006.[489] The restatement of the statutory test reflected agreement that shareholders could include weighted voting in their articles to remove directors. Accordingly, policy makers have twice rejected the option to reformulate the statutory provision to meet the policy aims assumed by Prentice.

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[482] *Bushell v Faith* [1970] AC 1099, 1106.
[483] Companies Act 1985, s 303.
[484] ibid ss 295–302.
[485] ibid ss 291–294.
[486] ibid ss 311–322B.
[487] ibid ss 323–329.
[488] ibid ss 330–334.
[489] Companies Act 2006, s 168.

This protection can be supplemented by provisions in the articles of association of the company entitling others to remove directors. Thus courts have upheld the ability in articles of association for certain categories of directors to remove certain other categories of directors,[490] and to enable a requirement for the majority of directors to require the resignation of others.[491] As these requirements come from the articles of association they are further evidence of the courts' approach that matters are for shareholders to include in their articles as they see fit.

4.3.4. Conclusion

The contradictory outcome of the judicial reasoning in *Bushell v Faith*, together with the retention of the statutory test in the 1985 and 2006 Acts, provides key insights into the statutory ability of shareholders to remove directors. The outcome of *Bushell v Faith* means that the regime does not achieve its goal of mitigating owner/manager agency costs – and in fact exacerbates minority/majority agency costs. There have been two opportunities to remedy the operation of this provision, and each has been avoided. As laudable as the aims of such a provision are for mitigation of owner/manager agency costs, its accepted operation does not match these aims and causes harm to the minority under the second exacerbation of indirect manifestations of majority/minority agency costs in private companies.

4.4. Overall Conclusion

Our first exacerbation happened by accident: lawmakers shifted the division of powers between shareholders and directors to articles of association for misguided reasons. Courts have struggled ever since to square that circle: over time, their rhetoric has become even stronger against shareholders using this power, whilst ultimately deferring to the statutory position and allowing them to do so should they abide by the prescribed formalities.

Our second exacerbation exists to solve a valid concern, but by its judicial operation does not do so. In other words, there is little historical reason why the first exacerbation proceeds on a default footing rather than a mandatory footing. The second exacerbation does not resolve the ill of owner/manager agency costs it intended to, but causes harm to the minority.

In the next chapter we review the concept of majority rule generally, followed by the current rules and regimes in respect of our twin exacerbations to establish how they fit into the

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490 *Bersel Manufacturing Co Ltd v Berry* [1968] 2 All ER 552 HL.

491 *Lee v Chou Wen Hsien* [1984] 1 WLR 1201 PC.

current framework for private companies, and how the issue is approached elsewhere. Having identified them as comparative anomalies, Chapter 6 reviews whether the twin exacerbations are mitigated by other areas of company law, particularly directors' duties, shareholder voting limitations, or other minority protections. Having identified that they do not, Chapter 7 reviews a market response to the twin exacerbations, to establish whether they have been sufficiently mitigated by the market.

CHAPTER 5

5. MAJORITY RULE AND THE CURRENT LAW OF THE TWIN EXACERBATIONS

5.1. Introduction

We have reviewed the historical development of company law generally (which reinforces our theoretical proposition that mandatory rules have been used when necessary to mitigate Costs) and the development of the twin exacerbations (which points to weaknesses in the historical development of both exacerbations). There is, however, one concept which underpins the twin exacerbations: the concept of majority rule. In the absence of majority rule there are limited circumstances in which the majority are able to exert sufficient pressure to create majority/minority agency costs. The twin exacerbations exist solely because majority decisions matter, and the interests of the majority may not align to the interests of other key corporate constituencies. This chapter, therefore, reviews the theoretical justification for majority rule and the current framework in which it operates, compared to the Delaware and Australian positions. This chapter provides a review of the current regime governing each of the twin exacerbations. It also considers how such issues are dealt with in other jurisdictions. Having identified that the exacerbations are, to some extent, mitigated in other jurisdictions, we then explore whether different areas of company law provide adequate mitigation in the UK.

5.2. Majority Rule

5.2.1. Theory behind Majority Rule

The foregoing analysis arises because company law enables majority rule.[492] We have seen that historically, majority rule arose primarily as a result of necessity in larger companies such as the East India Company. Is there, however, a more theoretical justification for majority rule? It is noted above that Arrow states that decisions must be made by consensus or by the imposition of authority.[493] However, he also conceded that:

> There are deep paradoxes connected with any form of consensus mechanism, such as majority rule, short of the situation where unanimity obtains,[494]

[492] See R Kraakman and others, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, OUP 2017) 80–84; Gower and Davies, paras 19-4 to 19-12.
[493] Kenneth J Arrow, *The Limits of Organisation* (Norton 1974).
[494] ibid 69.

and even goes on to state:

> Majority rule is no model for organizations with functionally differentiated elements among its membership, such as firms or universities.[495]

Why, then, do we allow majority rule to take place within companies? For Eisenberg, following the East India Company approach, majority rule is based on a practical consideration. He explains that unanimity may work in partnerships where it is possible to terminate the partnership and withdraw capital at any time, giving a natural limitation to the permanency of any failure to reach unanimous decision. However, the permanent nature of companies means that they go on forever. This means that a requirement for unanimity provides each shareholder with a veto that lasts forever, which is unhelpful when funds are trapped in the vehicle.[496] Easterbrook and Fishel go further, describing any requirement for unanimity as creating the risk of 'deadlock' and 'paralyzing the firm'.[497] Berle & Means state:

> The disadvantages of the '*liberum veto*' are too great to make unanimous actions practicable. The granting of control to a majority of stockholders has therefore been a natural and generally acceptable step.[498]

The use of the phrase '*liberum veto*' is particularly value laden – this was the term used to describe the ability of any member of the Sejm (or parliament) of the medieval state of the Polish-Lithuanian Commonwealth, to veto legislation, which is alleged to have been the subject of capture by foreign powers (by way of bribery), and is held to be responsible for bringing down the state by forcing the country into paralysis.[499] The use of this phrase, therefore, goes beyond the practicality arguments advanced by history, Eisenberg, Easterbrook, and Fishel, and hints at any requirement of unanimity enabling, ultimately, each minority shareholder to extract benefits for her agreement in return for her cooperation. This is a phenomenon known as the 'hold out', a typical example of which is a run-down apartment block which can be profitably developed if every apartment is bought. The owner of the last apartment is able to 'hold out' for more than her apartment is independently and objectively worth on the ground that it is worth more to the developer. Hold outs are economically inefficient, and are usually seen as rent-seeking behaviour.[500] Accordingly, we

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[495] ibid 79.
[496]M Eisenberg, *The Structure of the Corporation, A Legal Analysis* (Little, Brown and Company 1976) 16.
[497] Frank H Easterbrook and Daniel RR Fischel, *The Economic Structure of Corporate Law* (HUP 1991) 248.
[498] Adolf A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (rev edn, Harcourt, Brace & World, Inc 1967) 67.
[499] See J Lukowski, '"Machines of Government": Replacing the Liberum Veto in the Eighteenth-Century Polish-Lithuanian Commonwealth' [2012] Slavonic & East European Review 65.
[500] See L Cohen, 'Hold outs and free riders' (1991) 20 The Journal of Legal Studies 351.

can develop the analysis from the '*liberum veto*' to state that requiring unanimity in corporate action would ultimately enable each shareholder (even a shareholder who holds one of a million shares) to act as a hold out, which would be inefficient for the company as a whole. This is removed by allowing majority decision making, as then, if faced with a potential hold out, the majority can simply make up the numbers by obtaining the consent of the holder of another, fungible share. Cheffins agrees, stating:

> Furthermore, under a unanimity rule a shareholder who is otherwise indifferent to a change might well act in a strategic manner and withhold his consent so as to extract some extra benefit for himself. Such an individual, by acting in this sort of opportunistic fashion, would potentially have considerable bargaining leverage and thus could make matters highly inconvenient for the investors who wanted to carry out changes that would benefit the company's members. Use of the voting mechanism alleviates such problems substantially.[501]

In other words, majority decision making removes the potential for opportunism (ie, hold-out behaviour) from the minority. Berle & Means go further, to state:

> A large group of individuals cannot combine their capital effectively in a single enterprise without a loss of control by some members of the group. Clearly it would not be possible for each member to exercise the major elements of control over the enterprise.[502]

This provides a further rationale for majority rule. If the shareholders of the company require unanimity to act, it becomes more difficult for the shareholders to act effectively. In the context of agency costs, this would mean that it would be more difficult for the shareholders to act collectively to hold delinquent managers to account. By making it easier for shareholders as a constituency to act, majority rule makes it easier for shareholders to act to hold managers to account, which has the effect of reducing owner/manager agency costs. An analogy can be borrowed from labour law theory – the traditional rationale for trade unionism is that capital is automatically collectivised, whereas labour is disbursed, so enabling collectivisation of labour-enabled labour to centralise their power and so equalise the bargaining position between labour and capital.[503] This analogy applies to shareholders and directors: directors are naturally more collectivised as the circumstances in which they are able to act are clearer and, generally, they hold more regular meetings.[504] Allowing majority rule enables potentially disparate shareholders to collectivise and thus re-balance

[501] Brian R Cheffins, *Company Law Theory*, *Structure and Operations* (OUP 2008) 68–69.
[502] Berle and Means, *Corporation and Private Property* 67.
[503] See R Dukes, 'Otto Kahn-Freud and Collective Laissez-Faire: An Edifice without a Keystone?' (2009) 72 Modern Law Review 220.
[504] As, generally, they have more responsibilities.

power relations between shareholders and directors. Accordingly, in addition to majority rule preventing oppression by the minority, it enables shareholders as a whole to act to further reduce owner/manager agency costs.

For all the benefits (including to the shareholders as a whole) of majority power, majority rule does expose the minority to opportunistic activity by the majority. Berle and Means do not consider this important, however, and argue:

> Presumably too many if not most of the interests of a minority owner run parallel to those of the controlling majority and are in the main protected by the self-interest of the latter. So far as such interests of the minority are concerned, the loss of control is not serious. Only when the interests of majority and minority are in a measure opposed and the interests of the latter are not protected by enforceable law are the minority holders likely to suffer. This, however, is a risk which the minority must run; and since it is an inevitable counterpart of group exercise, the problems growing out of it, though they may be the most acute in isolated cases, have not taken on major social significance.[505]

Accordingly, Berle and Means consider that issues for the minority arising from majority rule are rare as the interests of the majority and the minority are in the main aligned, and if they are not, then the minority will be protected by law. If they are not, then this is just a side effect of being a minority shareholder. Easterbrook and Fishel disagree, stating that

> the issue is difficult because any constraint on the minority's veto power increases the probability that the majority will be able to exploit the minority notwithstanding the minority's bargained-for protection. One guide is whether the decision at issue might have a disproportionate effect on the minority.[506]

In other words, Easterbrook and Fishel argue in favour of legal protection for the minority. Cheffins agrees, stating that

> the voting mechanism [ie, majority voting] has defects and these might provide a justification for legal regulation concerning the matters on which shareholders vote.[507]

In conclusion, majority voting is a method of protecting against minority hold out and enabling shareholders to exercise self-help remedies to protect against owner/manager agency costs. However, like a number of features that we have seen, attempts to remedy some agency costs/externalities can displace those costs to others rather than fully resolve

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505 Berle and Means, *Corporation and Private Property* 67.
506 Easterbrook and Fischel, *Economic Structure* 248.
507 Cheffins, *Theory*, *Structure and Operations* 68–69.

them. The use of majority rule generally does this and enables the twin exacerbations to occur. It is noteworthy that Cheffins and Easterbrook and Fischel agree that the excesses of majority rule should be mitigated by law. So, in a less direct way, do Berle and Means, with the proviso that the issue to be mitigated must be significant.

5.2.2. Majority Rule in action

The majority rule is enshrined in UK company law. There are no mandatory or default rules requiring unanimity. The Companies Act provides for ordinary resolutions (passed on a 50%+1 majority) and special resolutions (passed on a 75% majority).[508] Whilst some provisions of the Companies Act mandate special resolutions,[509] the general position is that unless otherwise stipulated, an ordinary resolution of shareholders will suffice.[510] The Companies Act 2006 includes provisions which enable certain articles of association to be 'entrenched'.[511] This means that they require more than 75 per cent of shareholders to agree to the amendment of such an article. In theory, this would enable the protection of minority shareholders from the potential abuses of majority power. Unfortunately, however, entrenchment does not provide the automatic comfort that potentially can. This is because its use is nowhere mandated – entrenchment of articles only occurs on incorporation or by unanimous agreement of the shareholders.[512] In other words, protections can only be provided by way of entrenchment if the entrenchment is agreed to by all shareholders. In order to provide protection by this route, it is necessary for the majority to agree, in effect, to alienate their rights. This is a structural flaw in the ability for this route automatically to provide minority protection. However, it does open the possibility of market participants voluntarily utilising the technique to resolve the twin exacerbations. This is explored in Chapter 7.

Indeed, it is questionable whether it is advantageous to make mandatory entrenchment easier or more widespread as to do so would risk increasing the costs which theorists have identified as justification for the existence of majority rule. It therefore may be advantageous

[508] Companies Act 2006, s 378(2).
[509] For example, changing the articles of association in the Companies Act 2006, s 21(1).
[510] Companies Act 2006, s 281(3).
[511] ibid s 22.
[512] ibid s 22(2), as discussed in R Cheung, 'The use of statutory unanimous shareholder agreements and entrenched articles in reserving minority shareholders' rights: a comparative analysis' [2008] Company Lawyer 234.

to maintain entrenchment with its current limitations. But how is this topic approached in other jurisdictions?

Australian law has a system similar to that of the UK, in that decisions are made by either majority or super-majority by way of the ordinary and special resolution, respectively.[513] Australian law allows private companies to pass resolutions without the need for a shareholder meeting if all members of the company agree to the resolution.[514] However, this is a permissive regime which allows the formalities of meetings required for majority decision making to be circumvented. Unanimity is, therefore, not required in any given situation. This leaves the minority in substantially the same position as under UK law – it is possible for them to be included in decision making, but it is not required unless the majority agree to it. Under UK law, majority approval for mandated minority inclusion in decision making can be formalised in the articles of association if unanimously agreed, whereas in Australia this is not possible.

In Delaware, the general position is that for everything other than appointment of directors, a majority of shareholders will decide every act on behalf of the stockholders, and subject to the bye-laws.[515] Directors are elected by a plurality of votes,[516] which means that a director is appointed if she receives only one vote from the stockholders[517]– again subject to the bye-laws. The bye-laws of a company can be amended in line with the previous provisions, meaning that it is possible for a majority to amend the bye-laws to introduce higher thresholds. Whilst this is more helpful to a minority than the UK's requirement of unanimity for entrenchment, this mechanism is also of limited use to the minority as, by definition, it requires the majority to vote in favour of it. However, Delaware does provide a further benefit to the minority – controlling shareholders owe fiduciary duties to the minority.[518] This provides a method for Delaware law to more adequately mitigate the twin exacerbations. However, two issues arise: First, there are questions of degree. This duty only

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[513] See RP Austin and IM Ramsay, *Ford's Principles of Corporations Law* (17th edn, Lexis Nexis Butterworths 2018) para 7.490.
[514] Australian Corporations Act 2001, s 249A.
[515] Delaware Commercial Code, Title 8, s 216.
[516] ibid Title 8, s 216(c).
[517] See SJ Choi and others, 'Does Majority Voting Improve Board Accountability?' (2016) 83 The University of Chicago Law Review 1119.
[518] See discussion in MT Arnold, 'Shareholder Duties under State Law' (2013) 28 Tulsa Law Review 213, and J Rosenberg and Alexandra Lewis-Reisen, 'Controlling-Shareholder Related-Party Transactions Under Delaware Law' Harvard Law School Forum on Corporate Governance and Financial Regulation available at https://corpgov.law.harvard.edu/2017/08/30/controlling-shareholder-related-party-transactions-under-delaware-law/ accessed on 5 December 2019.

applies to action, as opposed to inaction, by shareholders.[519] Further, the majority are not excluded from voting in their own self-interest.[520] As a result, there has been significant case law to determine the precise extent of this fiduciary duty. If the UK currently lacks such an obligation (see Chapter 6 for further discussion) its introduction would result in a potentially uncertain, and therefore litigious, situation until the courts established its parameters. Second, whilst this may resolve direct manifestations of majority/minority agency costs, it does not resolve indirect manifestations: controlling shareholders are limited from harming the minority directly, but the triangulation of the twin exacerbations is not fully resolved as directors may act in a certain way to avoid the majority exercising their rights.

Accordingly the issues identified with majority rule remain valid in the UK, which means that the principles underlying the twin exacerbations remain valid as well. Neither Australia nor Delaware adequately remedies these issues for the minority.

As we have seen throughout this thesis, evidence that the theoretical principles underpinning the twin exacerbations are valid, does not automatically equate to the twin exacerbations themselves being relevant. We therefore review the law of the twin exacerbations to establish whether they remain a concern under the current framework.

5.3. The Division between Shareholders and Directors under UK law

5.3.1. Current Legal Framework for the Division between Shareholders and Directors

We have seen that the Companies Act 1985 retained the concept of the division between shareholders and directors as a matter for the articles, and in its default articles introduced the concept of special resolutions directing the actions of directors. The precise formulation was:

> Subject to the provisions of the Act, the memorandum and the articles and to any directions given by special resolution, the business of the company shall be managed by the directors who may exercise all the powers of the company.[521]

[519] Arnold, ibid 221–223.
[520] ibid 225–227.
[521] 1985, Table A, art 70.

The framework under the Companies Act 2006 for the division between shareholders and directors remains substantially as it was under the Companies Act 1985. Thus the division is not referred to in the Act itself at all, but is left to the company's articles of association. The White Paper which introduced the Model Articles stated that, 'the Government believes that it is worth setting out in the articles the breadth of directors' general authority as agents of the company'.[522] This 'general' authority, however, remains a default rule. Article 3 of the Model Articles provides a clear statement that:

> Subject to the articles, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company.[523]

However, article 4 of the Model Articles provides that, 'the shareholders may, by special resolution, direct the directors to take, or refrain from taking, specified action'.[524]

The current default formulation therefore substantively follows the formulation in the 1985 Act: the directors manage the business unless the articles or a shareholder resolution provides otherwise. However, there are three areas in which the modern default formulation has changed from default formulation in the 1985 Act.[525] First, the modern default formulation provides that directors bear responsibility for the management of the company. This clearly means that the directors bear blame in respect of a failure of the company's management. This is no more than a restatement of the legal position and its only function in the default articles of association appears to be to provide a link to the second reason: that the exercise of the powers of the company is necessarily linked to responsibility for the management of the company's business. It is helpful to set out the link between the powers and duties that directors have. However, it exposes the issues with the regime. We have seen that, in the form of joint stock companies before to 1844, directors were viewed as the trustees of the company.[526] Trustees owe certain duties to their beneficiaries. It has been held that directors have a dual role in respect of the company – as agents and as trustees. In each capacity they owe duties to the company.[527] Lindley MR has stated:

> Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is

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522 White Paper, 'Implementation of Companies Act 2006: A Consultative Document' issued 28 February 2007 (URN 07/666), para 3.46.
523 Model Articles, art 3.
524 ibid art 4(1).
525 See discussion of the 1985 Act default formulation in para 4.2.4
526 See also Gower and Davies (6th edn) 598.
527 *Great Eastern Railway Company v Turner* (1872) LR 8 Ch 149, 152.

> actually under their control; and ever since joint stock companies were invented directors have been held liable to make good moneys which they have misapplied upon the same footing as if they were trustees . . .[528]

Since the early twentieth century it has been acknowledged that directors are not trustees, but are directly analogous to trustees.[529] As a result, directors owe duties to the company. These duties are discussed further in the next chapter but apply automatically to directors by virtue of their positions as directors of the company, not because they are directors who also manage the company.[530] Indeed, directors have been held liable for breaches even when they were not responsible for the relevant action.[531] The formulation in the model articles links powers to responsibility. But this is only correct if the powers sit with the directors. Theoretically, the link between powers and responsibilities is very strong, but that advances the argument that there is a problem with the regime. Within the category of 'directors' it is acknowledged that there is a difference in the extent of responsibility borne by executive directors and non-executive directors.[532] However, this only applies within the corporate constituency of 'directors' – the extent of directors' duties is fundamentally linked to their roles and powers.[533] There is no scope for this to switch between 'directors' and 'shareholders' such that a shareholder (who is not a shadow director[534]) assumes responsibility for being active in the business. Consequently, linking directors' duties to the level of their individual responsibility is logical, but linking the powers of the directors as a constituency to the responsibilities of the directors as a constituency, does not appear to be – if directors are able to exercise the powers of the company because they as a constituency have duties, why should the shareholders be able to exercise the powers of the company when they do not have corresponding duties? In other words, we see a strong argument for a fixed link between power and responsibility. In the UK, responsibilities between corporate constituents are fixed (only directors owe duties – this is discussed more fully in Chapter 6). Whilst the flexibility of responsibilities intra-constituency means that duties can be open-textured and mapped onto specific circumstances,[535] this does not apply inter-constituency: this would only be logical if such duties could be owed by different constituencies in

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[528] *Re Lands Allotment Co* [1894] 1 Ch 616.
[529] *Re City Equitable Fire Insurance Co* [1925] Ch 407.
[530] *Eclairs Group Ltd v JKX Oil & Gas Plc* [2015] UKSC 71.
[531] *Re Barings plc (No 5), Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433.
[532] See *Equitable Life Assurance Society v Bowley* [2004] 1 BCLC 180 paras 35–40.
[533] See the 'dual test' in the Companies Act 2006, s 174, as discussed in T Zwinge, 'An analysis of the duty of care in the United Kingdom in comparison with the German Duty of Care' [2011] International Company and Commercial Law Review 31.
[534] See Companies Act 2006, s 251.
[535] See discussion in para 6.2.

appropriate circumstances. If responsibilities are fixed, and the link between powers and responsibilities should be fixed, it is unclear why powers should be variable.

The third element in the modern test is the clarification that shareholders can direct action to be taken or not taken by directors. This raises the same issues we saw under the Companies Act 1985 – it is possible for the shareholders to mandate a transaction which is not in the interests of the company. The division of powers between the shareholders and directors was not within the scope of the UK review which preceded the Companies Act 2006.[536]

This framework does not interact comfortably with other areas of company law. We have seen that third parties are protected when transacting with the company through its directors, but it is unclear how a third party would contract (or be deemed to contract) with a company acting through its shareholders.

5.3.2. Comparative Approaches to the Division between Shareholders and Directors

How does this position compare with other key jurisdictions? We consider the positions taken in the US, Australia, New Zealand, and Malaysia. Every US state other than Missouri, provides by statute that powers sit with the board of directors.[537] Delaware is the state most commonly used for incorporation.[538] Its relevant statutory provision states that:

> The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors.[539]

This position has enabled a US court (admittedly a New York court) to state unequivocally that:

> In corporate bodies, the powers of the board of directors are, in a very important sense, original and undelegated. The stockholders do not confer, nor can they revoke those powers. They are derivative only in the sense of being received by the state in the act of incorporation.[540]

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[536] Modern Company Law for a Competitive Economy: The Strategic Framework, the Company Law Review Steering Group, October 1999, URN 99/654.
[537] S Watson, 'The significance of the source of powers of boards of directors in UK company law' [2011] Journal of Business Law 597.
[538] FJ Naffziger, 'Conflicts of Interest in American merger and acquisition activity' [2017] Journal of International Banking Law and Regulation 22.
[539] Delaware General Corporation Law, Title 8, s 141(a).
[540] *Manson v Curtis* 119 NE 559 (1918) 562

Accordingly, the US position generally avoids this exacerbation of the agency cost. This enables Bainbridge to state:

> Corporation law virtually carves the separation of ownership and control into stone. Under all corporation statutes, the key players in the formal decision-making structure are the members of the board of directors who are empowered to make or delegate to employees most decisions affecting the business and affairs of the corporation. Shareholders have essentially no power to initiate corporation action and, indeed, are entitled to approve or disapprove only a very few board actions.[541]

Separation of ownership and control has, generally, been seen in corporate law theory as unfortunate.[542] However, the analysis underpinning this is that the separation occurs with centralised management on one 'side' and diverse, small, un-coordinated shareholders on the other.[543] Thus, the issue with separation of ownership and control becomes one of shareholders' lack of ability to act on the (limited) remedies available to them, in that it is more difficult for them to act collectively– the same issue which underpins majority decision making. Bainbridge's argument is simple but compelling – so long as the 'ends' of corporate governance remain shareholder primacy and there are adequate remedies against rogue directors, there can be no disadvantage to leaving the 'means' of corporate governance exclusively to the directors.[544] This is why so much of corporate law restricts and regulates the activities of management. We can gain an additional gloss on the analysis by factoring in the agency cost analysis above. As in private companies, there is a greater risk of majority interests generating agency costs than director interests. In the case of private companies, a distance between ownership and control can in fact act to mitigate agency costs rather than, as per conventional wisdom, exacerbate them. This explains the reference to the powers of directors being beneficial for the minority in *Salmon v Quin* and *Automatic Self Cleansing*.

Delaware law does, however, allow for opting out of this framework. If a corporation is a 'close corporation',[545] the shareholders are able to pass a resolution to restrict the powers of directors:

> The effect of any such agreement shall be to relieve the directors and impose upon the stockholders who are parties to the agreement the liability for managerial acts or omissions which is imposed on directors to the extent and so long as the discretion

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[541] S Bainbridge, *The New Corporate Governance in Theory and Practice* (OUP 2008) 4.
[542] See arguments advanced throughout Berle and Means, *Corporation and Private Property* .
[543] Bainbridge, *New Corporate Governance in Theory and Practice* 5–6.
[544] ibid 23–73.
[545] Defined as a corporation with 30 or fewer stockholders, which is not publicly traded, and where there are restrictions on transfer. See Delaware General Corporation Law, Title 8, s 342.

> or powers of the board in its management of corporate affairs is controlled by such agreement.[546]

In other words, stockholders are entitled to exercise management of the corporation, but if they do,

> …the stockholders of the corporation shall be deemed to be directors for purposes of applying provisions of this chapter; and
>
> the stockholders of the corporation shall be subject to all liabilities of directors.[547]

It is possible, therefore, under Delaware law, for the shareholders of a close company to allocate management powers in respect of their company to themselves rather than to the directors. Should they do so, however, they will have the same duties as directors would have had if the right had not been exercised. It should be noted that this differs from fiduciary duties which already apply to controlling shareholders in their capacity as shareholders – instead, in such circumstances, the duties which directors owe 'switch' to be owed by shareholders. This is a more logical linkage of responsibility to duties across corporate constituencies than we find under UK law, but it remains flawed. Is the transformation between the two an automatic switch if stockholders undertake any activity, or is it assessed on a sliding scale? Does only the formal passing of the resolution trigger the duties switching, or would a threat to pass a resolution (and thus require directors to act in a certain way) also result in the switch? This lack of clarity can be avoided by abolishing shareholders' rights to make such switch.

Australia also provides for the statutory provision of powers.[548] For private companies, this rule is termed a 'replaceable rule'[549] or a default rule.[550] This means that, in substance, the position is very similar to the UK and for Delaware close corporations: the shareholders can opt out of the default position. It is merely that the default position in Australia and Delaware is statutory, whereas the default position in the UK is contained in the Model Articles. Directors' duties apply in Australia even if this rule is replaced,[551] which does not seem to improve on the UK position. Why not either adopt the Delaware position or bar shareholders from exercising such rights?

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546 ibid Title 8, s 350.
547 ibid Title 8, s 351.
548 Australian Corporations Act 2001, s 198A.
549 ibid s 135.
550 Pey-Woan Lee, 'Shareholders' reserve powers: Implied terms and public policy' [2016] Journal of Business Law 128.
551 Rosemary Teele Langford, 'Best interests: Multifaceted but not unbounded' [2016] Cambridge Law Journal 505.

It is tempting to consider the above analysis irrelevant on the ground that in these jurisdictions the source directors' power differs from the UK source, and they, therefore, are of limited value to the UK framework. However, there are two jurisdictions which have moved away from the 'UK-style' constitutional-style powers: Malaysia and New Zealand.

In 2016 the new Malaysian statute replaced the UK-style statutory default rules – the Malaysian equivalent of the Model Articles were placed in statute as default rules rather than stand-alone default rules.[552] No reasons were given for the shift, but Salim and Leonard suggest three key potential reasons for such a move.

1. Firstly, the incorporation procedure is simplified: 'especially for private companies without a need for detailed tailor-made internal rules to govern the relationship among the company and its internal participants, i.e. the shareholders and directors';[553]

2. Secondly, the default rules apply but give sufficient flexibility for those who value an alternative approach to modify the rules for their specific needs; and

3. Thirdly, any changes to the law will automatically update the articles of a company which adopts this approach.[554]

This approach does not, however, prevent the exacerbation of the indirect manifestations of majority/minority agency costs, as the shareholders could simply resolve to opt out of the provision. A similar position arises in New Zealand, which enacted a new company law regime in 1993 following a New Zealand Law Commission report in 1989. The New Zealand Law Commission was highly critical of the existing UK-style framework, stating that:

> As the statutory platform for identification of allocation of responsibility and duties within the company, it is entirely unsatisfactory. It does not assist in making the obligations in a particular context easy to understand. It creates the fiction of a contractual regime which is then overlaid by statutory provisions which impose obligations and powers outside the 'contract', including the power to alter the contract without the consent of all.[555]

For the New Zealand Law Commission, the problem was that the corporate contract can be changed without the consent of all. It is conceivable that the 'all' the Commission had in

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[552] Companies Act 2016 (Malaysia), s 211.
[553] Mohammad Rizal Salim and Leonard LS, 'Farewell the constitution? Mandatory and (the new) default rules in the Companies Act' [2019] International Company and Commercial Law Review 1, 5.
[554] ibid 5–6. They also provide a fourth reason which is irrelevant for our purposes.
[555] New Zealand Law Commission, 'Company Law: Reform and Restatement' *(*R9 1989) para 155.

mind was all corporate participants – all directors and all shareholders. However, for our purposes, it could also be read as a risk that the majority is able amend the contract (in the UK, by way of special resolution) without the minority agreeing. The New Zealand Law Commission went on to state:

> [The relevant section] descends directly from the United Kingdom Act of 1856. It marked the transition between the old deed of settlement constitution and the modern constitution based on memorandum and articles. In its present form, [the relevant section] is an anachronism which is misleading. Through the popularity of Table A articles (the standard articles contained in the 1955 Act), powers of management are usually conferred upon directors. The Law Commission believes that the intelligibility of company law would be greatly assisted by the adoption of the Table A standard provision as a statutory presumption. Director management would therefore be conferred by statute directly, except where the constitution makes express provision for another arrangement.[556]

This approach is, however, unclear: why should the shareholders be authorised to rebut this presumption? This is especially unclear when we examine the Law Commission's approach to whether shareholders should, unanimously, be entitled to exercise all powers of the company regardless of its constitution:

> We have concluded that an explicit power in these terms is generally undesirable as cutting across the allocation of power in the constitution. The interests of shareholders and the company do not entirely coincide. The system of the draft Act for protection of creditors by imposing duties on directors could be undermined by a general power in the shareholders to exercise the directors' powers.[557]

The New Zealand Law Commission resolved this slight tension in the same manner as Delaware close corporations –its Draft Act provided that if the shareholders took on management of the company, directors' duties would be imposed upon them.[558] Indeed, it expanded its analysis to be more nuanced than the Delaware position:

> The greater the role for the general meeting in management of the company, the greater the need to develop a concept of a fiduciary duty owed by the majority to the minority. This is a developing area of law which, carried too far, may undermine the concept of the share as property and may make company decision-making and enforcement of obligation procedurally complex. (As L S Sealy has pointed out, assessing the good faith of a board of directors is one thing; assessing the good faith of a majority of shareholders, perhaps running into the hundreds, is quite another

[556] ibid para 156.
[557] ibid para 162.
[558] Ibid.

> thing. (LS Sealy 'Directors' "Wider" Responsibilities – Problems Conceptual, Practical and Procedural' (1987) 13 MULR 164.)[559]

The Law Commission's approach was adopted in 1993,[560] without discussion as to why such flexibility was needed. It would be better to avoid the need to introduce the concepts of shareholder responsibility and fiduciary duties, and use the division of power between shareholders and directors as mandatory.

Different jurisdictions adopt different approaches to the division of power between shareholders and directors. Delaware holds firmly to the concept of statute allocating responsibility between the shareholders and the directors, although this can be rebutted in close companies. Australia and Malaysia have adopted a position which is an improvement in form on the UK position, in that the division is in statute rather than the company's constitution, but in substance it remains subject to the same weaknesses as the UK provision. New Zealand has the same issues, but (as with Delaware close companies) provides for the equivalent of directors' duties to apply to shareholders if shareholders opt out of the default position. However, the ambit of this is unclear and potentially difficult, and open to academic questioning. It is easy to envisage issues caused by the unnecessary complication arising from duties being owed by shareholders rather than by directors, if part of management is undertaken by shareholders. Especially in the triangulated case of an indirect manifestation of majority/minority agency costs, there is a risk of a lacuna being created in terms of which liability is disputed by both the majority (on the ground that they took no direct action) and directors (on the ground that their discretion was removed). It seems that (unlike the Australian or the Malaysian positions) the US position, for all but close companies, resolves concerns arising in respect of the UK position. Indeed, it reverts to a pre-1856 UK position, without introducing the conceptual difficulties which have been introduced by the New Zealand and Delaware close company positions.

5.4. The Ability of Shareholders to Remove Directors

5.4.1. Current Legal Framework for the Ability for Shareholders to Remove Directors

The second exacerbation remains on a statutory footing. Section 168(1) of the Companies Act 2006 states that:

[559] ibid para 210.
[560] Companies Act 1993 (New Zealand) s 128.

> A company may by ordinary resolution at a meeting remove a director before the expiration of his period of office, notwithstanding anything in any agreement between it and him.[561]

The previous statutory formulation has been held to be a mandatory rule, and so cannot be opted-out of in the company's constitution,[562] although we have seen that it can be watered down to a point at which it becomes virtually meaningless. Keay shows that the statutory procedure was used to remove Maurice Saatchi as a director of Saatchi and Saatchi plc.[563] Nonetheless, he concludes that this is a cumbersome process[564]: special notice needs to be given to directors,[565] any such resolution must be passed by meeting rather than written resolution,[566] and the director has a right to protest against her removal at the meeting.[567] In private companies, this is a bespoke formulation which varies from the usual resolution mechanic, although it is used if the shareholders propose to remove auditors.[568] A larger issue, however, is that exercise of the right to remove a director does not extinguish the director's right to compensation for termination.[569] This could be a significant amount[570] but for the statutory restrictions that have developed in this area. Thus, long-term contracts need to be approved by the shareholders,[571] as do payments in respect of loss of office (other than for breach of contract).[572] In addition to the possibility of weighted voted neutralising this right, additional procedural and economic hurdles further reduce the utility of the provision in lowering owner/manager agency costs, whilst the threat of initiating such action exacerbates indirect manifestations of majority/minority agency costs. Removal of a director in a close company by the statutory method may, in addition, be a ground for the removed director to petition the court to wind up the company.[573]

We have seen that the statutory regime can be supplemented by additional powers in the company's articles of association to remove directors. Interestingly, when proposing the model articles, the government stated that it 'has decided to include the notion of failure to

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[561] Companies Act 2006, s 168(1).
[562] *Russell v Northern Bank Development Corp Ltd* [1992] 1 WLR 588.
[563] A Keay, 'Company directors behaving poorly: Disciplinary options for shareholders' [2007] Journal of Business Law 656, 673.
[564] ibid 674.
[565] Companies Act 2006, s 168(2).
[566] ibid s 288(2).
[567] ibid s 169.
[568] ibid s 511.
[569] ibid s 168(5)(a).
[570] A Keay, 'Company directors behaving poorly: Disciplinary options for shareholders' [2007] Journal of Business Law 656, 673; Gower and Davies, paras 14-54 and14-55.
[571] Companies Act 2006, s 188.
[572] ibid s 220. See Gower and Davies, paras 14-59 to 14-62.
[573] *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360.

attend meetings in the more general provision under which appointment terminates when all the other directors decide that a director should be removed from office.'[574] However, no such provision was actually included in the Model Articles.

The statutory position, therefore, perpetuates the flaws existing since *Bushell v Faith*: its utility in providing shareholders its efficacy in resolving owner/manager costs is limited, but it exacerbates indirect manifestations of majority/minority agency costs in private companies.

5.4.2. Comparative Approaches to Shareholders' Ability to Remove Directors

The general rule in the US is that shareholders are entitled to remove directors; however there are limitations to this in most states.[575] Delaware provides that, on initial incorporation or at any time thereafter by bye-law, the directors can be constituted as a 'staggered board'.[576] This splits the directors into three categories and requires each category of director to retire (but remain eligible for re-election) every three years on a staggered basis. If the board is so staggered, directors can only be removed at the end of their term of office or 'for cause'.[577] Staggered boards are commonly used as a defence against an hostile takeover, and so are popular.[578] The courts have clarified that, in the absence of a staggered board, it is not open to a company to opt out of the ability to remove directors without cause.[579] Nonetheless, under US law it is open to a company to prevent the removal of directors without reason through the staggered board. This, coupled with fiduciary duties of controlling shareholders and a switch of directors' duties to shareholders should they act on behalf of the company, provide mitigation for this exacerbation.

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[574] White Paper, 'Implementation of Companies Act 2006: A Consultative Document' issued 28 February 2007 (URN 07/666) para 3.101.
[575] See A Schneeman, *The Laws of Corporations and Other Business Organisations*' (6th edn, Delmar 2013) 368–369.
[576] Delaware General Corporation Law, Title 8, s 141(d).
[577] ibid Title 8, s 141(k).
[578] See L Ferruzzi, 'Defence strategies against hostile takeover: Legitimacy of the pre-bid and post- bid defences' [2019] International Company and Commercial Law Review 272.
[579] See *In re Vaalco Energy* CA No 11775-VCL, as discussed in W Savitt, 'Delaware Rules on "Without Cause" Director Removal' [2016] Harvard Law School Forum on Corporate Governance and Financial Regulation available at https://corpgov.law.harvard.edu/2016/01/11/delaware-rules-on-without-cause-director-removal/ accessed on 5 December 2019

In Australia, the Corporations Act provides that a non-public company has a replaceable rule that its shareholders may remove a director from office.[580] Two years after the adoption of the Act it was stated that:

> Surprisingly, there is a paucity of discussion as to the mechanics in place under the Corporations Act 2001… to remove a director of a company before the expiration of his or her term of office.[581]

For public companies, this changed with a high profile case in 2004 which allowed the use of the statutory regime to remove Catherine Walter, a director of the National Australia Bank.[582] The regime for public and private companies differs in Australia, and the literature generated by the case generally is limited to the public framework. However, the case has generated more current discussion of the theoretical basis for shareholders' right to remove directors than exists under UK law generally.[583] Thus it was stated:

> Day-to-day affairs are the responsibility of the company's management who are guided and monitored by the board of directors. Shareholders can only make decisions by resolution in a general meeting on a limited range of issues, such as: appointment or removal of directors.[584]

For Darvis, the ability to remove directors is important because shareholders are excluded from management. The Organisation for Economic Co-operation and Development also includes the ability to remove directors as a fundamental right that the shareholders should have.[585] Conversely, it has been argued that whilst shareholders should have the right to change the board as a whole when faced with the company underperforming, this does not mean that they are the best placed to deal with individual underperformance. Indeed, it may be that the reasons for that underperformance should not be made public, and shareholders ‘can't see inside the boardroom and they can't judge the performance of individual directors.’[586]

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[580] Australian Corporation Act, s 203C.
[581] J du Plessis and J McConvill, ‘Removal of Company Directors in a Climate of Corporate Collapses’ (2003) 31 Australian Business Law Review 251.
[582] See J McConvill, ‘Removal of Directors of Public Companies Takes Centre Stage in Australia: An Exploration of Corporate Law and Governance Issues’ (2005) 1 Corporate Governance Law Review 191.
[583] ibid 206–211.
[584] P Darvis, ‘Section 249D and the "Activist" Shareholder: Court Jester or Conscience of the Corporation?’ (2002) 20 Company and Securities Law Journal 390, 392–393.
[585] OECD Principles of Corporate Governance, 20 available at https://www.oecd-ilibrary.org/oecd-principles-of-corporate-governance_5lmqcr2km4wf.pdf?itemId=%2Fcontent%2Fpublication%2F9789264173705-en&mimeType=pdf accessed on 5 December 2019
[586] C Carter, ‘Boards Alone Know Who's Fit to Service’ (2004) 12 August The Australian Financial Review 63, quoted in McConvill, (2005) 1 Corporate Governance Law Review 191, 210.

New Zealand used to only allow shareholders of public companies to remove directors. However, the Law Commission Report stated of the carve-out of private companies from this regime:

> That seems an undesirable exemption and the Law Commission does not propose to continue it. It will, of course, be open to all companies to structure their voting arrangements to achieve director entrenchment, where that is appropriate to the circumstances of a closely held company.[587]

This has now been placed on a statutory footing in New Zealand.[588] The right of shareholders to remove underperforming directors would appear to be a more important right for shareholders than their ability to assume the management functions of the company. It should be possible for this right, in some form, to exist in a manner which does not generate the second exacerbation of majority/minority agency costs. However, no jurisdiction, other than Delaware, has managed to achieve this.

5.5. Conclusion

Majority rule provides a means for mitigating owner/manager agency costs. However, its operation can displace these costs to majority/minority agency costs. The principles underpinning the twin exacerbations remain relevant under both the current UK framework and Australian law. Delaware provides some mitigation by requiring shareholder fiduciary duties, but establishing the scope of these duties took considerable litigation.

In this chapter we have reviewed the current UK approach to the twin exacerbations. We have also examined comparative approaches. When it comes to the division of responsibilities, Delaware resolves the exacerbation but Australia, New Zealand, and Malaysia do not. When it comes to removal of directors, New Zealand and Australia have default rules which can be displaced, whereas Delaware has a more advanced structure which has the effect of resolving the exacerbation. However, this is a more difficult exacerbation to resolve as it does itself exist to resolve a key risk to shareholders.

As the exacerbations remain prima facie unresolved, we need to establish whether they have not perhaps been resolved by other means. Is it possible that there are other provisions of UK company law which mitigate the exacerbations? Thus, in Chapter 6 we review four potential mitigants: directors' duties; obligations on shareholders when voting; other minority remedies; and potential soft-law remedies. Even if there are no legal mitigants, it

[587] New Zealand Law Commission Report, para 231.
[588] Companies Act 1993, s 156.

is possible that market practice has had the effect of mitigating the twin exacerbations. This is explored in Chapter 7.

CHAPTER 6

6. POTENTIAL LEGAL MITIGATIONS TO THE TWIN EXACERBATIONS

6.1. Introduction

We have seen that both the twin exacerbations remain an active risk for the minority in the UK. It may be, however, that other areas of company law provide adequate mitigations of the twin exacerbations. If another area of law adequately mitigates them, there is no problem. The purpose of this chapter, therefore, is to establish whether other areas of UK company law can be said adequately to mitigate the twin exacerbations.

Underpinning our analysis so far, and the presence of both twin exacerbations, is that shareholder interests are not uniform: the interests of majority shareholders may diverge from the interests of the minority, and directors may act only to satisfy the majority. Without such a risk there would be no potential for either of the exacerbations, which only exist because the majority's interest does not always align to the interests of the minority, and the directors can be obliged to further only such majority interests or risk losing their powers or position. If the directors are able to ignore what they perceive as the wish of the majority, the problem is resolved. No agency cost is generated if the majority has to exercise all and any of their rights in a manner which is consistent with the interests of the minority (each as is the case in Delaware). Similarly, if the majority must consider the interests of the minority when deciding whether to remove directors, the indirect manifestation is mitigated. In such situations, directors would either be obliged to act in a manner which takes the interests of the minority into account, or to know that an element of objectivity would be required of majority shareholders in exercising their rights. This means that the directors would be less able or likely to feel the need to exercise their discretion in a manner which they regard as meeting the subjective needs of the majority shareholder to the exclusion of the minority. In other words, if the directors are required to consider the interests of the minority, or if the majority shareholders in their capacity as such, are obliged to consider the minority when making decisions, the exacerbations are mitigated. The latter issue can be divided into two questions. First, what obligations rest on shareholders when exercising their votes in such capacity? Second, what protections exist for the minority in respect of the abuse of power by the majority? Accordingly, in this chapter we explore possible mitigants to the twin exacerbations under UK company law. These are: duties of directors; voting obligations of shareholders; other protections that the minority enjoy; and whether there are any other 'soft-

law' tools which may potentially resolve the twin exacerbations. If any of these mitigate the twin exacerbations under UK law, then the matter can be considered resolved.

6.2. Possible Legal Mitigant: Directors' Duties

6.2.1. Introduction

If directors are required or permitted to ignore the wishes of the majority which do not align to the interests of the minority, part of our exacerbations of indirect manifestations of majority/minority agency costs will be mitigated. We therefore consider whether any protection exists in the face of directors' duties. We have seen that directors' duties originated in the law of trusts. Directors' duties have been codified in the Companies Act 2006,[589] but with the caveat that they be interpreted with reference to existing case law.[590] We therefore examine to whom these duties are owed, the details of such duties, and the nature of such duties, in order to establish whether they adequately mitigate the twin exacerbations. If directors duties' enable them to ignore the majority, this would act to mitigate indirect manifestations of majority/minority agency costs.

6.2.2. To Whom Owed

As we have seen, the general position under UK company law has long been that the duties owed by directors are owed to the company as a whole rather than any individual or specific shareholder. The case of *Percival v Wright*[591] involved directors who were approached by shareholders to purchase their shares at a time when the directors knew that an offer for the company was imminent which valued the shares at considerably more than the shareholders were asking. It was held that the directors owed no duties to any individual shareholder. This has been held to be the case even where the company is a wholly-owned subsidiary of another company, despite the shareholder in question holding all the shares in the company.[592] In addition, courts have held that (outside insolvency) directors owe no specific duties to individual creditors.[593] This is now provided for by statute: a director owes duties

[589] Companies Act 2006, ss 170–226.
[590] ibid s 170(4).
[591] *Percival v Wright* [1902] 2 Ch 421.
[592] *Bell v Lever Brothers, Limited* [1932] AC 161.
[593] *Yukong Line Ltd v Rendsburgh Investments Corporate (No 2)* [1998] 1 WLR 294.

to the company.[594] If 'the company' is interpreted in a manner which protects the minority, then the twin exacerbations could be said to have been mitigated.

Historically, the interests of the company have been interpreted as the interests of the shareholders, present and future, with actions of directors only being valid if they purported to advance the long-term shareholder value of the company.[595] The Company Law Review decided that, whilst there was limited demand to move to a full 'stakeholder' approach in company law, there was sufficient demand to adopt an 'enlightened shareholder value approach'.[596] Thus the current formulation provides that the success of the company is the success for the members as a whole, having regard to certain third parties (such as employees, suppliers, the environment, and the community) and the need to act fairly as between members of the company.[597] This formulation is not clear: it has been argued that reference to 'have regard to' means that the list of considerations in section 172 of the Companies Act 2006, are actually a sub-set of the general approach of the members as a whole – they are means to create shareholder value rather than objectives in their own right.[598] In addition, stakeholders have no rights under the formulation; there is merely a duty on the directors to consider these interests.[599] Indeed, if directors fail to consider the interests of these stakeholders then the only parties with any recourse would be the other directors (on behalf of the company) or the members (by way of derivative action).[600] This means that the directors as a whole are incentivised to ensure that the shareholders as a whole are provided with the best possible outcome to avoid them feeling dissatisfied and launching an action.[601] By referring to all shareholders, the 'minority' is ostensibly included in the formulation. The only constituency able to ratify a breach of duties by the directors, is the shareholders at any given time by ordinary resolution.[602] This provision excludes the vote of the affected director.[603] It therefore resolves a direct director/shareholder agency cost: the former are excluded from casting their votes as shareholders to correct their own wrongs. However, it undermines this concept's ability to resolve any indirect manifestation and so does not mitigate the twin exacerbations: majority shareholders in whose interests directors

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[594] Companies Act 2006, s 170(1).
[595] *Hutton v West Cork Railway Co* (1883) 23 Ch D 654 and *Parke v Daily News (No 2)* [1962] Ch 927.
[596] Company Law Review, 'Modern Company Law for a Competitive Economy: The Strategic Framework' URN 99/654 (London, DTI, 1999), paras 5.1.1.–5.1.12.
[597] Companies Act 2006, s 172(1).
[598] A Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the UK's Enlightened Shareholder Value Approach' [2007] Sydney Law Review 577, 597.
[599] ibid 605.
[600] ibid 608.
[601] ibid 609.
[602] Companies Act 2006, s 239; Morse and others (eds), *Palmer's Company Law* 8.3412–8.3424.
[603] Companies Act 2006, s 239(4).

have acted are still able to vote to ratify decisions made by the directors against the interests of the minority. Indeed, it further empowers the majority, who may be able to use a requirement (or an alleged requirement) to ratify, against a director to require their interests to be furthered. As a result, the operation of directors' duties being owed to the company is subject to majority capture, neutralising its ability to resolve the twin exacerbations.

6.2.3. Duties

The Companies Act 2006 places several duties on directors. Noting the general issue of to whom the duties are owed, we review the detail of the duties to establish whether they may provide any mitigation against the twin exacerbations. It may be that, notwithstanding this general issue, the substance of duties provides some protection for the minority. The key duties of directors are to act within their powers, to promote the success of the company, to exercise independent judgement, to exercise reasonable care, skill and diligence, and the duty to avoid conflicts of interest.[604] We consider these in turn.

(a) Duty to Act Within Powers

It has long been a rule of UK company law that directors have duties to ensure that the company acts within its powers, and to ensure that its actions are *intra vires*.[605] Consequently, directors who paid dividends when not able to do so under the company's articles, where held to have breached their duty to the company and found personally liable to the company for the value of such dividends.[606] This duty has been extended – in addition to acting within the powers of the company, the directors are under a duty to use their powers for a proper purpose. The definition of ‘proper purpose’ has been widely drawn,[607] such that issuing shares to a minority shareholder to flood out a majority has not been held to be an improper purpose.[608] These duties have been put on a statutory footing in the Companies Act 2006.[609] Now, directors have a duty to act within the

[604] See generally Gower and Davies, ch 16; Morse and others, *Palmer’s Company Law* ch 8 for overview discussions of the various duties and their histories.
[605] *Re Land Allotment Co* [1894] 1 Ch 616 CA.
[606] *Re Oxford Benefit Building and Investment Society* (1886) 35 Ch D 502.
[607] Gower and Davies, para16-26.
[608] *Howard Smith Ltd v Ampol Ltd* [1974] AC 821.
[609] Companies Act 2006, s 171.

company's constitution[610] and to exercise their powers only for the purposes for which they are conferred under the constitution.[611] Generally, what constitutes an improper purpose is defined by reference to the articles of association of the company.[612] This raises an issue for the twin exacerbations when coupled with the framework in which the division of power between shareholders and directors operates. Thus, if the majority have amended the articles of association to divert power to themselves, or have given a direction to the directors by way of special resolution under the Model Articles to mandate a certain course of action,[613] the directors are bound to perform that transaction at risk of breach of this duty (which could, in turn, only be ratified by the majority). In other words, rather than mitigating the exacerbations, the duty on directors to act within the company's constitution (when coupled with the legal framework) further exacerbates them: it ties the hands of directors to act within the constitution, which is, in turn, controlled by the majority.

(b) Duty to Promote the Success of the Company

We have seen the definition of the success of the company as a whole provides no comfort for the relevant stakeholders or the minority but in fact empowers the majority. Nevertheless, there is a statutory duty to act in the best interests of be company under this formulation.[614] This duty has been described as ‘the most basic of the duties of good faith or fidelity owed by directors. It is the core duty to which directors are subject.’[615] This duty is one in which the court will not be keen to interfere – as Green MR stated the duty was for directors' actions to be ‘bona fide in what they consider – not what a court may consider – is in the interests of the company.’[616] This approach further exacerbates the twin exacerbations: courts are unlikely to interfere in a breach of duty arising as a result of the directors acting in a manner designed to satisfy the majority in accordance with the company's constitution, and if any such action were ever to be threatened, the majority

[610] ibid s 171(a).
[611] ibid s 171(b).
[612] *Re Smith and Fawcett Ltd* [1942] Ch 304 CA.
[613] The Companies (Model Articles) Regulations 2008, SI 2008/3229 Sch 1, art 4(1).
[614] Companies Act 2006, s 172.
[615] Gower and Davies, para 16-37.
[616] *Re Smith and Fawcett Ltd* [1942] Ch 304 CA 306, as quoted in Gower and Davies, (10th edn) para 16-40.

would be able to ratify the breach (rendering commencing any action pointless).

(c) Duty to Exercise Independent Judgement

Section 173 of the Companies Act 2006 provides that each director has a duty to exercise her independent judgement.[617] At first glance, this would seem a protection against the twin exacerbations as it requires independence of directors, which must include independence from the majority. However, the section goes on to state expressly that the duty cannot be infringed by a director acting in a way authorised under the company's constitution.[618] In other words, should the majority use their power to change the constitution to require the company to do something, the director, acting in accordance with such a requirement, will not breach this duty.[619] Gower and Davies have described this provision as meaning that 'the articles may authorise restrictions on the exercise of independent judgement, which might be a useful facility in private companies'.[620] However, this utility carries with it a double-edged sword: it provides an *ex ante* ability for the majority to demand that action be undertaken, in addition to their *ex poste* right of ratification. So long as majority are able to capture the management of the company, the value of this duty in mitigating the twin exacerbations is neutralised.

(d) Duty to Exercise Reasonable Care, Skill, and Diligence

Directors are under a longstanding statutory duty exercise their responsibilities with reasonable care, skill, and diligence.[621] This is, once again, now codified in a statutory test.[622] There are two elements to this test: the objective and the subjective. This means that directors are obliged to undertake their duties to the higher of either the skill that a reasonable

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[617] Companies Act 2006, s 173(1).
[618] ibid s 163(2)(b).
[619] See A Keay, 'The duty of directors to exercise independent judgment' [2008] Company Lawyer 290.
[620] Gower and Davies, para 16-35.
[621] ibid para 16-16.
[622] Companies Act 2006, s 174.

director should have,[623] or the skill that such director does, in fact, have.[624] This imposes a higher burden and is designed to increase professionalism among directors.[625] It is, however, difficult to establish how this would interact with the twin exacerbations, which do not arise because of carelessness, but rather from deliberate action on behalf of the directors either on the instruction of, or to appease, the majority. In addition, any breach can be ratified by the majority pre-insolvency.[626]

(e) **Duties to Avoid Conflicts of Interest**

Duties to avoid a conflict of interests for directors also have a long pedigree under UK company law. Thus, a contract between a railway company and a chair provider of which the chairman of the railway company was a partner, was held to be void. The court stated:

> So strict was the principle, that no investigation could be allowed as to the fairness or unfairness of the contract. Blaikie was, at the time of the contract, bound to make the best bargain possible for the Company of which he was chairman of the court of directors. His personal interest, as a member of the firm contracting with the Company, would lead him in an entirely opposite direction. The directors of a company had duties which were of a fiduciary nature to discharge, and any contract in which a director was interested entered into with the Company must be void. It makes no difference whether the case was that of a sole trustee or manager, or one of a body of directors. The rule was imperative, as well by the law of Scotland as England.[627]

This rule against conflicts of interest between directors and their company has been seen as fundamental when it comes to ensuring that directors are not 'swayed by interest rather than driven by duty'.[628] In its widest sense, this would appear to have potential to mitigate the twin exacerbations. There are three statutory provisions which deal with this wide topic.

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[623] ibid s 174(1).
[624] ibid s 174(2).
[625] M Ashe, 'Reasonable case, skill and diligence' [2012] Company Lawyer 33.
[626] *Re D'Jan of London Ltd* [1993] BCC 646 Ch D.
[627] *Aberdeen Railway v Blaikie* (1854) 17 D (HL) 20, 21.
[628] *Breitenfeld UK Ltd v Harrison* [2015] EWHC 399 (Ch) para 68.

First, there is a duty to avoid situations in which the director may have a conflict of interest.[629] This expressly excludes transactions with the company.[630] Accordingly, the duty is to avoid non-transactional situations: for example situations in which an individual is a director of two competing companies. Any such conflict can, however, be approved/ratified, depending on the date of incorporation of the company. The directors of a company (excluding the conflicted director) incorporated under the Companies Act 2006, are able to authorise a conflict arising for one of them provided that the articles do not prohibit the other directors from so authorising the 'conflicted one' of their number.[631] The Model Articles are silent on this matter, and thus would allow the directors to approve a conflict arising for one of them.[632] On the other hand, the other directors of a company incorporated before 1 October 2009 (and therefore incorporated under the Companies Act 1985) are only able to exercise such a right if the shareholders of the company have passed an ordinary resolution to approve such a conflict.[633] Each of these empowers shareholders to prevent the directors from authorising one of their number having a situational conflict. This helps mitigate direct manifestations of owner/manager agency costs. However, it does nothing to mitigate indirect majority/minority agency costs and so provides no protection from the twin exacerbations: the issue is not that directors may act in a manner in which they are conflicted, but rather they may, as directors, act in a manner intended to appease the majority to the detriment of the minority. This triangulation, therefore, is not mitigated by limiting situational conflicts of directors.

A similar framework applies in respect of the duty of directors to avoid transactional conflicts. This framework obliges directors to disclose their interests in proposed[634] or current transactions[635] to the company. The former can be disclosed in any manner including, amongst other methods, disclosure at a board meeting, written notice to the directors, or a general notice to the

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[629] Companies Act 2006, s 175.
[630] ibid s 175(3).
[631] ibid ss 175(4) and 175(5)(a).
[632] J Hardman, *Granting Corporate Security* para 3-09.
[633] Companies Act 2006 (Commencement No 5, Transitional Provisions and Savings Order) 2008 (SI 2007/3495), Sch 4, para 47.
[634] Companies Act 2006, s 177.
[635] ibid s 182.

directors.[636] Conversely, disclosure of interests in an existing transaction may only be made in one of these three ways.[637] Once again, this mandatory disclosure provides no protection against the twin exacerbations. In fact, as breach of this duty can only be cured by ratification by ordinary resolution (ie, by the majority), the operation of such duties could be seen to further exacerbate the twin exacerbations as it risks causing breach by directors which can only be resolved by the agreement of the majority, making the directors further captive to the majority.

In addition to the protections against conflicts, there are mandatory provisions against self-dealing. Consequently, members' approval is required before a director can enter into a substantial transaction with the company,[638] before a director borrows money from the company,[639] before approval of payments for loss of office,[640] and prior to directors entering into long-term service contracts.[641] These provisions are mandatory, but protect only against direct director/shareholder agency costs by preventing directors from enriching their positions. Accordingly, despite the promise of the *dictum* cited above, they provide no protection against the twin exacerbations.

6.2.4. Conclusion

Directors owe fiduciary duties to the company. It therefore appears as if the regime governing these duties may mitigate the twin exacerbations. However, the current regime of directors' duties does not do this. Certain duties themselves defer to the constitution of the company, which the majority are able to amend. Accordingly, these duties are liable to be captured by the majority. Even those that do not, in their terms fail to provide any protection against the twin exacerbations.

Even if they did, the duties are owed to the company. The formulation of the interests of the company, whilst ostensibly promoting enlightened shareholder value, provides no rights for stakeholders, and so appear to be purely shareholder-centric. In addition, any breach of these duties can be ratified by the majority. As a result, whilst directors are obliged to act in a

[636] ibid s 177(2).
[637] ibid ss 182(2) and 183.
[638] ibid s 190.
[639] ibid s 197.
[640] ibid s 215.
[641] ibid s 227.

fiduciary manner, the way in which their duties are formulated leaves them either captive to the majority, or not required to address the twin exacerbations. The way in which breach of duties can be ratified provides further opportunity for capture of the directors by the majority. This leads to the conclusion that the current formulation of directors' duties does not offer protection against the twin exacerbations of majority/minority agency costs. Accordingly, this category does not provide sufficient mitigation to resolve the twin exacerbations.

6.3. Possible Legal Mitigant: Shareholder Voting Obligations

6.3.1. The Base Position

The duties of directors, as we have seen, cannot be said to act as a mitigant of the twin exacerbations of indirect manifestations of majority/minority agency costs. The next question is whether there are any obligations on shareholders when deciding how to make decisions in their capacity as shareholders, as we see in Delaware for controlling shareholders and shareholders who have assumed the powers of the directors of the company. If there are such obligations on shareholders in the UK, they could include obligations on the majority to not abuse the powers entrusted to them under the twin exacerbations to the detriment of the minority. This would mitigate both exacerbations.

The classic formulation of the answer to this question[642] is that delivered by the Privy Council in the Canadian case of *North-West Transportation v Beatty*.[643] The case involved a majority shareholder and director agreeing to sell a steamer, *The United Empire,* which he owned in his personal capacity, to the company of which he was majority shareholder and director. The company was a Canadian company which applied a mandatory division of powers between the directors and the shareholders. It was agreed by all parties that the company needed a new steamer to carry out its business, and that the *United Empire* was 'well adapted for that purposes…and that the price to be paid for the steamer was not excessive or unreasonable'.[644] Nonetheless, the vote to purchase the *United Empire* was close, with 306 for and 289 against. The 306 consisted of shares that the seller of the *United Empire* owned or controlled. The 289, therefore, commenced action to restrain the purchase

[642] Gower and Davies, para 16-122; Morse and others (eds), *Palmer's Company Law* para 7.630.
[643] *North-West Transportation Company Limited and other v Beatty and others (*1887) 12 App Cas 589 (PC).
[644] ibid 596.

on the ground that: ‘Beatty was in such a fiduciary relation to the company’ that no contract with him should stand.[645]

The first instance court ordered that the transaction be set aside on the ground that Beatty had a conflict of interest and so should not be permitted to exercise the power he held to the possible prejudice of the minority shareholders. This was appealed, with the Canadian Court of Appeal agreeing with the first instance judge on the ground of Beatty's role as a director transacting with the company. The Supreme Court of Canada agreed. The Privy Council agreed that, because the contract was with a director, it was voidable and that the general meeting was able to ratify or repudiate the contract. However, Beatty had acquired shares in accordance with the bye-laws of the company and to exercise the voting rights of the shares as he saw fit. Accordingly, it overturned the Supreme Court of Canada decision. The ratio was provided by Sir Richard Baggallay in delivering the Privy Council's judgment:

> [T]he resolution of a majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject-matter opposed to, or different from, the general or particular interests of the company.[646]

The judge contrasted the position of shareholders with directors – who do have such a fiduciary duty when making decisions in their capacity as such. It is interesting, however, that he felt it necessary to re-affirm that the company needed a steamer; the *United Empire* was a steamer which met the company's needs; and that the price was an accurate valuation.[647] But, in terms of Sir Richard's analysis, these factors are surely irrelevant? If, when it comes to ratifying a contract with a director, the shareholders are entitled to decide whether to do so with utmost freedom, the acceptability of the transaction should not be an issue. Nonetheless, Sir Richard's formulation would appear to place UK law on a fundamentally different footing to Delaware, and to deny any ability for shareholder voting obligations to provide any mitigation of the twin exacerbations.

This case has been used as authority for the proposition that ‘in general, members are entirely free to exercise their own judgement as to how to vote’.[648] In reaching this decision, the

[645] ibid 598.
[646] ibid 593.
[647] ibid 596.
[648] Morse and others (eds), *Palmer’s Company Law* para 7.630.

Privy Council no doubt followed the existing judicial approach that shares are seen as the property of the shareholder. Jessop MR stated ten years prior to *North-West v Beatty*:

> In all cases of this kind, where men exercise their rights of property, they exercise their rights from some motive adequate or inadequate, and I have always considered the law to be that those who have the rights of property are entitled to exercise them, whatever their motives may be for such exercise—that is as regards a Court of Law as distinguished from a court of morality or conscience, if such a court exists…I cannot deprive him of his property, although he may not make use of that right of property in a way I might altogether approve. That is really the question, because if these shareholders have a right of property, then I think all the arguments which have been addressed to me as to the motives which induced them to exercise it are entirely beside the question.[649]

If shares are the property of the shareholders, then, as with all property, the owner's motive when making decisions is irrelevant and the shareholder is entitled to exercise her rights in respect of such shares as she sees fit. This approach has been held to mean that shareholders are able to ignore court orders which bind the company. Walton J, faced with such circumstances, stated:

> I think that, in a nutshell, the distinction is this: when a director votes as a director for or against any particular resolution in a director's meeting, he is voting as a person under a fiduciary duty to the company for the proposition that the company should take a certain course of action. When a shareholder is voting for or against a particular resolution he is voting as a person owing no fiduciary duty to the company and who is exercising his own right of property, to vote as he thinks fit. The fact that the result of the voting at the meeting (or at a subsequent poll) will bind the company cannot affect the position that, in voting, he is voting simply in exercise of his own property rights.
>
> Perhaps another (and simpler) way of putting the matter is that a director is an agent, who casts his vote to decide in what manner his principal shall act through the collective agency of the board of directors; a shareholder who casts his vote in general meeting is not casting it as an agent of the company in any shape or form. His act therefore, in voting as he pleases, cannot in any way be regarded as an act of the company. This means that they have no duties to consider the minority when exercising that decision.[650]

That no duties are owed to the minority in voting has been stated as:

> The starting point is the proposition that in general the right of a shareholder to vote his shares is a right of property which the shareholder is free to exercise in what he

[649] *Pender v Lushington* (1877) 6 Ch D 70.
[650] *Northern Counties Securities Ltd v Jackson & Steeple Ltd* [1974] 1 WLR 1133, 1144.

> regards as his own best interests. He is not obliged to cast his vote in what others may regard as the best interests of the general body of shareholders, or in the best interests of the company as an entity in its own right.[651]

This ability to act in your own interests and not the interests of others, has been held to be a strong right – it is possible to cast your vote deliberately to harm another shareholder. As Harman J stated:

> Shareholders are entitled to sell their shares, to vote their shares, to take any course they like in general meeting without regard to any other person's rights or position. In my judgment the law is that a shareholder may act with malice in voting his shares against a particular resolution and there can be no objection to that.[652]

Coupled with this freedom to vote shares, is a general judicial unwillingness to interfere in the decisions made by companies. When considering *North-West v Beatty,* Lord Davey stated:

> [I]t is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so.[653]

Thus, the default position is that shareholders are entitled to vote their shares in whatever manner that they see fit.[654] This places majorities in the UK in a different position to majorities in Delaware, and it therefore appears that shareholder voting obligations would provide no comfort for minority shareholders in removing the twin exacerbations.

6.3.2. Shareholder Voting Obligations: Deviations

However, this rule is subject to a significant number of exceptions. Even in *Northwest v Beatty,* it was held that a majority was not able to procure the votes of their fellow shareholders in favour of a matter which benefitted the majority by unfair or improper means.[655] *Palmer's Company Law* states that there are three key areas in which the courts have been keen to hold that the majority's rights to vote in their own interests are curtailed:[656]

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[651] *Re Astec (BSR) plc* [1998] 2 BCLC 556 Ch D (Comp) 584–585.
[652] *Re Unisoft Group ltd (No 3)* [1994] BCC 766, 777.
[653] *Burland v Earle* [1902] AC 83, 93.
[654] As noted above, the Companies Act 2006, s 239(4) has changed the position when a shareholder is voting on a ratification motion in respect of her own acts as director. This would mean that, should the same facts arise today in respect of a UK company, *North-West v Beatty* would be decided differently as it involved an alleged breach of a director's duty. However, this represents an exception when faced with a specific type of resolution, rather than a general statement in respect of the rights of voting of shareholders.
[655] *North-West v Beatty* 600.
[656] Morse and others (eds), *Palmer's Company Law* para 7.630.

to agree transactions at under value; attempts to damage the minority economically; and where class rights are affected by a transfer. These may appear to be neat categories, but, as we shall see, many more complications arise in each purported category.

(a) Undervalue

Menier v Hooper's Telegraph Works[657] involved a majority using their votes to divert company property to themselves. James LJ described the case as:

> The minority of the shareholders say in effect that the majority has divided the assets of the company, more or less, between themselves, to the exclusion of the minority. I think it would be a shocking thing if that could be done, because if so the majority might divide the whole assets of the company, and pass a resolution that everything must be given to them, and that the minority should have nothing to do with it. Assuming the case to be as alleged by the bill, then the majority have put something into their pockets at the expense of the minority. If so, it appears to me that the minority have a right to have their share of the benefits ascertained for them in the best way in which the Court can do it, and given to them.[658]

Mellish LJ agreed, stating:

> I am of opinion that although it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet that the majority of shareholders cannot sell the assets of the company and keep the consideration, but must allow the minority to have their share of any consideration which may come to them.[659]

Palmer uses this case as authority that when it comes to a transaction with the company at a price under value, the majority cannot cast their votes in a manner designed to benefit themselves.[660] The Lord Justices framed their judgments in a manner designed to avoid a conflict with the general position in *North-West v Beatty.* Both effectively deemed the amount by which the value was undervalued as a distribution to the shareholders,[661] and in so characterising the transaction, the matter became a simple one of the majority receiving a distribution to which they were not entitled. Seen in this light, approving this transaction at under value becomes something that conflicts with legislative provisions in respect of dividends: the default rules applicable to company decision making breached mandatory rules directly applicable to the subject matter. Despite the rhetoric, protection against

[657] *Menier v Hooper's Telegraph Works* (1873-74) LR 9 Ch App 350.
[658] ibid 353.
[659] ibid 354.
[660] Morse and others (eds), *Palmer's Company Law* para 7.632
[661] A position which has been affirmed in *Averling Barford Ltd v Perion Ltd* [1989] 4 WLUK 159.

unlawful distributions apply to protect creditors rather than the minority. This result, therefore, cannot be extended to cover the matter at hand: the majority tried to make a company do something which statute forbade. That they were unable to agree to do so, was not because the minority objected or would suffer harm – indeed had the assets been transferred under value to all shareholders, the result (failure of the activity in question) would have been the same.

The facts of *Automatic Self Cleansing* were, of course, similar to issues above: the majority proposed a wrong which the directors considered would harm the company. It would have been possible for *Automatic Self Cleansing* to be framed as a case concerned with misuse of majority power by shareholders following the *Menier v Hooper* decision. However it was not so framed and instead focused on the balance of powers between the directors and shareholders. This conscious decision to correct an obvious wrong on the minority by the majority by reference to the powers of directors, provides a key insight that restraints on the majority are not as pervasive as is generally believed. Accordingly, it may be that restrictions on under-value transfers provide less of a restraint on the majority qua majority than Palmer states.

Precisely the opposite issue arose in *Atwool v Merryweather.*[662] There, one of the promotors of a company owned an interest in a mine which two promoters (Merryweather and Whitworth) of the company knew was worth £4,000. They, however, circulated a prospectus which contained statements that the mine was worth £7,000. The intention was for the mine to be sold to the company for £7,000 (to be shared between the promoters). Both the promoters also received shares in the company sufficient to retain control over the company. Once this came to the attention of the other shareholders, they summoned a meeting to consider whether to sue the promoters. If the votes of the promoters were included, then the vote was a majority of 58 against pursuing litigation, whereas if the promoters were excluded, the vote was a majority of 86 in favour of pursuing litigation. The matter before the court was whether litigation could be commenced. Wood VC stated:

> Upon such a transaction the Court will hold that the whole contract is a complete fraud. I do not in the least say that where persons with their eyes open know that the agent who secures them the bargain is going to take money for it, that would not be all right enough. If the company knew this gentleman was to have this amount as promotion-money, well and good. There might have been some difficulty, Mr. Whitworth being a director, if it had been a sale by Merryweather and Whitworth *eo nomine,* both of them together. If that had been the case more might have been said

[662] *Atwool v Merryweather* (1867-68) LR 5 Eq 464 (Note).

> about the frame of the suit. But here it is a simple fraud, and nothing else. Merryweather knowing Whitworth's position with regard to the company, and that as an honest man Whitworth was bound to tell the company what price he bought the mines for, agreed that the mine should be sold to the company for £7000, and that the real price, £4000, should not be disclosed to the company.[663]

Wood VC clearly viewed the matter simply as one of fraud. He therefore considered that the entire life of the company, from formation to completion of the transaction, was also a matter of fraud. Against so fraudulent a background, it was wrong to consider that any of the minority had genuinely subscribed for shares in the company. They were, accordingly, entitled to the return of their investment. This achieved a just end by side-stepping the formalities: the presence of fraud meant that the company was void from its inception, and so the issue of whether Merryweather and Whitworth were entitled to vote their own shares never arose. The company had to be entirely unwound to the position before the fraud was perpetrated. In other words, this case provides no limitations on shareholders' ability to vote their shares in whatever way they wish, and likewise no potential mitigation of the twin exacerbations.

Accordingly, in the absence of fraud or a breach of some other mandatory rule, it appears that there is no duty on the majority to consider the interests of the minority when voting their shares for an under-value transaction. Consequently, this line of authority provides no comfort for indirect manifestations of majority/minority agency costs.

(b) **Economic Harm to the Minority**

It is stated that the majority cannot use their powers to undermine the economic interests of the minority.[664] The classic case is frequently cited[665] as *Allen v Gold Reefs of West Africa, Limited*.[666] This case involved a company with articles of association which provided for a lien over shares which were not fully paid. All shareholders had only partially-paid shares, apart from one shareholder, Zuccani, who had a mixture of fully-paid and partially-paid shares. Zuccani died, and his estate did not have sufficient assets to pay the unpaid amounts on his shares. The other shareholders proposed an amendment to the articles to extend the lien to shares even if fully paid. This was against Zuccani's estate's interests but in the interests of the majority. Once the resolution passed, the directors issued a call on unpaid

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[663] ibid 464.
[664] William Wong, 'Can Shareholders Vote Inadvertently?" [2011] LQR 522; Hollington, *Hollington on Shareholders' Rights*, 5-33 and 5-34
[665] See Palmer and Morse and others (eds), *Palmer's Company Law* para 2.1135.
[666] *Allen v Gold Reefs of West Africa, Limited* [1900] 1 Ch 656.

shares which all other shareholders paid but Zuccani's estate could not, meaning that the company had a lien on all of Zuccani's shares. The directors moved to forfeit the partially-paid shares and freeze the rights of the fully-paid shares. The effect, therefore, of the small change in the articles was to exclude Zuccani's shares from their rights, although prior to the call he was the only holder of any fully-paid shares.

Zuccani's estate petitioned for a restraint on the lien. At first instance, this was granted due to technical defects in the service of notice of meetings. The Court of Appeal, however, held that the amendment to the articles was valid. Lindley MR's famous dictum[667] is that, in respect of the ability to amend articles,

> the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied, and are seldom, if ever, expressed.[668]

This purports to require shareholders to cast their votes in good faith and in the interests of the company, similar to the requirements for controlling shareholders in Delaware. The value of this dictum in the UK, however, is actually limited. It was clear that the majority had amended the articles to deprive Zuccani's fully-paid shares of their enjoyment, and to manufacture a way to appropriate rights that should sit with Zuccani or his executors from such shares. The majority therefore did not exercise their rights '*bona fide* for the benefit of the company as a whole'.[669] Nonetheless, the court held that the amendment of the articles was valid. Lindley MR stated that the court was not duty bound to restrict the statutory freedom to amend the articles.[670] However, he could have avoided the need to do so had he implied the limitation he flagged to the operation of such a freedom. He then moved on to consider whether there was anything inherent in the corporate agreement between Zuccani and the company which would in some way estop a subsequent lien over fully-paid shares. He concluded:

> After carefully considering the whole case, and endeavouring in vain to discover grounds for holding that there was some special bargain differentiating Zuccani's shares from others, I have come to the conclusion that the appeal from the decision

[667] See Gower and Davies, (10th edn), paras 19-4 and 19-5; Morse and others (eds), *Palmer's Company Law* paras 2.1148 and 2.1149.
[668] *Allen v Gold Reefs of West Africa, Limited* [1900] 1 Ch 656, 671–672.
[669] ibid.
[670] ibid 672.

> of the learned judge, so far as it relates to the lien created by the altered articles, must be allowed.[671]

It is surprising that Lindley MR had been 'endeavouring in vain' to find a way to hold there had been such a special bargain between Zuccani and the other corporate constituents. However, he would not have needed to do so had he followed his own dictum and overturned the amendment on the ground that it was not a bona fide use of the powers of the majority. His analysis moved seamlessly from 'each shareholder always has a duty' to 'there was no special agreement which created a duty'. If his initial dictum was correct, then there was no need to attempt to explore 'special agreements'. The result of this case was, therefore, that a clear attempt by the majority to amend articles in a manner which they knew was favourable to them and detrimental to the minority, was upheld as valid. It is against this result that Lindley MR's dictum should be tested, and it can be seen that it is found wanting. If the law were as per Lindley MR's dictum then the case would have been decided in favour of the minority. That the case was decided in favour of the majority shows that, despite dicta to the contrary, there can have been no such bona fide requirement on the votes of the majority. As a result, this heading also provides no mitigation of the twin exacerbations. The dictum that the votes of shareholders must be exercised '*bona fide* for the benefit of the company as the whole' has been described as:

> [A] statement which, read casually, might suggest that shareholders are subject at common law to precisely the same basic principle as directors. This would be highly misleading, however, and the decisions do not support any such parallel.[672]

Nevertheless, this dictum has been acted upon. *Sidebottom v Kershaw, Leese and Company, Limited*[673] involved the introduction of an article which dispossessed a minority of their rights on the ground that they were in competition with the company. This was upheld as valid by the court on the ground that the article had been introduced in the bona fide best interests of the company. In *Dafen Tinplate Company, Limited v Llanelly Steel Company (1907) Limited*[674] there was a falling-out between shareholders, and the majority proposed resolutions which allowed them, without restriction, to resolve that any number of shares of any member (other than the majority) should be offered by the directors to persons (including members) which the directors considered fit at the price fixed from time to time by the directors. Peterson J applied the *Allen v Gold* dictum, but concluded that the outcome

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[671] ibid 675.
[672] Gower and Davies, para 19-4.
[673] *Sidebottom v Kershaw, Leese and Company, Limited* [1920] 1 Ch 154.
[674] *Dafen Tinplate Company, Limited v Llanelly Steel Company (1907) Limited* [1920] 2 Ch 124.

differed from that in *Sidebottom*: in *Dafen* the article was not proposed for bona fide reasons in the interests of the company. It was put to Peterson J that the test for compliance with Lindley MR's dictum was subjective, but he considered that the matter should rather be tested objectively.[675] However, it was a mistake to consider such a matter as linked to any duty on the majority to vote in a certain way. Instead, we can differentiate the property of the company from the property of the shareholders (ie, the shares themselves). Seen in this light, the issue was the forfeiture of the minority's property in a way to which they had not consented. By becoming members and therefore agreeing to the articles of association of the company, it could be argued that they had agreed to the procedure for amendment of the articles as set out in the articles. However, when the difference between the personal property of the shareholder and the activities of the company is acknowledged, we can see why it would be a higher bar to amend articles so as forcibly to remove the property owned by the minority shareholders, than it would be to amend matters in respect of the company in which the shareholder holds shares. In other words, this line of authority can be limited to preventing forfeiture of the minority's shares, or rights attaching to them, at the instigation of the majority shareholders in a manner to which the minority has not agreed, rather than being of wider application in respect of considerations that the majority have when voting. A prohibition on the majority from directly appropriating the assets of the minority (other than by pre-agreed mechanisms) can be seen as a lower bar than a general protection that the majority has to vote its shares in the bona fide interests of the company as a whole. Once again, Lindley MR's dictum is undermined, as is the ability for this heading of shareholder interaction to mitigate the twin exacerbations.

This analysis is reinforced by the attitude the courts have taken when such an article has been adopted by agreement between members prior to the underlying dispute. *Philips v Manufacturers' Securities Ltd*[676] involved a company set up in parallel with a federation of bedstead manufacturers. The company was set up by the members of the federation, but was separate and distinct from it. The articles contained a provision that a special resolution could determine that any shares in the company be sold at any price determined by such special resolution, but not less than 1s per share, and if no price was fixed then the price would be 1s per share. One of the shareholders left the federation but continued to be involved in the company. The other shareholders passed a resolution in accordance with the pre-agreed article to transfer the federation-leaver's shares for 1s per share. It was acknowledged that this represented a gross undervaluation of the asset, and was undertaken by the majority to

[675] ibid 140.
[676] *Phillips v Manufacturer's Securities Ltd* (1917) 86 LJ Ch 305.

punish the federation-leaver for leaving the federation. Therefore, the majority acted for purposes which were at most indirectly and vaguely connected to the company and were, in reality, entirely irrelevant to the company. The purpose was directly to harm a minority shareholder for matters relating to a separate entity, and so were not an exercise of the majority's right in the bona fide exercise of the best interests of the company. Indeed, the only purpose of this amendment was, as per Palmer's ostensible test, to cause economic damage to the minority. Although the article had been agreed to by all parties, if there was a genuine duty to act in the interests of any other party, or not to cause economic harm to the minority, then the operation of the article should have been blocked. However, the court held the operation of the article to be valid. This confirms the analysis above. If there is truly an obligation to vote shares in the bona fide interests of the company, or not to cause economic harm to the minority, then Philips should have succeeded as it was common cause that the sole purpose in passing the resolution was to punish him. However, he did not as he had signed up to the adoption of the article. Effectively, this meant that the forfeiture of his shares – as capricious and vindictive as it may have been – was acceptable. The exercise of such a right is not purely historic either; it is common in private companies to provide that those leaving businesses are obliged to transfer their shares, sometimes below their actual values.[677] This is reconciled by acknowledging that such exit requirements were agreed to by the minority prior to the act in question – the exit conditions are therefore part of the corporate contract which the minority enter into. This can be contrasted with an *ex post* attempt by the majority to use their power to change this contract to remove rights the minority had. However, it is not linked to any duty the majority has to the minority or the majority when it comes to voting shares generally. Accordingly, this right may operate to mitigate direct manifestations of majority/minority agency costs (the majority cannot take from the minority), but it does nothing to mitigate the indirect manifestations.

We can, therefore, deduce that there is no duty on the majority to vote in the interests of the minority or the company as a whole, or to ensure, when casting their vote, that they avoid causing economic harm to the minority. All that they cannot require is that the minority alienate their assets other than where they have agreed the process in advance. This means that the twin exacerbations cannot be said to be mitigated by any such duty.

The issue has clarified over time. Thus in *Shuttleworth v Cox Brothers*[678] the court disagreed strongly with Peterson J's dicta in *Dafen. Shuttleworth* involved a company whose articles

[677] *Arbuthnott v Bonnyman* [2014] EWHC 1410.
[678] *Shuttleworth v Cox Brothers and Company (Maidenhead) Limited* [1927] 2 KB 9.

purported to appoint four directors for life. After accounting irregularities, the shareholders amended the articles to disqualify one of the directors. The issue was whether the variation of the articles was valid or not, as the removed director argued that vindictiveness lay at the heart of the amendment. Bankes LJ examined the criteria a court can use when deciding whether an amendment is for the benefit of the company, and concluded that the test should be whether no reasonable person could consider the amendment to be in the interests of the company.[679] The court also rejected Peterson J's objectivity of the test as outlined in *Dafen* – to follow Peterson J's ruling would be 'to make the court the manager of the affairs of innumerable companies instead of the shareholders themselves'.[680] In the result, the court held that the decision as to whether the amendment by the shareholders was in the interests of the company was ultimately a decision for the shareholders. This somewhat neutralised Lindley MR's dicta by replacing for these purposes the 'interests of the company' (itself a flawed formulation for our purposes as it is open to majority capture) with the 'interests of the shareholders' (a formulation even more open to majority capture). This inflection on the dicta rendered it tautologous: shareholders must act in what they consider to be their interests as a whole – enabling the majority to conflate their interests with the interests of shareholders as a whole. Matters became less clear in *Greenhalgh v Arderne.*[681] This case involved a company with pre-emption rights on transfer in its articles. The articles were amended to provide that the general meeting could approve any transfer by ordinary resolution. Evershed MR reviewed the authorities, upheld the amendment, and concluded:

> that a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders, so as to give to the former an advantage of which the latter were deprived.[682]

In this case, however, the majority had received an offer from a third party which they wanted to accept. This offer had only been made to the majority. The amendment purported to provide the same rights to all shareholders, but in practice the offer was intended to benefit the majority only. Accordingly, the effect of the amendment was, in practice, to discriminate between the majority and the minority on the ground that the majority were free to enter into a transaction which the minority were not able to access despite the corporate contract initially excluding such a possibility. We therefore see that *Greenhalgh* represents another case whereby the ostensible dicta emanating from the case purport to provide a clear

[679] ibid 18.
[680] ibid 22 (per Scrutton LJ).
[681] *Greenhalgh v Arderne Cinemas, LD and others* [1951] Ch 286.
[682] ibid 291.

statements of law which has the potential to mitigate the twin exacerbations, but which the results of the case themselves undermine, steering towards a clear conclusion that the ostensible protections provided to the minority by restrictions on shareholder voting (and so providing potential to mitigate the twin exacerbations) are purely illusory.

Clemens v Clemens[683] was a case involving two shareholders in a company – a niece (who held 45%) and an aunt (who held 55%). The company was very successful. The aunt and four others were directors, but the niece was not. A proposal was made under which the directors other than the aunt would subscribe for shares. The niece objected because the issues would reduce her shareholding to under 25 per cent of the shares in the company. Foster J reviewed the dicta quoted above and decided that, although the aunt was acting in what she genuinely believed to be in the interests of the company, she nevertheless was acting in a manner designed to ensure that the niece lost her negative control in blocking special resolutions. He therefore held that the allotment of shares was invalid. This decision has been described as 'remarkable' and 'much criticised'.[684] Indeed, Joffe described the decision as one which 'warms the heart',[685] but stated that its reasoning, if correct, would effectively destroy the shareholder's right to take account of her own interests.[686] Going further, he argues that the result

> subverts the present basis of the law by displacing the principle of majority rule. The majority would have to satisfy the court that it acted in what the court, not the majority, thinks is in the best interests of the company–a notion elsewhere expressly rejected by the Court of Appeal.[687]

It is curious why the outcome of this case has received so much academic criticism when the outcome of *Dafen* has not (clearly, the dictum in *Dafen* has been judicially criticised). It is submitted that the difference between the two would more accurately have centred on whether the majority removed the ownership rights of the minority. In *Dafens*, it was clear that property of the minority was sold under value without their consent. In *Clemens*, this would only be the case if the negative right to block a resolution of the company could be classified as property of the minority, or whether the important right was the number of shares that she owned. The latter seems more correct,[688] and would lead to a difference in the levels of academic criticism of the outcome: in *Dafens* the court ultimately decided

[683] *Clemens v Clemens Bros Ltd* [1976] 2 All ER 268.
[684] Gower and Davies, (6th edn), 716.
[685] V Joffe, 'Majority Rule Undermined?' (1977) 40 Modern Law Review 71.
[686] ibid at 72.
[687] ibid at 73.
[688] See *White v Bristol Aeroplane Co Ltd* [1953] Ch 65, where it was held, in the context of class rights, dilution by the issue of new shares did not affect the rights the shareholder had prior to the share issue.

correctly as it prevented expropriation of minority's assets. But on that test, it is doubtful whether the same can be said of the court in *Clemens*. In other words, the exception of *Clemens* shows that the proposition advanced in this chapter is correct – the twin exacerbations are not resolved by this area of law.

Gibson J attempted to reconcile the cases by deferring to shareholders' right to vote against the concept of a '*bona fide* interest of the company'. He formulated the questions as:

> All resolutions must be passed bona fide for the benefit of the company as a whole, but that requirement does not have the same content for a board of directors, all of whom are fiduciaries, as it does for a general meeting of the company. The law is not so foolish as to prevent a shareholder from voting in his own private interests provided that the resolution is not discriminatory.[689]

Whilst this is an accurate summary of the confused position resulting from the case law, it is not helpful: it would seem to position the bona fide requirement as somehow subsidiary to the general proprietary right, despite that never having been expressly articulated elsewhere (and not reasoned by Gibson J). As the case law developed, the judicial analysis shifted from a general discussion of whether a shareholder has a duty to vote her shares a certain way, to a discussion of whether the majority do.[690] To an extent, this is a semantic change driven by the realities that the matter is only relevant when there is a majority (as a minority acting in their own interests would be overruled and, therefore, not require litigation to resolve the issue). However, it also shows an underlying weakness in the analysis advanced in the cases. Gower and Davies stated that, in respect of these cases,

> if the courts, instead of having to ask themselves whether…the resolution had been passed 'bona fide in the interests of the company', had simply had to consider whether the members of some of them were being unfairly prejudiced, it can scarcely be doubted that they would have found that an easier question to answer.[691]

However, as we have seen, even this is not entirely inaccurate. The issue in these cases is not that there is a general duty to vote shares with any particular considerations in mind, nor the generally unfairly prejudicial conduct of the majority. Instead, the legal principle which is highlighted by this line of authority is an inability of a majority to use their personal property to directly appropriate the personal property of the minority other than in limited circumstances. This changes the issue considerably. The issue is no longer whether shareholders are constrained generally when they exercise their rights, but is instead whether

[689] *Re Ringtower Holdings plc* (1989) 5 BCC 82, 101.
[690] *Estmanco (Kilner House) Ltd v Greater London Council* [1982] 1 WLR 2.
[691] Gower and Davies, (6th edn), 717.

they have any right to appropriate assets of the minority in the first place,. This formulation may mitigate direct manifestations of majority/minority agency costs, but does not resolve the indirect manifestations of the twin exacerbations.

Therefore, the absence of an obligation on shareholders to cast their votes in any way other than their own interests, means that there is no protection against the twin exacerbations: the majority are able to act in their own interests provided they do not actively remove property from the minority. Accordingly, this limb provides no mitigation against the twin exacerbations.

(c) Class Rights

The analysis above is embodied in the principle underpinning the concept of 'class rights': each class of share enjoys some rights with which other classes are not entitled to interfere.[692] If a company issues different shares to which different rights attach, the rights attaching to those shares can only be varied with the consent of the majority of that class of share.[693]

The key case on this matter is *In re Holders Investment Trust Ltd*.[694] In this case, it was proposed that five per cent cumulative, redeemable, preference shares due in 1971, be exchanged for six per cent unsecured loan stock due in 1985 or 1990. The majority holders of the preference shares were also the majority ordinary shareholders. At the vote of the preference shareholders, those who did not also hold ordinary shares objected to the motion. Megarry J held that the votes of those in favour were to be set aside on the ground that they had not acted in a way which they considered to be in the best interests of their class as a whole.[695] This creates problems: objectively, on any corporate decision, it will be possible to isolate whether certain matters are in the interests of a certain class or not. This approach would mean that if there was the same individuals were ordinary shareholders and preference shareholders, and they held their shares in each class in the same proportion, they could not make the exchange even if it was agreed and acknowledged that any reduction in value of their rights in their capacity as preference shareholders, increased the value of their rights as ordinary shareholders exponentially. This cannot be the correct legal analysis.

It is submitted that this judgment should be see to truncate some analytical steps. The issue was that the majority of the class were actually using their power as a majority to deprive

[692] Morse and others (eds), *Palmer's Company Law* para 6.029.
[693] Companies Act 2006, ss 630–640.
[694] *In re Holders Investment Trust Ltd* [1970] 1 WLR 583.
[695] ibid 589E.

the minority of their rights – in this case, the right to redeem their preference shares in 1971. In other words, the issue at stake in *Holders Investment Trust* was exactly the same as in all other cases reviewed above: a narrower issue than the dicta state. If this submission is correct, then there is no duty on those casting their votes in favour of the class as a whole, but there is a duty on the majority to not deprive the minority of their positive rights. In this case, the majority/minority division was obscured by the presence of two share classes. But the same parties constituted the 'majority' in both classes, which enables us to analyse the case as a majority/minority issue rather than a discrete issue of class rights. If this is the case, then once again, the level of importance of the decision diminishes. Instead of providing general qualifications on a shareholders' ability to vote in a class-rights issue, it provides that a shareholder cannot use her votes in a class-right variation to remove rights from that class with the aim of benefitting them in a different capacity. In other words, the duty is not to consider the issues of the class, but rather to ensure that your other shareholding interests do not deprive others of their positive rights. Once again, this formulation aids direct manifestations of majority/minority agency costs in that it prevents the majority from appropriating the rights of the minority. However, it does not mitigate the indirect manifestations with which we are concerned.

6.3.3. Conclusion

We have seen the general position in *North-West Transportation v Beatty* that a shareholder is entitled to vote her shares (as her personal property) in any way she sees fit.[696] We have also reviewed the apparent deviations from this general rule and found them lacking. It appears that a more accurate rule is that whilst shareholders may use rights attaching to their personal property to further their own interests, they cannot use these rights to reduce positive rights already attaching to the personal property of others without their prior approval. In this light, there are numerous personal or irrelevant considerations that a shareholder could have when deciding how to vote, so long as they do not reduce the property of the minority. This is the approach advocated by Gower and Davies in their summation of this line of authority:

> [I]t has been also repeatedly laid down that votes are proprietary rights, like other incidents of shares, which the holder may exercise in his or her own selfish interests

[696] Of course, as with all personal property, there can be other limitations on how shares are voted. For example, it is possible for a shareholder to hold legal title to the shares and yet have passed any economic benefit of the shares to a third party (eg, a secured creditor on enforcement – *Standard Charter v Walker* [1992] 1 WLR 561), in which case the shareholder's rights to deal with the property unfettered may not apply. However, this is a matter of property law rather than of company law restrictions.

> even if they are opposed to those of the company….Thus it is wrong to see the voting powers of shareholders as being of a fiduciary character. Unlike directors' powers, shareholders' voting rights are not conferred upon them in order that they shall be exercised in the way which prefers the interests of others over the interests of the voting shareholder where the two are in conflict… however, to deny the fiduciary character of shareholders' voting rights and to assert their proprietary nature is not to say that the exercise of shareholders' voting powers is, or should be, unconstrained by the law.[697]

This means that the analysis of shareholder voting is simpler than generally considered – shareholders have a right to vote their shares how they wish. The limitations on how a shareholder votes are therefore narrower than first thought. This means that the rules in respect of shareholder voting only protect the minority from direct appropriation of their assets. This means, further, that to be a shareholder in the UK (with minimal duties when it comes to exercising rights) it is conceptually different than in Delaware (where controlling majorities receive automatic duties). The UK rules do not protect the majority from giving themselves a benefit. Consequently as these rules currently sit, they provide no protection for the minority to mitigate the twin exacerbations. Gower and Davies highlight that the case law hints at three options for development of the law of judicial review of shareholder decision making:

(A) A subjective view of decision making – where all that is required is rationality in shareholder decision making and, when it comes to infringing on the proprietary rights of the minority, a requirement for shareholders to have acted fairly;

(B) An objective view of decision making – where the courts must establish whether a certain decision was in the best interests of the company when the interests of the minority are infringed;[698] or

(C) A hybrid view – where the courts are able to consider both of the above.[699]

A allows the majority the greatest discretion, and C allows the least. It currently appears as if none of these statements provides a neat, descriptive view of the current law of shareholder

[697] Gower and Davies, para 19-4.
[698] This is the approach taken when creditors consider casting their votes in a decision of the class of creditors of which they form part. See *British American Nickel Corporation, Limited v M J O'Brien* [1927] AC 369.
[699] Gower and Davies, para 19-11.

voting. Indeed, the answer is likely to differ in different contexts.[700] However, whichever option is most appropriate, whilst it may provide some mitigation of direct manifestations of majority/minority agency costs in private companies, that is the limit of this line of authority. The lack of a general obligation to vote shares in any way but in the holders' own interests, means that nothing is done to mitigate indirect manifestations of majority/minority agency costs. It is possible that the majority may be constrained from actually reducing the minority's rights – although here, too, the ambit is unclear. Any such protection, however, only acts to mitigate direct manifestations of majority/minority agency costs. It does nothing to protect against the triangulation which occurs in respect of indirect manifestations. The concern of the twin exacerbations of indirect manifestations of majority/minority agency costs is that either directors will act in a way to appease the majority, or the majority will assume control of the powers of the company and run the business in their own interests. Accordingly, the concern extends beyond appropriation of assets, to a structural flaw in the operations of private companies which can allow majority interests to dominate the operation of the company. The duties of majorities when voting shares do not mitigate the indirect manifestations evidenced by the twin exacerbations.

6.4. Other Minority Protections

6.4.1. Introduction

The minority are unable to rely on the fiduciary duties owed by directors or any obligations that the majority may have towards them to mitigate the twin exacerbations of indirect majority/minority agency costs in private companies. However, are they able to rely on other protection they may have? In establishing this we review the statutory derivative claim and the remedy of unfair prejudice.

6.4.2. Derivative Claim

The derivative claim exists because directors may not be best placed to take action arising from the wrongs of one of their own. This has led to a tendency for directors not to pursue action against a miscreant director, and, in turn, has resulted in shareholders themselves attempting to take direct action in respect of the wrongs of directors.[701] If the minority are

[700] ibid.
[701] ibid ch 17 for a full discussion of the derivative action.

able to raise a derivate claim, it may be possible to argue that such a mechanism could mitigate the twin exacerbations. Judicial reticence to such action created a line of authority which became known as 'the rule in *Foss v Harbottle*',[702] which prevented an individual shareholder raising actions on behalf of the company in all but limited circumstances. This ability for the shareholders to act, on occasion, has now been put on a statutory footing. The derivative claim allows a member of the company to commence action on behalf of the company against a director of the company[703] in certain circumstances. Before doing so, however, the member must seek the court's permission[704] and the court must be satisfied that there is a prima facie case against the director.[705] The court must refuse the claim if it considers that someone acting in the interests of the company would not continue with the claim,[706] or if the act was authorised or has subsequently been ratified.[707] The effect of a successful derivative action is that the amounts recovered from the director become part of the assets of the company.[708] The derivative claim has been called an 'outmoded superfluousness'.[709] For our purposes there are several reasons why it provides no protection to the minority. First, the claims can only be brought against a director qua director: they therefore cannot be brought in respect of the indirect manifestations with which we are dealing. Second, a claim must be refused if it relates to something which was approved or ratified – an avenue open to the majority to defeat the claim. Third, the effect of a successful derivative action would be receipt of damages by the company: there is therefore little incentive for the minority to undertake action which, even if successful, would secure them only an indirect proportional benefit.

The derivative claim, therefore, offers no mitigation of either of the twin exacerbations.

6.4.3. Unfair Prejudice

Under the Companies Act 2006, any shareholder may petition the court for relief on the grounds:

[702] *Foss v Harbottle* (1843) 2 Hare 461.
[703] Companies Act 2006, s 260(1).
[704] ibid s 261.
[705] ibid s 261(2).
[706] ibid s 263(2)(a).
[707] ibid s 263(2)(c).
[708] ibid s 260(1)(b).
[709] AM Gray, 'The statutory derivative claim: An outmoded superflousness?' [2012] Company Lawyer 295.

> (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.[710]

At first reading, it appears as if this protection would be perfectly placed to mitigate the twin exacerbations. Gower and Davies note that the broad scope of the formulation gives rise to two primary questions. Firstly, does the action need to be limited to conduct which is unfairly prejudicial to the member qua member, or can it cover other capacities? Initially, this was cast very narrowly, and only protected conduct prejudicial qua member and, therefore, not qua director.[711] Over time, it has extended to conduct which affects the members in their non-member capacities.[712] Secondly, should the scope of the conduct only cover unlawful acts, or should it be wider? Gower and Davies state that 'the important steps taken by the courts can be characterised as saying that s 994 protects expectations and not just rights'.[713] Thus, public law terminology has been borrowed so that a breach of the minority shareholder's 'legitimate expectation' will also trigger the unfair-prejudice regime.[714] In the case in which this was introduced, it was explained that it:

> [A]rises out of a fundamental understanding between the shareholders which formed the basis of their association but was not put into contractual form.[715]

This can arise on formation of the company or subsequently.[716] It is, however, a high burden: the court's presumption will be that 'it can safely be said that the basis for association is adequately and exhaustively laid down in the articles'.[717] In other words, courts will not readily provide this protection to minorities in the absence of clear evidence of agreement between the majority and the minority. There has been a change in description from 'legitimate expectations' to 'equitable considerations'.[718] The House of Lords stated that this was so that the court could ask whether there was any equitable requirement to constrain the majority's rights based on the bargain that the majority had struck with the minority.[719] This

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[710] Companies Act 2006, s 994.
[711] *Re Lundie Brothers* [1965] 1 WLR 1051.
[712] *Re Haden Bill Electrical Ltd* [1995] 2 BCLC 280
[713] Gower and Davies, para 20-6.
[714] *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, 19.
[715] ibid.
[716] *Strahan v Wilcock* [2006] 2 BCLC 555 CA.
[717] *Ebrahmi v Westbourne Galleries Ltd* [1973] AC 360, 379.
[718] *O'Neill v Phillips* [1999] 2 BCLC 1.
[719] ibid 10–11.

has been held to extend to non-contractual understandings,[720] but under this line of authority must be the result of an understanding by the minority. Thus, to trigger unfair prejudice in this category, it is not enough that the company is simply run in a way which ignores the interests of the minority (the primary concern of the twin exacerbations). Instead, it must be equitable to uphold an informally-struck bargain which has now been breached by the majority. This will only provide a remedy to the minority in respect of discrete ills that the minority has considered in advance, rather than providing a general protection. Thus, whilst this category provides mitigation if there is a pre-existing informal agreement to the contrary, it does not arise in the absence of such pre-existing informal agreement. It therefore cannot be said to remedy the twin exacerbations on a general basis. This provides limited comfort, as it requires a putative wrongdoer to agree in advance to do no wrong.

Gower and Davies state that there are other categories of unfair prejudice which do not rely on 'legitimate expectations'/'equitable considerations'.[721] The courts have considered whether there was a breach of actual duties by the majority, or breaches of standards or guides which do not apply but are seen as analogous – for example, compliance with the Takeover Code (which, as we have seen, only applies to public companies) in the run up to a takeover of a private company,[722] and a consideration of model articles to establish whether there was a delay in requisitioning a general meeting which could be deemed prejudicial, even though the model articles were not part of the constitution of the company in question.[723] The issue arises if there is no equivalent provision, and therefore nothing to breach. Gower and Davies summarise the position as:

> Then the court may have to face the task of developing its own criteria of fairness. For example, the company may have adopted a policy of paying only low dividends, although financial able to do better and even though the controllers have been able to obtain an income from the company by way of directors' fees. Is that unfairly prejudicial to the interests of the non-director shareholders, even in the absence of any informal understanding as to the level of dividend pay-outs or as to the participation of the petitioner in the management of the company as a directors (and thus entitling him to fees)?[724]

This is unknown. In addition, unfair prejudice requires some form of unfairness in addition to the prejudice.[725] This has been stated to be simply a reformulation of a requirement for

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[720] *Re Guidezone Ltd* [2000] 2 BCLC 321.
[721] Gower and Davies, para 20-12.
[722] *Re A Company* [1986] BCLC 382.
[723] *McGuiness v Bremner* [1988] BCLC 673.
[724] Gower and Davies, para 20-12.
[725] There must, as a pre-requisite, be prejudice. See *Re Coroin Ltd* [2012] EWHC 2343 (Ch).

some form of expectation on behalf of the minority.[726] Certainly, consent[727] or acquiescence[728] on behalf of the minority will preclude a claim, as will a claim arising when some blame for the situation can be ascribed to the minority.[729] It therefore appears that the remedy offers little mitigation for the twin exacerbations of agency costs. The established line of authority on 'equitable considerations' relies on the breach of some expectation of the minority, whether formal or informal. In the absence of such a breach, there will be no remedy. Other potential routes for unfair prejudice are undeveloped, and even if they were to be developed, would be subject to the argument that the conduct was somehow consented to or acquiesced in.

6.4.4. Conclusions

These minority protections do not, in fact, provide any protection against the twin exacerbations. The derivative claim is only available for breach by directors, can be stopped by ratification by the majority, and even if successful, would result in the company benefitting (which would proportionately benefit the majority). The derivative claim, therefore, does not mitigate the twin exacerbations. The same is true of an unfair prejudice petition, which requires either a breach of an expectation, or a test case for a minority. Even then, the ability of the majority to argue that the minority somehow acquiesced in the course of action resulting in the prejudice, means that unfair prejudice also provides no mitigation for the twin exacerbations.

6.5. Soft Law

If none of the 'hard law' mechanisms considered above adequately mitigates the twin exacerbations, is it possible that there are soft-law mechanisms to do so?

As the twin exacerbations arise primarily as a result of decisions being made for incorrect reasons, it seems that the UK Corporate Governance Code would have the greatest potential to act as a mitigator, as it provides guidance on the best way to make decisions.[730] As we have seen, this Code operates on a 'comply-or-explain' basis. The Code applies to those

[726] Gower and Davies, para 20-13.
[727] *Jesner v Jarrad Properties Ltd* [1993] BCLC 1032.
[728] *Re RA Noble & Sons (Clothing) Ltd* [1983] BCLC 273.
[729] *Grace v Biagioli* [2006] 2 BCLC 70.
[730] Available at https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.pdf accessed on 5 December 2019 (the '**Code**').

companies listed on the main market,[731] and it is through the listing rules that enforcement of the code actually takes place.

On 30 January 2018, James Wates was appointed to review standards of corporate governance,[732] in response to a regulation requiring all private companies with more than 2,000 employees or turnover of more than £200m and a balance sheet of more than £2b, to provide a statement of corporate governance arrangements or explain why they have not done so.[733] Wates attempts to justify this as 'apply-and-explain', rather than 'comply-or-explain'.[734] These principles have now been published.[735] The proposal to extend the 'comply-or-explain' concept to private companies has not yet been subject to major academic comment. The approach appears to aim at preventing a future collapse of a large private company, so avoiding another BHS.[736] However, it appears misplaced. 'Comply-or-explain' works by requiring disclosure of the reason for opting out of rules. This can only be effective in achieving policy goals if the act of disclosure has an effect on the business entity in question. In any untraded company the most important effect of such a disclosure – that on the price of issued shares in the company and thus the market capitalisation of the business vehicle – is entirely removed. The other effect of failing to either comply or explain with a provision of the Code is that the traded company breaches the listing rules, which in turn brings sanctions on the company. Thus, when faced with no market to react to negative disclosure, and no regulator to force compliance or disclosure, it seems that imposing a 'comply-or-explain' regime on a private company will provide no benefit. Without a centralised body providing sanctions for the breach of the Wates proposals (of which there will be none), there is no primary incentive for a private company to comply. The only possible advantage in the use in private companies would be as a Pascalian Wager by the government in the hope of ensuring better corporate governance.

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[731] See page 3 of the Code
[732] Anon, 'Chairman appointment to group developing corporate governance principles for large private companies [2018] Company Lawyer 158.
[733] The Companies (Miscellaneous Reporting) Regulations 2018 (SI 2018/860), reg 26.
[734] See Financial Reporting Council, 'The Wates Corporate Governance Principles for Large Private Companies June 2018' available at https://www.frc.org.uk/getattachment/48653f86-92c3-4cd6-8465-da4b7cac0034/;.aspx accessed 5 December 2019.
[735] See https://www.wates.co.uk/wp-content/uploads/2018/12/Wates-Corporate-Governance_Screen_2018-2.pdf accessed 5 December 2019; and The Companies (Miscellaneous Reporting) Regulations 2018 (SI 2018/869).
[736] See M Stamp, 'Sir Philip Green: Villain or victim? An analysis of the circumstances leading up to the administration of the BHS Group' [2017] Company Lawyer 180.

There are other, industry-specific, soft-law codes which apply to private companies. Thus, the Walker Guidelines[737] apply to private equity companies. These require 'private equity firms' to undertake enhanced disclosure obligations in their annual reports. Compliance with the Walker Guidelines is measured by the Private Equity Reporting Group (PERG). The PERG is independent, however its members are appointed by the British Venture Capital Association (BVCA).[738] PERG delivers an annual report. Larger portfolio companies of private equity houses also need to provide enhanced disclosure in their annual reports.[739] Whilst this may provide better governance for such companies, it is specific to private equity companies and therefore has no wider application. The Walker Report is clear that the concerns it seeks to address are specific to the private equity market. The monitoring body is also subject to capture by the industry as a whole: as the BVCA appoints members of the PERG, the PERG is likely to reflect the views of the BVCA. Accordingly, any wholesale practices which become acceptable to members of the BVCA are likely to be reflected in the PERG. The possibility of industry capture in such a soft code highlights the risks of relying on these sources. The analysis ultimately is the same as that reached for the Wates Report: without a centralised enforcement mechanism, or a market to react to disclosure of failure to comply, soft codes are not effective in resolving issues. Accordingly, not only do current soft-law tools not act to resolve the twin exacerbations, the concept of soft law doing so is flawed. For the same reasons that the 'comply-or-explain' concept cannot be used to resolve issues in private companies, other soft-law codes and related voluntary measures can also not be said to do so effectively.

6.6. Overall Conclusion

We can therefore see that other potential legal mitigants available under corporate law are lacking when it comes to mitigating the twin exacerbations. Duties of directors provide no protection. Breaches can be ratified by the majority, and they also include a requirement to act in accordance with the company's constitution, which could mean following the requirements set by the majority. Similarly, there is no comfort to be gleaned from general obligations on shareholders to exercise their votes in a certain way. Despite some promising dicta which suggested that there may be obligations on the majority, these are likely to be incorrectly characterised to provide a narrower framework than intended. Similarly, other

[737] Available at http://privateequityreportinggroup.co.uk/Portals/0/Documents/About%20the%20Guidelines/Walker-Guidelines-November-2007.pdf?ver=2019-10-29-171241-380×tamp=1572369234454 accessed on 5 December 2019.
[738] See http://privateequityreportinggroup.co.uk/About-the-Group accessed on 5 December 2019
[739] The level of reporting required is equivalent to that in Companies Act 2006, s 414C.

minority remedies do not, in fact, provide adequate mitigation to the twin exacerbations. Doctrinally, the twin exacerbations therefore remain unmitigated by UK company law.

However, this does not necessarily mean that they are unmitigated. It possible that the twin exacerbations are not unmitigated at all, but are instead mitigated by market practice rather than by legal regulation. If so, then there is no need to propose reform to mitigate them. The next chapter therefore examines whether this is the case.

CHAPTER 7

7. POTENTIAL MARKET MITIGANTS TO THE TWIN EXACERBATIONS

7.1. Introduction

Thus far this thesis has identified an exception under the theoretical approach adopted to agency costs and externalities: indirect manifestations of majority/minority agency costs in private companies are high and unmitigated. Historical analysis of legal rules has revealed that this has long been the case. Doctrinal analysis of current legal rules emphasises that this exception remains relevant, and that it is not mitigated by other areas of UK corporate law. The implication, therefore, is that the legal rules should be remedied to remove this exception. However, before we can conclude that such reform is necessary we need to establish whether the market has not adequately resolved this exception: if the market has already resolved it, there is no need to amend the legal framework. Economically, this is based on the Coasean conception that market actors will internalise matters wherever possible[740]– and this includes inefficient legal rules.[741] Accordingly, the market will contract around inefficient rules to create efficient solutions. Accordingly, legal resolution of any such inefficient rules is only necessary when the market cannot resolve the situation.[742]

Accordingly this chapter examines a theoretical and historical basis for looking to such a market to resolve failures in the legal regime. Having established that such resolution is possible, this chapter undertakes empirical leximetric research to establish whether the twin exacerbations are, in fact, mitigated.

How, then, could the 'market' mitigate the exacerbations? One market discussed in Chapter 2 was the geographical market for incorporations.[743] This demonstrates the ability of shareholders to divert the jurisdiction of incorporation of their firm to a jurisdiction which more accurately reflects their wishes when establishing corporate vehicles. It is debatable whether or not jurisdictions actively compete for such inflow of incorporations.[744] Nonetheless, it is evident that, however unintended, a geographical market for incorporation can be said to exist – 'buyers' are those looking to incorporate companies, and 'sellers' are

[740] See para 2.1.
[741] R Coase, 'The Problem of Social Cost' (1960) 3 Journal of Law and Economics 1.
[742] Richard A Posner, *Economic Analysis of the Law* (5th edn, Wolters Kluwer 1998) 27.
[743] See also O Bar-Gill, M Barzuz and L Bebchuk, 'The Market for Corporate Law' (2006) 162 Journal of Institutional and Theoretical Economics 134.
[744] See L Bebchuk and A Hamdani, 'Vigorous race or leisurely walk: Reconsidering the competition over corporate charters' (2002) 112 Yale Law Journal 553.

jurisdictions in which companies can be incorporated. Buyers in this circumstance are able to 'shop around' for the jurisdiction which best suits their needs, and sellers are able to set the terms and conditions on which they are willing to allow incorporation: be it payment of fees, residency requirements, or other restrictions. However, this analysis does not apply to a market within a single jurisdiction, as in such a case there is only one 'seller' which has a monopoly on incorporation.

Is there perhaps another 'market' that we can seek to apply to the twin exacerbations? We have seen that both twin exacerbations rely heavily on default rules. Our 'market' in this situation, therefore, is the ability for these default rules to be changed – if shareholders are routinely eschewing the default rules and replacing them with alternative, voluntary arrangements which mitigate the twin exacerbations, then the issue with the exception is resolved by alternative means. In such situations, we could analogise the shareholders as the buyers and these terms which apply as the products: the buyers will select the product that best suits their needs, in much the same way as a buyer does in a supermarket. Given that the twin exacerbations relate to decision making within companies, these terms will therefore apply to the core constitutional documents of the company. Thus, the products become different techniques which could be used in the company's articles of association

Our examination in this chapter then becomes whether there are any commonly used 'products' available in the market which could be said to mitigate the twin exacerbations.

7.2. History

The theoretical proposition is that options available for the amendment of the articles of association of companies can be viewed as a marketplace from which shareholders, as buyers, are able to select their preferred product to best meet their needs. Is there any historical evidence of the use of such a market to resolve Costs in the way proposed?

Freeman, Pearson and Taylor have identified three 'controversies' in pre-Bubble Act companies: firstly, in respect of votes per share; secondly, in respect of control over directors; and thirdly, in respect of access to information.[745] Each of these evidence support for the 'market' approach and map directly to the analysis of Costs.

[745] M Freeman, R Pearson and J Taylor, 'Law, politics and the governance of English and Scottish joint-stock companies, 1600-1850' (2013) 55 Business History 636.

The first controversy linked to the number of votes per share cast by (what we would now consider to be) shareholders in the general court (the precursor to the general meeting). Freeman and others, identify that various different shareholding voting franchises were adopted. At one end of the spectrum, Saltpetre Company provided shareholders with one vote per share, whereas at the other end, Million Bank provided shareholders with one vote per shareholder, regardless of the number of shares held by the shareholder.[746] Along this spectrum various other approaches were taken: Bank of Scotland provided that no shareholder could own more shares than the shares which could be subscribed for with Scots £20,000. Each £1,000 of shareholding provided the shareholder with one vote per share, which limited the number of votes to twenty per shareholder.[747] This approach capped the size of shareholding any investor could have as part of its shareholding. This prevented the formation of majorities. Although it was still possible for majorities to form by way of a coalition of shareholders, at the core of this concept was an attempt to limit any individual shareholder becoming too powerful and so to lower majority/minority agency costs. In other words, they acted to provide different products from which shareholders could chose to meet their requirements to lower Costs. The Land Bank provided for 'stepped' shareholder voting: subscription for a £300 shareholding gave a shareholder two votes, a £500 subscription gave a shareholder three votes, and a £1000 subscription gave a shareholder five votes, with a cap at a £1000 subscription.[748] The Land Bank approach therefore also favoured minority investors: an investor who subscribed for £300 of stock paid £150 per vote, an investor who subscribed for £500 of stock paid £166.67 per vote, and an investor who subscribed for £1000 of stock paid £200 per vote. In other words, the smaller the stake the investor held in the company, the more proportional votes per pound subscribed they received. The cap of £1000, whilst risking coalitions, aimed to protect minorities from decision making by an oppressive majority – a response to an agency cost recognisable in modern analysis. Cooke has noted that adopting the approach of one vote per shareholder caused issues, as:

> The unit of stock was commonly large, not usually less than £100, and the holder could split his holding and assign part of it. Such a division among his friends would increase his voting power in the company and in an age when Richard Roe and John Doe were continually flitting through the courts a temporary division of stock for immediate voting purposes was an easy expedient.[749]

[746] WR Scott, 'The Constitution and Finance of English, Scottish and Irish Joint Stock Companies to 1720' vol 1 (Cambridge University Press 1911) 340.
[747] Freeman and others, (2013) 55 Business History 636, 642.
[748] Scott, *English, Scottish and Irish Joint Stock Companies* vol 3 250.
[749] C Cooke, *Corporation, Trust & Company* (Manchester University Press 1950) 74.

In other words, regulations limiting votes on anything other than a one vote per share was open to abuse: someone could nominally split their shares amongst their friends and artificially increased the number of votes they control. This resulted in the introduction of restrictions by a 1767 Act which required shareholders to hold shares for at least six months before they received a vote on the basis of such shares.[750] This response was primarily provided by the market rather than by law, with some legal provisions necessary to provide mandatory protection to the operation of this market response. Accordingly, this 'controversy' reflects the theoretical proposition made in this chapter.

Such caps were often controversial. For example, the government proposed a cap of £10,000 per shareholder for subscribing in the East India Company which the directors objected to on the grounds that larger shareholdings more closely aligned their interests to those of the shareholders.[751] This is an insight into our two exacerbations of indirect manifestations of the majority/minority agency cost: directors preferred to deal with larger shareholders in order more closely to align their interests. The response in the market varied from sliding scales of voting, to a cap on the number of votes any shareholder could cast.[752] The market responded because the legal framework did not adequately protect against agency costs, with some legal constraints included on the operation of those market provisions.

The second controversy was linked to the length of directors' terms of office. Early charters provided for life appointment for directors, and the Bank of England directors complained when Parliament attempted to compel eight of its 24 directors to retire or stand for re-election each year.[753] Eventually, after much debate, Parliament was successful in respect of the Bank of England as per its charter, but left matters open to the charters of individual companies.

The third controversy was over the degree of access to books and accounts of the company to which shareholders were entitled. In the market, this ranged from shareholders enjoying a right to fully attend all meetings of directors and to receive all information supplied to directors in respect of such meetings, to not being allowed access to any information in the case of the Darien Company.[754] This also clearly maps to agency costs between management and shareholders.

[750] Ibid.
[751] Freeman and others, (2013) 55 Business History 636, 642.
[752] Freeman and others, (2013) 55 Business History 636, 642–643.
[753] ibid 643.
[754] Ibid.

Freeman and others, trace 492 constitutions from 1720 (the passage of the Bubble Act) to 1844 (the year of the introduced incorporation by registration) to review the trends regarding these controversies. As regards the first controversy, they identify that caps were abandoned over the course of their study. As we have seen, the weighting of votes between shareholders remains a matter for the articles of association: the market forces provide preferred products so that we do not need mandatory rules to resolve them. In respect of the second controversy, in every company shareholders appointed directors, and 90 per cent of constitutions included some form of rotation for directors. Within the study, only three companies allowed for terms of office for directors of ten years or more. Freeman and others, point out that there were no real changes in trends on this subject and no real clarity as to the legal framework on the subject within the timescale reviewed.[755] Nevertheless, the market provided for an adequate response to manifestations of this agency cost, meaning that intervention by mandatory rule was not required. The third controversy tended towards increased restrictions on access to accounts by members. Over time, more and more companies restricted members' access to their accounts. This issue was resolved by the 1845 Act which created mandatory disclosure of accounts to public bodies and to shareholders. It is difficult to identify whether this mandatory rule was deliberately introduced to remedy this 'controversy', but the end result was that a mandatory rule was used to resolve an agency costs when the market failed to do so. In other words, in the pre-history of company law, two of the three controversies were resolved by market pressure to reduce agency costs, whereas the third was resolved by legislative action. Externalities were not as relevant as limited liability was not yet ubiquitous, which meant that (in line with the foregoing analysis) externalities were generally lower.

Such market analysis depends on the ability for shareholders to decide the contractual norms. An earlier empirical study identified that, throughout the 1800s and 1900s deviations from the default rules were common, showing that markets can use deviations from default rules to remedy ills they perceive.[756] This, therefore, appears to undermine the purpose of a legal analysis entirely: either shareholders will care about the twin exacerbations, and therefore remedy them (meaning that law has no role); or they will not care about the twin exacerbations, and therefore not remedy them (meaning that law does not need to have a role). However, factoring our Costs back into the analysis may alter this outcome. If the manifestation of Costs affects the ability of shareholders to use the market to remedy such

[755] ibid 644.

[756] See T Guinnane, R Harris and N R Lamoreaux, 'Contractual Freedom and Corporate Governance in Britain in the Late Nineteenth and Early Twentieth Centuries' (2017) 91 Business History Review 227.

Costs, then it becomes necessary to consider judicial intervention. Thus, the first controversy identifies majority/minority Costs and posits that they were resolved by market action. However, we will not know whether all Costs were in fact remedied, or whether only those Costs that the majority allowed to be remedied were in fact remedied. Similarly, the second controversy as to the length of a director's term, inevitably allowed for their re-election: clearly linked to owner/manager agency costs. Over time with the removal of control over limits to directors' terms of office in the default rules, it may well be that in the post-Bubble Act this Cost reasserted itself. The third controversy evidences owner/manager agency costs and, to a lesser extent, given the framework in which such costs operated, externalities. This was not resolved by the market, and required mandatory intervention. Given the trajectory of increased disclosure over time,[757] it is evident that market forces were not unhappy with the increased requirement for information. Yet the market did not resolve this controversy on its own.

Accordingly, we can refine our use of the market analogy – if the market resolves the twin exacerbations, then they care about the twin exacerbations sufficiently to provide a market remedy, and if such remedy is provided there is no need for intervention. However, if the market does not provide a remedy, then it is necessary to examine whether the Costs themselves act to retard the operation of market mechanics.

7.3. Empirical Study: Background

How, then, to apply the 'market' analogy to the twin exacerbations. As Freeman and others, did with pre-Bubble Act companies, we shall establish whether the constitutional documents of companies were amended to mitigate the twin exacerbations. To do so, we adopt a quantitative, or leximetric, methodology. The term 'leximetrics' was coined in 2003 by Cooter and Ginsburg[758] to describe a quantitative analytical style that developed in the late 1990s. Leximetrics is a 'quantitative form of empirical methodology'.[759] Lele and Siems state that: '"Leximetrics" can be understood as every quantitative measurement of law.'[760]

[757] See, eg, Companies Act 2006, s 414C.
[758]RD Cooter and T Ginsburg, 'Leximetrics: Why the Same Laws are Longer in Some Countries than Others' (2003) available at http://ssrn.com/abstract=456520 accessed on 9 May 2018.
[759] J Hardman, 'Some Legal Determinants of External Finance in Scotland: A Response to Lord Hodge' (2017) 21(1) Edinburgh Law Review 30, 39.
[760] PP Lele and MM Siems, 'Shareholder Protection: A Leximetric Approach' (2006) 7 Journal of Corporate Law Studies 17, 20.

The pioneers of this approach were La Porta, Lopez-de-Silanes, Shleifer and Vishny, who in two articles in the late 1990s began the methodological school.[761] La Porta and others, applied scores to laws within various jurisdictions. When comparing these to various financial metrics applicable to that jurisdiction, they were able to draw lines of correlation between aggregate scores for certain legal norms and financial metrics. They therefore selected a series of *variables* in legal norms and applied *coding* to allow them to establish correlations between different scores and financial metrics. It is important to note that such correlation does not imply causation.[762]

The approach of La Porta and others, 'has been and is still cited frequently and usually uncritically, in legal as well as economic journals'.[763] Two key strands of criticism emerge: those of variable selection; and those of coding. On the selection of variables, Lele and Siems have stated:

> [T]he selection of variables must be intelligible and wide enough to function as a proxy for shareholder protection in general, which is not the case with La Porta et al's eight variables. They do not fully capture the most significant aspects of the law.[764]

It is therefore important to select the variables used within a leximetric data set correctly. Sometimes more variables are required in order to provide a more complete understanding of the issue.[765] Lele and Siems emphasise the importance of 'functionality' within variables – that legal rules may achieve the same function in ways which appear very different. It is therefore important to ensure that variables are tested functionally rather than by formal appearance. Similarly, there have been issues raised with how La Porta and others coded their scores within variables. Spamman has found that re-coded data varies greatly from the official La Porta data set.[766] Similarly, Cools found that the coding ignored various other

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[761] R La Porta and others, 'Law and finance' (1998) 106(6) Journal of Political Economy 1113, and R La Porta, and others, 'Legal determinants of external finance' (1997) 52(3) Journal of Finance 1131.
[762] S Fagernäs, P Sarkar and A Singh, 'Legal origin, shareholder protection and the stock market: New challenges from time series analysis' in K Gugler and B Burcin Yurtoglu (eds), *The Economics of Corporate Governance and Mergers* (Edward Elgar 2008) 21.
[763] UC Braendle, 'Shareholder protection in the USA and Germany – "Law and Finance" revisited' (2006) 7(3) German Law Journal 257, 260, as quoted in Hardman (2017) 21(1) Edinburgh Law Review 30, 51.
[764] Lele and Siems, (2006) 7 Journal of Corporate Law Studies 17, 19.
[765] K Pistor, 'Patterns of Legal Change: Shareholder Protection and Creditor Rights in Transition Economies' (2000) 1 European Business Organization Law Review 59.
[766] H Spamann, 'The "Antidirector Rights Index" Revisited' (2010) 23(2) The Review of Financial Studies 467.

legal devices to achieve the same ends.[767] It is therefore important to ensure that the coding is consistently and accurately performed when undertaking leximetric research.

Leximetrics began as a method by which to analyse different legal approaches to shareholder protection and their effects, but has developed considerably. It is widely used in comparative law from testing whether corporate laws converge over time,[768] to comparisons of collateral and bankruptcy law,[769] to comparing labour law between jurisdictions.[770] Such studies have also become more sophisticated in their analysis. Thus, studies have commenced comparing jurisdictions over time[771] and phenomena within a single jurisdiction over time.[772] This approach shows the flexibility of a leximetric model: rather than a traditional qualitative analysis, any laws can be subject to a leximetric, quantitative analysis provided that the variables and the coding are correct.

For application to this thesis, the most important development of leximetric methodology occurred in the context of strategic reporting. Esser, MacNeil and Chalaczkiewicz-Ladna applied a leximetric approach to establish whether companies were complying with strategic reporting requirements.[773] Rather than variables as to 'law' being coded, variables as to 'compliance' were coded. This approach shows that leximetrics can be extended beyond coding laws to establish whether market participants are complying with statutory requirements of non-financial reporting. In other words, we can use the leximetric approach to measure what is actually taking place in the market. Esser et al used leximetrics to test compliance, which shows its flexibility in measuring other features of the market as well. We therefore test for market mitigation of the twin exacerbations utilising a leximetric approach to establish whether market participants are diverging from the default position in order to remedy the twin exacerbations – simply stated: have techniques developed within

[767]S Cools, 'The Real Difference in Corporate Law Between the United States and Continental Europe: Distribution of Powers' (2006) 30 Delaware Journal of Corporate Law 697.
[768] M Siems, 'Convergence in Corporate Governance: A Leximetric Approach' (2010) 35 Journal of Corporation Law 729. It should be noted that more complicated methodologies are also being developed on a qualitative comparative basis. See LM LoPucki, 'A Rule-Based Method for Comparing Corporate Laws' (2018) 94 Notre Dame Law Review 264.
[769] R Haslemann, K Pistor and V Vig, 'How law affects lending' (2010) 23(2) The Review of Financial Studies 549.
[770] See Z Adams and others, 'The CBR-LRI dataset: Methods, properties and potential of leximetric coding of labour laws' (2017) 33 International Journal of Comparative Labour Law and Industrial Relations 59.
[771] M Siems, 'Shareholder Protection around the World (Leximetric II)' (2008) 33 Delaware Journal of Corporate Law 111.
[772] H Anderson and others, 'Investor and Worker Protection in Australia: A Longitudinal Analysis' (2012) 34 Sydney Law Review 573.
[773] I-M Esser, I MacNeil and K Chalaczkiewicz, 'Engaging Stakeholders in the UK in Corporate Decision-Making Through Strategic Reporting: An Empirical Study of FTSE 100 companies' (2018) 29(5) European Business Law Review 729 .

the market to resolve the issues? Other empirical studies have reviewed whether market participants use default rules in corporate governance.[774] Using leximetric techniques, we therefore establish whether market participants conform to the default regime, which does not mitigate the twin exacerbations, or diverge from the default regime and, if they do, whether they resolve the twin exacerbations.

We therefore need to find a way to establish whether market participants are doing anything to mitigate the twin exacerbations. This we do this using public filing systems. A company's constitution, together with any changes to it, must be publicly filed.[775] Given that our test of market resolution is a test as to whether the constitution of the company remedies the twin exacerbations, any action that market participants take to remedy the twin exacerbations must be publicly filed. There have been recent reforms to the public register which increases its utility for empirical research.[776] Whilst this register has always been publicly searchable, the search methods have been very cumbersome. A searcher was able to review data on 'microfiche',[777] but this was particularly time consuming. This prevented the primary gathering of data, but more importantly, prevented the verification of any data collected which undermined the value of the quantitative research. This data was eventually uploaded online, and was accessible in exchange for payment for each document reviewed. On 22 June 2015 information became easier to access with the launch of a new website which offers a free 'beta' search of the Companies House data.[778] The free data enables easier data gathering and verification, however, it does not contain all (especially historical) records of companies, and accordingly when faced with the two options the paid service is more reliable. Nonetheless, the beta service is especially useful for research, enabling free access to data for the primary data gatherer and any subsequent verification of that dataset by third parties. This is key to ensuring that the often stark results of leximetric analysis are, in fact, accurate.[779] Between January 2018 and March 2018 there were 167,717 companies incorporated in the UK.[780] If the rate of incorporation was constant then this implies over

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[774] Yu-Hsin Lin and Yun-chien Chang, 'An Empirical Study of Corporate Default Rules and Menus in China, Hong Kong, and Taiwan' [2018] Journal of Empirical Legal Studies 875.
[775] Companies Act 2006, ss 9 and 20.
[776] See J Hardman, 'The Moral Hazard of Limited Liability' (2018) 6 Nottingham Insolvency and Business Law eJournal 30.
[777] Copies of all documents filed before 1 January 2003 were originally stored in this way, but are now being scanned into online access. See S Howley and P Bateman, 'Legislative Comment Companies Act 2006: An overview: Part 1' [2007] Company Law Newsletter 1, 4.
[778] See https://www.gov.uk/government/news/launch-of-the-new-companies-house-public-beta-service accessed on 5 December 2019
[779] See Spamann, 2010 23(2) The Review of Financial Studies 467.
[780] See https://www.gov.uk/government/publications/incorporated-companies-in-the-uk-january-to-march-2018/incorporated-companies-in-the-uk-january-to-march-2018 accessed on 5 December 2019

6,000,000 companies have been incorporated since 1 October 2009. Reviewing all of these articles to establish whether they converge to or diverge from the Model Articles is impractical. Accordingly, we need to select a sample of these companies.

We narrow our focus to companies incorporated in Scotland for a sample period: all those companies incorporated in Scotland within the first month of the new Model Articles: October 2009. We use the term '*Sample*' for this group. As the Companies Act 2006's provisions with regard to company incorporation were introduced on 1 October 2009, the Sample represents the oldest group of companies incorporated under this regime. It therefore provides us with the longest possible period in which to evaluate what market participants have changed from the default regime for which specific companies. Upon registration, companies are each given an eight digit sequential number by Companies House which remains their unique identifying number.[781] This is important as the names of companies can change,[782] which may mean that tracking companies becomes difficult in the event of name 'swapping' between companies or frequent changes. All companies incorporated in Scotland have a unique six number digit code prefaced by 'SC' (in contradistinction to companies incorporated in England which have a unique eight number digit code).[783] All companies also have a date of incorporation which is publicly available. Accordingly, to identify our sample groups, we begin with the lowest six number digit code prefaced by SC on the first date of the sample period, and include all sequentially numbered companies up to and including the highest six number digit code prefaced by SC on the last date of the sample period.

Companies are incorporated by filling in the correct form and submitting it to Companies House. The company is formed on the date that Companies House processes the form.[784] Since 1 October 2009, all companies have had to be incorporated using a form IN01, which means that the companies are incorporated under the 2006 Act regime.[785] However, to ease transition from the Companies Act 1985 regime to the Companies Act 2006 regime, Companies House continued to process applications submitted under the Companies Act 1985 regime, provided that they were received by Companies House (albeit not yet processed) prior to 1 October 2009.[786] Any such applicant is subject to the regime under the

[781] Companies Act 2006, s 1066.
[782] ibid s 77.
[783] ibid s 1066(2).
[784] ibid s 17.
[785] The Registrar's Rules 2009, vol 2, Sch 2 issued under Companies Act 2006, s 117.
[786] Companies Act 2006 (Commencement No 8, Transitional Provisions and Savings) Order 2008 (2008/2860), art 5

Companies Act 1985. Accordingly, we need to exclude any applications which fall under the Companies Act 1985 regime from our sample group. The twin exacerbations only occur in private companies, and so we exclude any other form of company from our consideration, including entities incorporated as public limited companies,[787] private companies limited by guarantee,[788] or unlimited companies.[789] Accordingly, there are some elements of the Sample which must be excluded from this group before undertaking the relevant leximetric analysis.

We have seen that leximetrics relies on the identification of variables. Having identified the variables to be tested, it is important to establish how they are tested. We have further seen that functionality is a key element of leximetrics. This concept is generally applied to legal systems in comparative leximetrics when it comes to identifying the correct variables,[790] but the principles can equally be applied to the concept of coding when testing deviation.

Initial leximetric studies used a 'binary' coding system (ie, assigning laws with either 0 or 1).[791] More recent leximetric studies have introduced a system of 'non-binary' coding to encapsulate more of the complicated nature of the issues being discussed.[792] It has been stated that 'non-binary coding can lead to more meaningful results'.[793] However, it can also lead to confusion as it increases complexity. If multiple numbers or fractions are used, then avoidable value judgements are introduced as to the differences between the variables – when averaging over larger datasets, using fractions implies set distances between the fractions. For example, it is tempting to measure full compliance with a default regime at '0', full deviation from the default regime as a '1', and a 'partial' deviation at a '0.5'. However, this approach risks misleading results as not every partial deviation would be exactly halfway between full convergence and full deviation. A more qualitative figure allocated to the degree of deviation could allow the coder to ascribe a value to partial deviation in 0.1 increments which would reduce this problem. However, it would add an unnecessary level of subjectivity (and therefore make the results less verifiable) and should be avoided.

Similarly, it is tempting to create added complexity by ascribing positive and negative numbers. For example, it is easy to imagine coding compliance with a default rule as '0',

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[787] Companies Act 2006, s 4.
[788] ibid s 5.
[789] ibid s 3.
[790] Lele and Siems, (2006) 7 Journal of Corporate Law Studies 17.
[791] La Porta and others, (1998) 106(6) Journal of Political Economy 1113 and La Porta and others, (1997) 52(3) Journal of Finance 1131.
[792] For example, use of fractions in Siems, (2010) 35 Journal of Corporation Law 729.
[793] Esser, MacNeil and Chalaczkiewicz, (2018) 29(5) European Business Law Review 729.

deviation in a 'shareholder friendly' way as '+1' and deviation in a 'director friendly' way as '-1'. However, this results in the figures cancelling each other out on aggregation: a sample of 100 companies in which 50 diverged in a 'shareholder friendly' way, and 50 in a 'director friendly' way, would produce an average score of 0, which implies pure convergence to the default rule instead of the full deviation that is actually seen. Accordingly, such an approach complicates a simple overview of the Sample.

In order to avoid these complications, we use leximetrics merely to establish whether the market have moved away from the (flawed) default regime. We therefore establish, for each of the variables identified, whether functionally the constitution of the company in question converges with the default regime or not. If it does converge, it receives a '0' and if it diverges it receives a '1'. This enables us to establish which companies have functionally diverged from the default position. We can then undertake further study of any material deviations to establish whether they point to any discernible trends in how such deviations manifest. In other words, our first step is to use the crudest form of leximetrics to establish quantitatively whether there is any deviation from the default regime. If there is, our second step is to examine this deviation qualitatively to establish whether it can be said to mitigate the twin exacerbations.

7.4. Empirical Study: Variables and Coding

Having identified our sample group, the next stage is to identify our variables. We consider three variables to establish whether the market resolves the twin exacerbations.

7.4.1. Entrenchment

We have seen that the Companies Act 2006 enabled, but did not require, any article within the articles of association to be 'entrenched'.[794] By way of recap, when entrenched an article subverts the general rule that articles of association can be amended by special resolution.[795] An entrenched article within the articles of association can be 'amended or repealed only if conditions are met, or procedures are complied with, that are more restrictive than those applicable in the case of a special resolution'.[796] Accordingly, any article within a company's

[794] Companies Act 2006, s 22; R Cheung, 'The use of statutory unanimous shareholder agreements and entrenched articles in reserving minority shareholders' rights: A comparative analysis' [2008] Company Lawyer 234.
[795] Companies Act 2006, s 21(1).
[796] ibid s 22(1).

articles is entrenched if it provides that it can only be amended with the agreement of 85 per cent of the shareholders. Entrenched articles can either be included on formation[797] or inserted by unanimous resolution.[798] If entrenchment were commonly utilised it would have the potential to mitigate the twin exacerbations as it would require the minority to consent to any change in respect of the entrenched position. Thus, if the division of powers were entrenched, the division-of-powers exacerbation would be mitigated as the minority would need to be involved in any such decision. The directors would not feel the need to act in a manner designed to appease the majority. Moreover, the presence of any entrenchment would imply an acknowledgment by the market that, on occasion, higher majorities are required. Thus, even if the market regularly entrenches articles, but not any articles relevant to the twin exacerbations, this would be as revealing – it would show that the market acknowledges the need, and has the ability, to entrench articles on occasion, but does not acknowledge a need to use the entrenchment mechanism to remedy the twin exacerbations. Accordingly, we can split our study into two stages: first, quantitatively, does the market use entrenchment, and if it does, then second, qualitatively, if this technique is used in any way to mitigate the twin exacerbations.

Our first variable is to examine whether or not any articles within the articles of association have been entrenched by each member of the Sample group. The default regime allows for entrenched articles but does not mandate any. Therefore, a constitution without an entrenched article within their articles of association is coded with a ‘0’, and a constitution with an entrenched article is coded with a ‘1’.

[797] ibid s 22(2)(a).
[798] ibid s 22(2)(b).

7.4.2. Powers of Directors

Our second variable examines whether there are any changes to the default regime for the powers of directors. It is possible that the market has established a mechanism to resolve this exacerbation. We shall first establish whether the market has deviated from the default regime and, if it has, how it has varied it. We therefore establish whether a constitution has any variation on the usual division of powers – that directors exercise all powers of the company subject to a special resolution and the rest of the constitution. If the constitution converges functionally with the default regime, it is coded with a '0'. Any variation from this is coded with a '1', including:

a. any embedded restriction on the powers of directors;

b. any ability to direct shareholders by a lesser or greater majority than special resolution; and/or

c. any ability for instructions to have retrospective effect.

If there is any such deviation we analyse the changes made qualitatively.

7.4.3. Dismissal of Directors

The analysis so far has concentrated on the operation of the statutory regime for removing directors. However, the default constitutional position provides for circumstances in which a director is automatically removed from office.[799] These provisions are all either automatic or under the control of the director whose termination is in question. It is possible for the market to provide for removal regimes which adequately resolve this exacerbation outside the statutory framework. Our third and final variable is, therefore, whether or not the market does so. Deferring to the functionality principle, the key coding issue is that a director vacates her position by her own choice or automatically due to a prescribed event. There is no possibility under the Model Articles for the other directors or shareholders to remove a director, although this right obviously appears in the statutory regime. Accordingly, this variable is coded '0' where termination events are either at the under the control of the outgoing director or automatic, and as '1' where other parties have the ability to require a director to resign. The ability of directors or shareholders to remove a director only after the occurrence of certain events which the director controls (eg, her prolonged absence) will

[799] Model Article 18.

therefore be coded as '0' on the ground that rights to remove the director are inherently linked to, and contingent upon, the actions of that director. After coding, we undertake a qualitative analysis of any divergent articles.

7.4.4. Summary

A summary of the coding for the variables is as follows:

Variable	**Provision for 0 (ie, convergence with default)**	**Provision for 1 (ie,** deviation **from default)**
Entrenchment	No entrenchment	Entrenchment
Powers of Directors	Unlimited unless otherwise stated by shareholder direction	Limited in any other way
Dismissal of Directors	Automatic vacation on resignation, financial difficulty, or health	Ability of directors or (in addition to CA 2006) shareholders to require resignation

On incorporation each company must file its constitution, failing which the default constitution applies.[800] We therefore code the initial constitution of each member of the Sample. The constitution adopted on incorporation is not, of course, the end of the matter. A company is able to amend its constitution.[801] We therefore explore the constitutions of the

[800] Companies Act 2006, s 20.
[801] Companies Act 2006, s 21.

Sample group over time, including any amendments. We also explore whether companies which have already diverged from the default position are more likely to amend their constitutions than those that have not.

We therefore code any subsequent amendments to companies' constitutions since their incorporation to a cut-off date of 1 December 2017. All constitutions were downloaded from Companies House beta, and reviewed between 1 January 2018 and 31 March 2018. This remains a beta service and so it is possible that there may be further additional companies listed which are marked as 'none' as at such dates, and similarly some of the companies which were available at such dates may not remain available.

7.5. Empirical Results

7.5.1. Sample Group

The Sample consists of 1,417 companies. Details of the companies involved in the Sample are included in Table 1. When we apply our exclusions from the Sample:

(a) 8 were incorporated using forms from the Companies Act 1985 regime that must have been received from Companies House prior to 1 October 2009 but were only processed subsequently. Accordingly, they are incorporated under the 1985 Act's terms and are excluded;

(b) 24 are not private limited companies and so are excluded (20 are companies limited by guarantee, 3 are public limited companies, and 1 is an unlimited company); and

(c) 291 companies are not listed on Companies House beta. The formal paid site, Companies House Direct, confirms that the vast majority of these companies were incorporated in October 2009 but had been dissolved by June 2012. These companies are listed as having company name 'None' in Table 1. No further information in respect of these companies was publicly available without charge when the constitutions were downloaded and they therefore are excluded.

Accordingly, from the initial sample the 1,417 is reduced to 1,094.

Table 1 also shows the coding of variables for the 1,094 companies constituting the Sample on their incorporation. The results appear immediately below.

Variable	**Number of Divergent Articles (ie, Coded '1')**	**Percentage of Divergent Articles**
Entrenchment	0[802]	0%
Powers of Directors	11	1%
Dismissal of Directors	38	3.47%

From this it appears that the market does not, on incorporation, mitigate the twin exacerbations. From our Sample on incorporation, entrenchment is not used at all. This means that it is not used in the market to effect a wider mitigation of majority/minority agency costs arising in private companies. One per cent amended the powers of directors. However, of these 11 companies, one (SC367627) amended the powers to provide that director representatives of certain shareholders must be present for the directors to be quorate and to proceed to business. The other 10 companies diverged by providing specific overriding powers to majority shareholders to direct, in any way, the actions of the company. Six of these companies provided for this threshold to be 90 per cent and 4 provided for 75 per cent This is an improvement on the twin exacerbations by requiring more of the minority to consent, but does not fully resolve them as there remains an unprotected minority. For the purposes of this thesis, we can see minimal evidence of the market providing a resolution to the first exacerbation on incorporation. The relevant article is not entrenched on

[802] One constitution merely ticked a box on the incorporation form which stated that an article was entrenched, without actually providing for an entrenched article. Accordingly, its coding is '0'.

incorporation, nor is it varied in the market (other than a minority of companies which have introduced additional, majority-friendly metrics).

It can also not be said that there is any evidence of market responses to the second exacerbation on incorporation. Just under 3.5 per cent of companies varied from the default position on their incorporation. Table 2 sets out the nature of those variations, which can be summarised as:

Nature of Deviation from Default Regime	**Number of Companies**
Unanimous resolution of the other directors	7
Repetition of statutory test without change	19
Notice of removal by majority shareholders	5
Notice of removal by 75% shareholders	4
Removal by specified shareholders	1
Removal by specified shareholders or removal by other directors for cause	2

Nineteen of the 38 companies which varied from the default position merely restated the statutory test in the same terms, which is coded as a '1' because it differs from the default regime in the Model Articles. An additional 5 provided for removal of a director by notice from a mere majority, and a further 4 provided for removal of a director by notice from 75 per cent of shareholders of their removal. Once again, this slightly improves, but does not resolve, this exacerbation. Seven of the other variations enabled directors to remove one of their number. Two of the variations allowed either a specified shareholder to remove a director, or for the other directors to remove a director (the latter for cause only), and one variation allowed only a specified shareholder to remove a director. None of these methods

mitigates our exacerbation, and the low number of divergent companies means that neither of the twin exacerbations is adequately mitigated within the market on incorporation of companies.

7.5.2. Sample Change of Articles

Having reviewed results for the incorporation metrics of the Sample, it is necessary to review the amendment results for the Sample (ie, the summary of changes that have taken place in our sample post-incorporation). Table 3 shows the details of the companies which amended their constitutions, and the coding of the constitutions of such companies.

Table 1 shows us that 65 companies (or 5.94%) changed their constitution at some point since their incorporation**.** This is a very low percentage. Of these, 14 made a further change to their constitutions, and 2 companies changed their constitutions twice more. 24.61% of companies who changed their constitutions once after incorporation went on to change them again. This is considerably higher than the percentage of companies who changed their constitution since incorporation. This combination results in there being 81 changes to articles of association across the Sample, and shows that a company is more likely to change its constitution again if it has already changed it previously.

Of the restated constitutions, the coding across the 81 is as follows:

Variable	**Number of Divergent (ie, Coded '1') on Amendment**	**Percentage of Divergent Articles on Amendment**	**Percent of Divergent Articles on Incorporation**
Entrenchment	0	0%	0%
Powers of Directors	14	17.28%	1%

Dismissal of Directors	40	49.38%	3.47%

This shows that markets are more likely to diverge from the default position on these three variables when they subsequently amended their constitutions. This seems inevitable given the high convergence on initial incorporation, but there are, of course, many other amendments to the constitutional framework which could be made.

In terms of the types of deviation arising in respect of powers of directors:

Nature of Deviation from Default Regime	**Number of Companies**
Ability for majority shareholders to limit powers of directors	8
Ability for unanimous shareholder action to limit powers of directors	3
Directors restricted by reference to private shareholders' agreement	3

8 of the 14 deviations amongst the amendments gave express majority power to alter the division of powers. 3 of the 14 deviations referred to the activities of directors being restricted by reference to a private shareholders' agreement. 3 of the 14 deviations provided for unanimous shareholder action to amend the division of powers. This is the only form which resolved the exacerbation caused by the division of powers, yet its take up of this 'market product' for resolving this exacerbation is minimal.

Nearly half of the constitutional amendments varied the position in respect of removing directors. In terms of those deviations:

Nature of Deviation from Default Regime	Number of Companies
Cessation of employment	2
Notice of removal by majority shareholders	8
Notice of removal by 75% shareholders	2
Notice of removal by 100% shareholders	3
Removal by class of shares who appointed directors	13
Unanimous resolution of the other directors	4
A named individual having rights to remove any director	1
Repetition of the statutory test	1
Removal by other directors for cause	1
Removal of any directors by the majority of one class of shares	1
Breach of shareholders' agreement	2

Once again, only 3 of these amendments can be said to operate to reduce the twin exacerbations: each by the notice of removal by 100% of shareholders. Even then, these constitutions did not amend the statutory regime, leading to an ability for this exacerbation to remain.

Of the 1,175 constitutions of private companies reviewed across the Sample (consisting of 1,094 constitutions on incorporation and 81 amendments to the constitution), we can see the following aggregate results:

Variable	**Number of Deviating (ie, Coded '1') in Aggregate**	**Percentage of Deviating Articles**	**Number Deviating in a way which mitigates exacerbation**	**Percentage of mitigating articles**
Entrenchment	0	0%	0	0%
Powers of Directors	25	2.13%	3	0.0025%
Dismissal of Directors	78	6.64%	3	0.0025%

This shows a very low level of deviation from the default rule, and an even smaller deviation in a manner which can be stated to have mitigated the twin exacerbations.

7.6. Do market forces operate?

We can therefore conclude that the market we have analysed does not act to mitigate the twin exacerbations. There are two potential reasons for this: either the market does not consider that the twin exacerbations require to be mitigated (which can arise from deliberate action or lack of knowledge that the twin exacerbations exist), or there is some element which blocks the market from acting adequately to remedy the twin exacerbations.

Each of the potential market remedies we explored requires the agreement of the majority: they are needed to entrench articles; they are needed to amend articles; to divert power from the directors; and to change the mechanisms for removing directors. Consequently, the

market approach can only operate to mitigate the twin exacerbations if the majority agree to such an approach. Thus, viewing constitutional flexibility as a market helps demonstrate that it can act to reduce owner/manager agency costs. This is on the ground that the victim of the costs (owner) is able to use these options against the cost-generator by amending the constitution – a right which only the cost-victim has. However, these tools cannot be seen adequately to remedy majority/minority agency costs within the same category, as it requires the majority of that category to sign up in the first place.

Accordingly, an intra-shareholder, market-driven response as a method to remedy the twin exacerbations exhibits the same structural flaw that arose in the context of unfair prejudice[803] – it can only operate in this way if the majority agree to it. In other words, the protection only arises by agreement with the putative wrongdoer. In the case of market resolution, this is by the majority agreeing to the company's constitution being amended in such a way. In the case of unfair prejudice, this is by way of the majority agreeing to act a certain way towards the minority, breach of which will result in a claim. But any attempted resolution of an agency cost which requires the agreement of the potential wrongdoer, risks becoming circular: those who would not act to manifest agency costs (and therefore were not a concern) will readily sign up to a meaningless protection, whilst those who would (and therefore are the concern) would not agree to be bound. This may not apply to diversified shareholders who hold minority stakes in a number of firms, who may have an incentive to provide a solution to the twin manifestations across the market. There are two comments which can be made in respect of this exception. First, most such investors would likely use investment in traded companies only in order to enable a re-alignment of their portfolios and so are irrelevant as regards the twin exacerbations. Second, any such investor in a private company is generally aiming to acquire a majority stake (eg, private equity companies), which would negate her incentive to resolve the twin exacerbations across the market.

This means that not only does the market not currently mitigate the twin exacerbations, there are strong theoretical reasons why it may not be able be used to mitigate them at all within the category of shareholders, whilst decisions are made by majority.

[803] See Chapter 6.4.3.

CHAPTER 8

8. RESOLVING THE TWIN EXACERBATIONS

8.1. Introduction

We have seen so far that the twin exacerbations are exceptions from a theoretical perspective: law generally protects potential suffers of direct or indirect manifestations of Costs by way of mandatory rules or through the comply-or-explain principle, but does nothing to protect indirect manifestations of majority/minority agency costs in private companies. Majority/minority agency costs are manifested through directors – either acting on the instructions of the majority, or out of fear of the majority to protect their position. Indeed, these indirect manifestations are actively exacerbated by two features: the ability of shareholders to transfer the powers of the company from directors to shareholders (in both cases via the majority), and the ability of shareholders to remove directors.

The presence of weaknesses in the UK regime for protection of minorities is not the received wisdom. La Porta and others coded that the UK had strong shareholder protection, including minority protection,[804] and that this resulted in a well-developed financial market.[805] This appears not align to the conclusions of this thesis. There are two reasons for this. First, La Porta and others have been criticised for being overly simplistic in their variables and their grading.[806] Similarly, as noted in paragraph 7.3, any element of correlation between the development of the financial market and shareholder protection is not evidence of causation. This means that we cannot use the fact that there is such a strong financial market to undermine the outcomes of this thesis. Second, La Porta and others, are only interested in international comparisons rather than absolute outcomes. Accordingly, their analysis is that the UK's legal regime is more shareholder friendly than other jurisdictions. That may well be the case, although it is subject to the criticisms noted. However, even if it is the case, it does not mean that the UK regime is flawless, or that it is not in need of reform. Merely because other systems may be worse does not mean that we should stop trying to improve the UK position.

The twin exacerbations are a structural flaw which exists under UK law, and are not mitigated by other elements of corporate law. They are also not mitigated by market action,

[804] R La Porta and others, 'Law and finance' (1998) 106(6) Journal of Political Economy 1113, 1130.
[805] R La Porta and others, 'Legal determinants of external finance' (1997) 52(3) Journal of Finance 1131.
[806] See the criticisms of the La Porta approach outlined in para 7.3.

and it is likely that market action is incapable of mitigating them. This, therefore, leads us to the conclusion that it is necessary to resolve them by some legal mechanism. This chapter explores potential methods to mitigate the twin exacerbations. It initially attempt to find a generic solution that will resolve both, and having failed to do so, it proposes individual methods for resolving each of the twin exacerbations.

8.2. A Generic Resolution?

The twin exacerbations are based on the ability of the majority to instruct action to their own advantage, without adequately considering the minority. If either of these elements are resolved, then the twin exacerbations are also resolved. This means that removing majority rule,[807] or imposing duties on shareholders when acting as shareholders[808] have the potential to resolve the twin exacerbations by making a single, generic change to UK company law. But is either change desirable?

We have seen advantages to majority rule. It helps prevent the minority acting as a 'hold out' and exercising a '*liberum veto*' over the life of the company. More than this, it helps collectivise shareholders to respond more efficiently and take self-help to resolve owner/manager agency costs.[809] Removing majority rule generally would therefore increase the chances of deadlock, stasis, and would reduce the shareholders' ability to defend against agency costs from managers. A wholescale removal, therefore, appears counterproductive. Both Easterbrook and Fischel, and Berle and Means, agree that majority rule is an important tool, but that occasionally its effects need to be tempered.[810] Accordingly, rather than replacing majority rule, a better course is to temper its effects.

Can this be done by ascribing a duty to the majority when voting their shares, as happens in Delaware? After all, this would seem to be an 'off the shelf' resolution which could be adopted in UK law as a 'package deal'. Despite dicta in the UK which claim that such a duty exists, it does not.[811] Accordingly, introducing such a duty would fundamentally change the nature of owning a share in the UK: rather than a share being purely a piece of personal

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[807] See Chapter 5.2.
[808] See Chapter 6.3.
[809] See Chapter 5.2.1.
[810] See nn 505 and 506 respectively.
[811] See Chapter 6.3.2(b).

property, duties would attach to the rights shareholders receive from their shareholding.[812] It is difficult to establish what the scope of any such duty would be. Would it be a generic standard applicable to all shareholders? If so, would it cover failure to act as well as the actions of shareholders?[813] This would place many shareholders at risk of accidental breach of such a new duty imposed after they became shareholders. In addition, we have seen that Delaware required extensive litigation to establish the precise boundaries of a majority fiduciary duty. This indicates that the introduction of any such duty risks uncertainty. The same issues arise if we attempt to apply extant directors' duties to shareholders in instances where shareholders be able to act in the name of the company (as in Delaware and New Zealand). When does the switch take place and is it absolute? Attempting to adopt either of these approaches (generic shareholder duties, or shareholders having imputed directors' duties) raises several variables and uncertainties which will not easily be resolved under UK law. It also creates further potential lacunae in which indirect manifestations may arise.

Instead, we can attempt to find a solution which avoids the need to deal with these variables and uncertainties. We have seen a theoretical link between the concept of any 'duties' and the concomitant 'powers' which attach to them.[814] This is conceptually sensible: the greater the power, the greater the duty associated with that power. Rather than change the 'duties' element of the equation, it may therefore be preferable to reduce the 'powers element of the equation to make it unnecessary to introduce new duties for a large number of shareholders who have not agreed to the imposition of those duties. This would match Bainbridge's normative discussion of how the interaction between shareholders and directors should operate.[815]

Indeed, it could be argued that this is the logical corollary of the UK position that shares are purely private property to be used however the holder wishes: early defences of shareholders' abilities to hold meetings were justified on the ground that their ability to hold such meetings was the only way that shareholders had to 'interfere' in the running of the company.[816] If powers were curtailed using a method which did not remove other protections, then it would not be necessary to include such a duty. Perhaps, then, a generic resolution to the twin exacerbations is neither necessary nor desirable. Instead, if we resolve the individual exacerbations they will be mitigated.

[812] Current duties are effectively limited to paying calls on any unpaid shares.
[813] See discussion in Chapter 5.3.
[814] See Chapter 5.3.
[815] See n 9.
[816] *Isle of Wight Railway Company v Tahourdin* (1884) LR 25 Ch D 320, 329 (per Cotton LJ).

8.3. Mandatory Division of Powers

The first exacerbation, the risk that shareholders threaten (overtly or tacitly) directors with usurping the powers to make directors manifest majority/minority agency costs (or the directors act in a manner to appease the majority to avoid such threat), can be resolved by introducing a statutory division of powers. This would return the UK to its initial position,[817] as well as following global trends.[818] This is a simple and blunt approach in that it resolves the exacerbations without causing any downsides. Other than the vague concept that the entire governance structure of a company should be able to be decided contractually by its participants, there are no advantages to such a rule. Whilst flexibility may be an overriding intention of the UK corporate law sphere,[819] we have seen in this thesis that, in this area, flexibility causes an active harm. And it does so for limited benefit. If the first exacerbation exists to avoid majority shareholders being excluded from the management of the company, then such shareholders can become involved by also assuming the capacity of directors of the company: and therefore be subject to the existing regimes which govern those managing companies. Accordingly, the limited benefits of the flexibility in this regime can be achieved by other routes which avoid the harm caused by the regime. It could be argued that shareholders may not wish to make the transition to being directors. It is difficult, however, to understand this objection: the proposition is merely that those who act as managers of the company should be subject to the duties which apply to such management, This would avoid any current (and potential future) lack of clarity between the division of responsibility and duties between an active shareholder and a passive director: as a director then one has duties and powers to act on behalf of the company, whereas as a shareholder one has the right to act purely in your own interests on a limited number of matters.

Indeed, the current voluntary regime is, in fact, unworkable. Even when put on notice by the publicly-filed articles of association that the shareholders may exercise the powers of the company rather than directors, it is unclear what a third party would require to interact with the company. Whilst company law provides a regime for third parties dealing with directors in good faith – to protect the third parties[820]– it offers no equivalent for interacting with

[817] See Chapter 4.2. See also the proposal in the 1844 Report to clearly distinguish between the two bodies as a method of regulating agency costs.
[818] See Chapter 5.2.
[819] Gower and Davies, para 3-3.
[820] See Chapter 3.6.

shareholders. This is clearly based on the argument that directors' powers are inherently delegated to them by the general meeting, and so all undelegated authority sits with the shareholders. This means that third parties need no evidence of the authority of shareholders. However, it is unclear how comfortable third parties would be transacting with shareholders on behalf of the company in practice. Accordingly it is unclear how the exercise of the existing shareholder power to assume the powers of the company qua shareholder, could be practical vis-à-vis third parties. The ability of shareholders to assume powers, therefore, only acts as a threat to directors: one which, as this thesis has shown, can have severe consequences.

However, the total exclusion of shareholders from the management of the company is significant. Every formulation of the division of powers, whether mandatory or by default,[821] includes an ability for shareholders to mandate or restrain directors in their performance of some activity. If shareholders have the power to mandate activity, then whilst overt appropriations of funds are likely to be ineffective for other corporate law reasons,[822] they still create a lacuna whereby directors (with duties) could be mandated to undertake activity by the majority (without duties) which is not in the company's interest. The directors would then be faced with either breaching their duties to act in accordance with the company's constitution (if they ignore the instruction), or breaching their duties to act in the best interests of the company (if they carry out the instruction). As the majority are those able to ratify breaches; directors would likely carry out the instruction, leaving this exacerbation still unmitigated.

It is more difficult to establish whether shareholders should be able to restrain activity proposed by directors. On the one hand, power to stop directors from following one of a series of viable options, provides an important power for shareholders to direct the company in the manner that they wish it to develop. On the other hand, an ability to resist the only viable option provides the same risk that we have seen in respect of this exacerbation. We therefore need a mechanism whereby the shareholders are able to restrain activity by the directors, but directors are able to override this when necessary.[823] The next issue is, therefore, how to test whether such an override is necessary. We have seen that in the context of review of shareholder decision making, Gower and Davies consider that three potentially possible versions of the test could be applied: that the shareholders considered the activity

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[821] See Chapter 4.2.
[822] See Chapter 6.3.
[823] The inverse of the facts in *Automatic Self Cleansing,* where the shareholders attempted to mandate something and the directors refused to do it.

subjectively to be in the interests of the company; that the courts objectively establish whether the activity was objectively in the interests of the company; and a hybrid view between the two.[824] We can consider applying these metrics to establish when directors should be able to override shareholder instructions.

It is unusual for directors to ignore the wishes of shareholders. Shareholders, subject to the discussion in what follows below, are able to remove directors and are required to approve any of their long-term service contracts.[825] It can therefore be assumed that directors will use this override power sparingly due to the severe reputational damage the face among the shareholders should the veto power be exercised. The directors should therefore be able to exercise this veto power if they subjectively believe it is in the best interests of the company to do so. Apart from providing certainty for directors, concentrating on the subjective element avoids majority capture: it enables directors to ignore an instruction to refrain from action without the majority arguing that the actions of the directors were not, in fact, in the interests of the company (which can be conflated with the majority).

The current wording of the default regime is:

> 3. Directors' general authority
>
> 3. Subject to the articles, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company.
>
> 4. Shareholders' reserve power
>
> 4. (1) The shareholders may, by special resolution, direct the directors to take, or refrain from taking, specified action.
>
> (2) No such special resolution invalidates anything which the directors have done before the passing of the resolution.[826]

Section 17 of the Companies Act 2006 is the section which deals with the company's constitution generally, and section 18 is the first section of the chapter which deals with the articles of association. It is therefore sensible for any new section which resolves this exacerbation to be introduced between the two.

[824] See Chapter 6.3.
[825] Companies Act 2006, s 227.
[826] Model Articles 3 and 4.

The first proposal of this thesis is therefore to introduce a new section 17A to the Companies Act 2006 which reads:

17A Directors' authority

(1) Notwithstanding any other provision in the company's constitution, the directors are responsible for the management of the company's business, for which purpose they may exercise all the powers of the company.[827]

(2) The shareholders may, subject to subsection 3, by special resolution, direct the directors to refrain from taking specified action.[828]

(3) The directors may ignore such a special resolution if they honestly and genuinely believe that to undertake the action restrained by such special resolution is in the best interests of the company.[829]

(4) No such special resolution invalidates anything which the directors have done before the passing of the resolution.[830]

Introducing such a statutory provision would resolve the first of the twin exacerbations. Directors would no longer be concerned that, if they did not undertake activity to appease the majority, their powers would be usurped. It therefore acts to mitigate agency costs suffered by the minority.

This change rights a number of wrongs:

A. historically, there was no reason for this provision to move to the articles of association.[831] Such transfer was, therefore, an anomaly;

B. theoretically, it provides mandatory protection for a risk of a Cost, bringing the area in line with the general theoretical approach advanced;[832]

[827] This retains the current default language but replaces 'subject to the articles' with 'notwithstanding any other provision of the company's constitution'. This means that this new section will apply to all companies, including companies which are currently in existence.
[828] This retains the current default wording but makes two changes. Firstly it adds 'subject to subsection 3' to provide for the override of this right by directors. Secondly, the words 'take action or' have been deleted for the reasons outlined above.
[829] This enables the override by directors.
[830] This retains the existing language in the default regime which states that any such action by shareholders does not invalidate anything that went before – which, amongst other things, can protect third parties.
[831] See Chapter 4.2.
[832] See Chapters 2 and 3.

C. comparatively, it aligns UK law to other jurisdictions and to the trajectory of reform undertaken in other jurisdictions,[833] without causing the uncertainty (and therefore the need for litigation) that has arisen in other jurisdictions by either trying to apply blanket duties to shareholders, or switching directors' duties to shareholders in certain circumstances; and

D. empirically, the market does not resolve this exacerbation of Costs, and is unlikely to be able to do so.[834]

8.4. Removal of Directors

Resolving the first exacerbation makes the considerations which give rise to the second exacerbation more pressing: if shareholders are excluded from directly assuming management of the company, they face an increased risk of being subjected to owner/manager agency costs. The ability of shareholders to remove directors therefore assumes even greater importance. A move to protect the minority by introducing unanimity as a requirement for the removal of directors is therefore flawed: it would enable a director with one share to resist removal, and so risk direct and indirect manifestations of owner/manager agency costs. We therefore need to find a way to ensure that the ability of shareholders to remove directors remains effective if we are to combat owner/manager agency costs whilst at the same time mitigating the indirect manifestation of majority/minority agency costs arising therefrom. We have seen in several cases related to the obligations of shareholder voting, that courts often state that there is a duty to vote in the best interests of the company, but that this has generally been interpreted in a way which prioritises majority control.[835] Whilst this approach mitigates owner/manager agency costs, it shifts such costs to the minority. Australia and New Zealand provide no further assistance in resolving this exacerbation, and it would be only partially resolved by Delaware's ‘staggered board’ approach – Delaware relies on the duties imposed on shareholders (which we have rejected) to complete the resolution of the exacerbation.

Although we have shown that a generic change to shareholder voting rules is undesirable, there is no reason why this specific ability could not be adapted. This would mean that voting

[833] See Chapter 5.3.
[834] See Chapter 7.5.
[835] See Chapter 6.3.2(a).

shares to remove directors would be treated differently to other rights to vote shares, but this is the case anyway: the requirement to provided special notice;[836] the right of directors to make representations to any such meeting;[837] and that such resolution cannot be decided by way of written resolution[838] mean that shareholder resolutions to remove directors already differ from other resolutions. In addition, company law acknowledges that conflicted shareholders should be excluded from voting when it comes to decisions involving whether to ratify wrongs by directors.[839] Company law therefore already acknowledges that resolutions to remove directors should be subject to a separate regime, and that votes cast by shareholders can, in certain circumstances, fall outside the normal regime when it comes to voting.

It is therefore a natural extension of the above to mitigate this exacerbation by adjusting rules on how shareholders can vote on such a resolution. This can be achieved by requiring shareholders to cast their votes 'in the best interests of the company' on a decision to remove a director. This would solve both policy aims: it would enable shareholders to act by way of majority rule to remove directors who are not acting in the best interests of the company. As, in effect, the best interests of the company translates as the best interests of the shareholders of the company,[840] this would protect shareholders as a whole. It also avoids the displacement of this agency cost from the majority to the minority – the minority will have the protection that the majority cannot act capriciously when making such a decision.

We have seen that the current formulation of the interests of the company leads to risks of majority capture.[841] This primarily arises, however, as a result of the majority being able to ratify any breaches of this obligation (on behalf of shareholders as a whole). By applying this test within the shareholder constituency, we remove the ability of the majority to capture ratification of this breach and therefore avoid the concerns. This, in turn, would enable directors to be more objective in managing the company as they would be aware that shareholders would be unable to remove them for capricious reasons.

On the other hand, there may be a concern that this amendment would create the same risks of providing too much power to the minority, and so create the issues which are avoided by the concept of majority rule. There is a risk that such a power could be used capriciously by

[836] Companies Act 2006, s 168(2).
[837] ibid s 169.
[838] ibid s 288(2)(a).
[839] ibid s 239.
[840] ibid s 172.
[841] See Chapter 3.8.

minority shareholders (including removed directors who also hold shares) to challenge any decision to remove a director, thus embroiling shareholders in costly litigation. To avoid this, we should borrow techniques from the ‘derivative claim’ mechanism that works to protect owner/manager agency costs.[842] We could require a court intervention to establish whether the objecting shareholder has a prima facie case prior to commencing action.,[843] The court could refuse the action if it considers the outcome to be objectively in the best interests of the company,[844] and a claim will be refused if the exclusion of all of the affected shares (held by all challenged shareholders) would produce the same result.[845] This would provide the majority with the comfort that their decisions would not be challenged as a matter of rote – as the challenge would need to pass certain hurdles in order to succeed. These hurdles are designed, as with the derivative claim, to ensure that the mechanism provides the intended protection without becoming open to abuse.

This mechanism would resolve our exacerbation as it would mean that a vote by the majority to remove a director could be challenged if it were not in the best interests of the company (ie, if it were only in the interests of the majority). It would also resolve the current issues with the *Bushell v Faith* operation: even if a director's shares were, by operation of weighted voting, required to obtain a majority, failure of such director to vote in favour of a resolution to remove her could be challenged if it could be shown that her removal is in the interests of the company. In other words, rather than weakening the ability for shareholders to hold directors to account, the proposed formulation actually strengthens it. At the same time the issues with both categories of agency costs would be resolved.

Under the current regime, section 168 provides the right for shareholders to remove directors, and section 169 provides for the right of directors to object to such a proposal. It is sensible to introduce our new requirements between these two sections as section168A:

168A Shareholder Voting Obligations

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[842] See Chapter 6.4.2.
[843] Companies Act 2006, s 261.
[844] This is based on the Companies Act 2006, s 263(2)(a), which provides that a derivative proceeding cannot continue if it is not in the best interests of the company to continue it.
[845] This is based on Companies Act 2006, s 263(2)(c), which provides that the derivative claim must fail if it could be ratified. Applying this from owner/manager agency costs, the equivalent is if the minority would have decided the same way.

(1) Each shareholder shall cast any vote pursuant to section 168 and any provision in the constitution of the company which enables shareholders to remove directors in the best interests of the company.[846]

(2) a member of a company may raise proceedings to set aside any votes cast in breach of the requirement specified in subsection (1) in order to protect the interests of the company and obtain a remedy on its behalf with the leave of the court.[847]

(3) An application for leave must–

(a) specify the cause of action, and

(b) summarise the facts on which such proceedings are to be based.

(4) If it appears to the court that the application and the evidence produced by the applicant in support of it do not disclose a prima facie case for granting it, the court–

(a) must refuse the application, and

(b) may make any consequential order it considers appropriate.

(5) If the application is not refused under subsection (4)–

(a) the applicant must serve the application on the shareholder who is alleged to breach the requirements of subsection (1) the "relevant shareholder",

(b) the court–

(i) may make an order requiring evidence to be produced by the relevant shareholder, and

(ii) may adjourn the proceedings on the application to enable the evidence to be obtained, and

(c) the relevant shareholder is entitled to take part in the further proceedings on the application.

(6) On hearing the application, the court may–

(a) grant the application on such terms as it thinks fit,

(b) refuse the application, or

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[846] This section provides clear statutory wording for the specific new duty on shareholders in their limited circumstances.

[847] This formulation is taken from derivative proceedings in s 265 of the Companies Act 2006, supplemented by reference to language copied in respect of the 'leave of the court' from s 266(1).

(c) adjourn the proceedings on the application and make such order as to further procedure as it thinks fit.[848].

(7) The court must refuse leave to raise proceedings under this section if satisfied–

(a) that a person acting in accordance with section 172 (duty to promote the success of the company) would not seek to raise or continue the proceedings (as the case may be),[849] or

(b) the outcome of the resolution in which the cause of action arose would have occurred without the votes of the relevant shareholders and any other shareholders who are alleged to have breached such duty.[850]

(8) In considering whether to grant leave to raise proceedings under this section, the court must take into account, in particular–

(a) whether the member is acting in good faith in seeking to raise the proceedings,

(b) the importance that a person acting in accordance with section 172 (duty to promote the success of the company) would attach to raising or continuing them (as the case may be).[851]

The introduction of such a provision resolves the second of the twin exacerbations. It also strengthens protections offered to shareholders in respect of owner/manager agency costs: whilst it is acknowledged by all that shareholders that they can agree between themselves to apportion different weighting to their votes,[852] and that the right to vote generally is a right of ownership that a shareholder may have, it does not follow that this should give the shareholders a right to harm the minority. In various cases, courts have found legal methods to prevent such an outcome.[853] This additional reform will make this the case for votes to

[848] The language included in subsections 3–5 is taken from Companies Act 2006, s 266, but amended to be made applicable.
[849] This is the provision which reflects that the action should only continue if it is in the best interests of the company, thus avoiding the minority abusing their position.
[850] This language is taken from Companies Act 2006, s 268, but has been is narrowed from any general future or current acts to a specific resolution, the wording has been simplified. Similarly, reference to prior approval is no longer relevant as the act must have taken place post-resolution. Accordingly, we can simplify the past and future language in the derivative proceeding formulation to refer to past actions only.
[851] This language is also taken from Companies Act 2006, s 268. It merely concludes the analysis to discuss the factors that the court should weigh when deciding whether to allow the proceeding – being the good faith of the challenger, and the best interests of the company
[852] See discussion in *Bushell v Faith* in ch 4.3
[853] For example, *Automatic Self Cleansing; Shaw & Sons;* etc.

remove directors as well. This reform would, however, result in an asymmetric shareholder-voting regime with section 168 resolutions subject to the best interests of the company, but other resolutions not. There are two reasons why this is irrelevant. First, section 168 resolutions already differ from the general shareholder voting regime: they cannot be passed by written resolution;[854] require the possibility for directors to present representations as to why they should not be removed;[855] and require special notice[856] of 28 days.[857] As a result, section 168 resolutions already operate on an asymmetric footing. Second, textbooks normally state that resolutions to amend the articles of association are subject to a bona fide requirement,[858] even if (as we have seen above) they are not. Accordingly, asymmetry in form currently applies to the section 168 regime, and there is a perception of asymmetry in substance across different types of resolution.

This reform will mean that directors are more difficult to remove. There is, accordingly, a risk that directors could become entrenched. However, there are two mitigations for this. First, shareholders can still remove errant directors using the above reform. Following the derivative-claim mechanism, someone challenging a shareholders' vote to remove a director would need to present evidence in court of a prima facie case that the vote was not in the interests of the company. Second, the directors owe their duties to the company. Whilst this mechanism will prevent the risk of 'majority capture' which undermines the current regime,[859] it does not prevent shareholders collectively holding directors to account by way of their fiduciary duties. Accordingly, this reform of company law can mean that instead of the directors being subject to majority capture, they become accountable to the shareholders as a whole: either by being removed, or on the basis of a breach of duty.

8.5. Removing a Negative?

This thesis has identified that indirect manifestations of majority/minority agency costs in private companies are an exception to the theoretical framework for the law of business organisations in that they do not provide mandatory protection to the minority in a situation

[854] Companies Act 2006, s 288(2)(a).
[855] ibid s169.
[856] ibid s 168(2).
[857] ibid s 312.
[858] For example, Gower and Davies, para19-4 – 'Scattered throughout the reports are statements hat members must exercise their votes "bona fide for the benefit of the company as a whole.' Gower and Davies proceed to reject this notion, but nonetheless acknowledge that it is a perception.
[859] See para 6.3.2(b).

where they are at risk of being exposed to such manifestations of Costs. It has identified that these Costs, far from being mitigated, are actually exacerbated by the twin exacerbations highlighted. It has then proposed methods to mitigate the exacerbations.

This raises the question whether the reforms proposed above are sufficient to bring indirect manifestations of majority/minority agency costs into line with the theoretical position advanced. After all, the above resolutions remove a negative (ie, the situation will no longer be exacerbated), but this does not automatically translate into providing a positive (ie, it is not automatic that removing the exacerbations will fully mitigate the underlying problem, which is a lack of mandatory protection for the minority from indirect manifestations of majority/minority agency costs). One of Bellenden Ker's primary criticisms of the repeal of the Bubble Act was that it removed a bad measure but did not replace it with a corresponding good measure. Does the proposed reform, therefore, adequately address the concerns highlighted by this thesis, or merely remove elements which currently make them worse?

The effect of the foregoing reforms is to restrain the majority. Easterbrook and Fischel, Berle and Means, and Cheffins all agree that the majority can be so restrained if there is an adequate provision requiring them to do so. It is submitted that the current flaws in the twin exacerbations highlighted throughout this thesis provide such a requirement. The majority would no longer be able to shift powers away from directors to shareholders, or threaten to do so, and would only be able to vote to remove a director were it in the bests interests of the company as whole to do so. Accordingly, the reforms act to provide directors with greater freedom (subject to their existing constraints), and avoid majority capture. Resolving these two exacerbations acts to remove the risk of indirect manifestation of agency costs; the directors cannot be threatened or forced to act in a manner which ignores the minority. Therefore, the act of removing the exacerbations in accordance with the foregoing provides a mandatory method to resolve indirect manifestations of majority/minority agency costs. Not only are we removing a negative, we are replacing it with a positive which brings this area of Costs into line with the theoretical propositions advanced in Chapters 2 and 3. Accordingly, resolving the twin exacerbations in the manner proposed does more than merely remove exacerbations: it provides an active protection.

CHAPTER 9

9. CONCLUSION

Private companies function under a fundamental structural flaw. Most of the literature on agency costs is concerned with owner/manager agency costs, which means that consideration of how the majority can indirectly exert pressure on the minority is avoided.[860] For most legal entities, this is not important as the minority have the ability to withdraw their capital at will: either by withdrawing from the company, or by selling their shares on a public market to third parties. However, for private companies with limitations on the removal of capital and no ready market, this remains an exception within the category of majority/minority agency costs. Worse still, two tools used to mitigate owner/manager agency costs by subjecting managers to greater control by shareholders, actively exacerbate the problem. This makes indirect manifestations of majority/minority agency costs in private companies an exception: every other high Cost is mitigated by mandatory rules.

These twin exacerbations exist as historical exceptions: when faced with Costs, company law history has traditionally –since 1845 – attempted to reduce them. Watson states that the transfer of the powers of the company from a mandatory provision to a default position occurred accidentally.[861] Judgments on this exacerbation have always made for uneasy reading: whilst they have tended to protect the minority by requiring that the majority can only act in accordance with specified procedure, this leaves the question of substance unanswered. Why should the majority be able to act in such a way if they follow the procedure? Comparatively, most jurisdictions provide for a statutory regime – albeit one that can be displaced by shareholders should they resolve to do so. This, in turn, leads to more questions. Should this mean that duties which apply to directors should shift to the shareholders? If so, should the duties act on a sliding scale, or 'tip' at one point between directors and shareholders? In either case, delineating who owes which duties becomes very difficult. In the absence of a compelling reason for the default rules of such parties, other than a (flawed) belief that the company consists (or should exist) of entirely voluntary contracts in which mandatory rules are (or should be) minimised, it is difficult to justify such a provision: for (at best) nebulous gain, it exacerbates a serious harm.

[860] Often deliberately, on the flawed grounds that the majority/minority costs are not as likely to arise (eg, see n 505).
[861] See discussion in Chapter 4.6.

On the other hand, shareholders' ability to remove directors does produce a tangible benefit: it aids in the mitigation of owner/manager agency costs between shareholders and directors. However, there are two flaws with its current interpretation. First, the *Bushell v Faith* iteration of this right neutralises its ability to provide the desired protections. Second, the operation of this iteration creates indirect majority/minority agency costs: directors will be subject to majority capture arising from either a threat by the majority to remove directors unless they carry out their bidding, or directors acting in a certain way to avoid such a threat. Delaware enables company constitutions to require that directors can only be removed 'for cause' in certain situations, but other jurisdictions allow for directors to be removed by the majority. This exacerbation can be resolved to protect the minority, whilst also providing a better resolution of owner/manager agency costs.

Neither of these exacerbations is resolved by general legal protections. Directors' duties are subject to capture by the majority – in fact, are often expressly subject to the majority. Shareholders are not under a duty to vote their shares any particular way, although they may be barred from directly appropriating the property of the minority. This does not provide any protection against the triangulation which underpins the twin exacerbations. Ostensible minority remedies are inadequate, and the lack of a market for shares in private companies, means that we cannot rely on any 'soft laws' to remove the twin exacerbations. In addition, action by the market currently does little to resolve the twin exacerbations in constitutions of companies: there is a minimal deviation from the (flawed) default regime, and where there is deviation it appears to advance majority rule rather than remove it. Indeed, it is doubtful whether the current market will ever be able to resolve the exacerbations in and of itself: whilst it can do so to enable shareholders to protect themselves against directors (as shareholders pick the articles), it cannot do so to enable the minority to protect themselves against the majority (as the majority are (tautologously) the largest constituency within the category of those able to amend the articles).

Accordingly, introducing mandatory rules aligns with the theoretical and historical propositions advanced. They also help resolve issues arising in comparative jurisdictions as regards the same subject matter, and resolve the doctrinal and empirical issues analysed. The proposals above resolve the twin exacerbations, and, accordingly, succeed in providing mandatory protections against indirect manifestations of majority/minority agency costs.

Private companies are important: by number, they dwarf public companies. Their economic realities make them conceptually different to public companies, yet the majority of academic

analysis of companies has been directed at resolving owner/manager agency costs. By these two, relatively minor, changes to UK company law, we can resolve indirect manifestations of majority/minority agency costs in private companies.

APPENDIX

Table 1: Sample Group on Incorporation

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366399	A1 Integrity Management Services Ltd			Old				
366400	Construction Licensing Executive			Old				
366401	Nith Valley Leaf Trust			Old				
366402	Reactive Property Solutions Ltd			Old				
366403	Perthshire Women's Aid			Old				
366404	Volunteer Action Dumfries and Galloway			Old				
366405	R P C Trading (Scotland) Limited			Old				
366406	Scottish Chambers International Limited			Old				
366407	Campend Limited	Ltd	04-Oct-09	New	FALSE	0	0	0
366408	Shawfair Park Limited	Ltd	04-Oct-09	New	FALSE	0	0	0
366409	Shawfair Business Park Limited	Ltd	04-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366410	Shawfair Retail Park Limited	Ltd	04-Oct-09	New	FALSE	0	0	0
366411	Cole and Joshua Ltd	Ltd	05-Oct-09	New	FALSE	0	0	0
366412	None							
366413	None							
366414	None							
366415	Steve & Webi Consultancy Limited	Ltd	05-Oct-09	New	FALSE	0	0	0
366416	A Home in Brittany Limited	Ltd	05-Oct-09	New	FALSE	0	0	0
366417	Protogenus Design Ltd	Ltd	05-Oct-09	New	FALSE	0	0	0
366418	OMEP Ltd	Ltd	05-Oct-09	New	FALSE	0	0	0
366419	None							
366420	Kapi Limited	Ltd	05-Oct-09	New	FALSE	0	0	0
366421	Routine Engineering Solutions Limited	Ltd	05-Oct-09	New	FALSE	0	0	0
366422	Complirisk Limited	Ltd	05-Oct-09	New	FALSE	0	0	0
366423	Evonix Offshore Limited	Ltd	05-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366424	Live and Let Buy Ltd	Ltd	05-Oct-09	New	FALSE	0	0	0
366425	Alchemy Charity Advisers Limited	Ltd	06-Oct-09	New	TRUE	0	0	0
366426	None							
366427	Spitfire Group Holdings Limited	Ltd	06-Oct-09	New	TRUE	0	0	0
366428	Loreny Outdoor & Leisure Limited	Ltd	06-Oct-09	New	FALSE	0	0	0
366429	None							
366430	None							
366431	None							
366432	Elgin Infrastructure Limited	Ltd	06-Oct-09	New	TRUE	0	0	0
366433	Kelvin KBB Holdings Limited	Ltd	06-Oct-09	New	TRUE	0	0	0
366434	None							
366435	Yellow Pepper Contract Catering Ltd	Ltd	06-Oct-09	New	FALSE	0	0	0
366436	None							
366437	J M Well Services Limited	Ltd	06-Oct-09	New	FALSE	0	0	0
366438	Performant Ltd	Ltd	06-Oct-09	New	FALSE	0	0	0
366439	EBP Pub Company (Guarantee) Limited	Guarantee						

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366440	Ashridge Capital Fund I CI GP Limited	Ltd	07-Oct-09	New	FALSE	0	0	1
366441	Icare (Beauty) Limited	Ltd	07-Oct-09	New	FALSE	0	0	0
366442	None							
366443	None							
366444	None							
366445	Montgomery & Associates (International) Limited	Ltd	07-Oct-09	New	FALSE	0	0	0
366446	None							
366447	RF Plumbing and Sons Ltd	Ltd	07-Oct-09	New	FALSE	0	0	0
366448	Maggie Mellon Ltd	Ltd	07-Oct-09	New	FALSE	0	0	0
366449	S P A (Troon) Limited	Ltd	07-Oct-09	New	FALSE	0	0	0
366450	Emcona Limited	Ltd	07-Oct-09	New	FALSE	0	0	0
366451	Ross Fernie Motors (Scotland) Limited	Ltd	07-Oct-09	New	FALSE	0	0	0
366452	Dynamo Engineering Limited	Ltd	07-Oct-09	New	FALSE	0	0	0
366453	None							
366454	Gifts Galore (Nationwide) Limited	Ltd	07-Oct-09	New	FALSE	0	0	0
366455	G & E Solutions Limited	Ltd	07-Oct-09	New	FALSE	0	0	0
366456	Warmthru Ltd	Ltd	07-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366457	FBS 2009 Ltd	Ltd	07-Oct-09	New	FALSE	0	0	0
366458	Jamie Blake (Fife) Ltd	Ltd	07-Oct-09	New	FALSE	0	0	0
366459	Kareem Salhiyyah Ltd	Ltd	07-Oct-09	New	FALSE	0	0	0
366460	Port Beach House Ltd	Ltd	07-Oct-09	New	FALSE	0	0	0
366461	S&G Building and Drain Services Limited	Ltd	07-Oct-09	New	FALSE	0	0	0
366462	Viasoft Ltd	Ltd	07-Oct-09	New	FALSE	0	0	0
366463	Scots Seats Marine Ltd	Ltd	07-Oct-09	New	TRUE	0	0	0
366464	Plan-tek Limited	Ltd	07-Oct-09	New	FALSE	0	0	0
366465	ATP (Scotland) Limited	Ltd	07-Oct-09	New	FALSE	0	0	0
366466	None							
366467	Holm Mill Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366468	Waterside Productions Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366469	Dr. Robert Hawthorn Consultancy Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366470	Limehouse (Property Specialists) Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366471	None							
366472	None							
366473	Town & Country Apartments (Aberdeen) Limited	Ltd	08-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Change d Articles Since?	Entrenchment	Director Powers	Director Removal
366474	Euriqa Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366475	Real Pipey Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366476	MWBaccess Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366477	A K Stoddart (Farms) Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366478	Systems Engineering (Scotland) Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366479	Quickbrick Systems Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366480	None							
366481	Chocolala Fine Foods Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366482	Edenside Affordable Community Housing Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366483	AMCA Creative Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366484	None							
366485	DSL Engineering Consultants Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366486	None							
366487	Kevin Pirie Joinery Ltd	Ltd	08-Oct-09	New	TRUE	0	0	0
366488	Hope Brown Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366489	Party Daze Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366490	Daviot Care Limited	Ltd	08-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366491	A & J Elliot Electrical Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366492	Roromore Hydro Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366493	Pauls Original Sandwich House 2010 Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366494	GWT For You Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366495	Epsilon Training & IT Services Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366496	Sinbad Ecosse Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366497	Star Actuarial Futures Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366498	DBA Remote Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366499	JMB General Builders Limited	Ltd	08-Oct-09	New	FALSE	0	0	1
366500	Task-Pro (Aberdeen) Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366501	UK Cleaning Specialists Limited	Ltd	08-Oct-09	New	FALSE	0	0	1
366502	None							
366503	None							

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366504	Campbell & Macsween Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366505	Smith's Inspection Services Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366506	Kitchener's Delicatessen Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366507	None							
366508	None							
366509	None							
366510	A. Ross Joinery and Building Services Limited	Ltd	08-Oct-09	New	TRUE	0	0	0
366511	Clear Blue Cleaning Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366512	None							
366513	None							
366514	EEM Planning Ltd	Ltd	08-Oct-09	New	TRUE	0	0	0
366515	None							
366516	Mintquads Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366517	Home Improvement Advice Centre Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366518	Edinburgh Adventure Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366519	Boss Plant Hire (Scotland) Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366520	Wallace Dunn Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366521	DU Projects Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366522	None							

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366523	Sixth Sense Trading Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366524	Catherine & Fred Marees Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366525	To Me Love Me Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366526	Tom Daniels Music Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366527	None							
366528	Druim Ba Sustainable Energy Limited	Ltd	08-Oct-09	New	FALSE	0	0	1
366529	DMCK Maintenance Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366530	Aldbar UK Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366531	ECO Clean Solutions Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366532	Sinclair Associates (Highland) Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366533	D Fionda Associates Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366534	McMillan Shopfitting & Equipment Supplies Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366535	Procon Consultancy Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366536	Guy Reid Marine Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366537	Quality Facilities Management Ltd.	Ltd	08-Oct-09	New	FALSE	0	0	0
366538	City Centre News Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366539	Rosbill Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366540	Brakelight Films Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366541	None							

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366542	Inverness Hearing Services Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366543	Silver Rose Funeral Directors Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366544	Jim Hewit Property Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366545	Pak Leisure Group Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366546	Dennis Parts Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366547	None							
366548	Stenic Projects Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366549	Grant & Geoghegan Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366550	Mestag Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366551	Zedaxis Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366552	L.D. Consultant Engineering Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366553	Lucky Little Stars Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366554	Audsecty Professional Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366555	Border Finance Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366556	Smart Maintenance Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366557	SC366557 Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366558	Roadside Travel Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366559	Greenlight Technologies Limited	Ltd	08-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366560	Regents House (Properties) Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366561	Goldenwell Chinese Ltd	Ltd	08-Oct-09	New	FALSE	0	0	0
366562	Kilbride Stretton Limited	Ltd	08-Oct-09	New	TRUE	0	0	0
366563	Kelso Place Asset Management (Scotland) IV Limited	Ltd	08-Oct-09	New	FALSE	0	1	1
366564	Will Alsop at RMJM Limited	Ltd	08-Oct-09	New	TRUE	0	1	1
366565	Patac Limited	Ltd	08-Oct-09	New	FALSE	0	1	1
366566	Shieldhall Logistics Limited	Ltd	08-Oct-09	New	TRUE	0	1	1
366567	Penta TPI Limited	Ltd	08-Oct-09	New	FALSE	0	1	1
366568	Penta TPI SP Limited	Ltd	08-Oct-09	New	FALSE	0	1	1
366569	Cathcart Associates Ltd	Ltd	08-Oct-09	New	TRUE	0	0	0
366570	Mark Millar Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366571	Millarworld Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366572	Vida Cabrera Limited	Ltd	08-Oct-09	New	FALSE	0	0	0
366573	None							
366574	None							
366575	None							
366576	Lawrence Edwards Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366577	Global Solutions (Asia Industrial Chemicals) Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366578	None							
366579	Maxi's Café Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366580	Noj Associates Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366581	Fabric of the Universe Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366582	Neon Gecko (Glasgow) ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366583	Midshore EP Ltd	Ltd	09-Oct-09	New	TRUE	0	0	0
366584	Graeme Robertson Photography Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366585	None							
366586	Drumond Developments Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366587	New Spices (Glasgow) Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366588	None							
366589	Allandale Joiners Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366590	Studio MB Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366591	Roma Scotland Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366592	LVR Business to Business Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366593	The Law Group Scotland Limited	Ltd	09-Oct-09	New	TRUE	0	0	0
366594	Eagle Plant Installations Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366595	E W (Scotland) Ltd	Ltd	09-Oct-09	New	TRUE	0	0	0
366596	New Horizon Distribution Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366597	Boss Group (Scotland) Limited	Ltd	09-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366598	EPCW Services Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366599	Construction Solutions Glasgow Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366600	Doo Diddly Productions Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366601	SP1 Takeaway Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366602	Now Publishing (Scotland) ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366603	The Carr Company (Scotland) Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366604	Host Academy plc	plc						
366605	None							
366606	Cookie Highland Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366607	Calypso Cuisine Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366608	Dual Phones Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366609	S L 427 Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366610	Maxwell Bennett Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366611	Broadband Anywhere Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366612	Villa Seafood UK Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366613	Victory Day Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366614	None							
366615	Best Electrical Contracts Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366616	R G Model Services Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366617	None							

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Change d Articles Since?	Entrenchment	Director Powers	Director Removal
366618	2B Properties Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366619	Two Leisure Scotland Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366620	Direct Automation Systems Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366621	None							
366622	None							
366623	Purple Venture 507 Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366624	Quick Off the Mark Productions Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366625	Crescent Properties (Scotland) Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366626	None							
366627	None							
366628	F&C Private Equity Zeros plc	plc						
366629	One Stone Advisors Ltd	Ltd	09-Oct-09	New	TRUE	0	0	0
366630	None							
366631	Metropolitan (Edinburgh) Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366632	Kinetic Machine Tool Service & Repaid Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366633	Findlater's Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366634	Wholesale Flooring (Scotland) Limited	Ltd	09-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366635	None							
366636	Stiggy Motorsport Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366637	G Walker Electrical Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366638	The Munchies (Scotland) Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366639	George Mewes Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366640	K and D Leisure Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366641	Greenforty Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366642	M. A. G. Testing Services Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366643	TPM (Islands) Ltd	Ltd	09-Oct-09	New	FALSE	0	0	0
366644	Engineer Solutions Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366645	None							
366646	Scotcloud Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366647	Room Booking System Ltd	Ltd	09-Oct-09	New	TRUE	0	0	0
366648	None							
366649	Heart of Oak Ships Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366650	None							
366651	None							
366652	None							
366653	Elegant Line Limited	Ltd	09-Oct-09	New	FALSE	0	0	0
366654	Forth Builders Limited	Ltd	09-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366655	Adept International Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366656	JCT Consultants (Aberdeen) Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366657	Mintola Testing Consultancy Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366658	Darbar Leisure Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366659	Tease Coffee Bar Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366660	Greenspan Electric St. Fergus Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366661	David Nicolson Engineering Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366662	Revie's Private Hire (Glasgow) Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366663	Treeglen Estates Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366664	None							
366665	None							
366666	None							
366667	None							
366668	Colin Happer Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366669	Dalkin Sykes Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366670	None							
366671	None							

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366672	Yulong Engineering Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366673	None							
366674	Revolution Cans Limited	Ltd	12-Oct-09	New	TRUE	0	0	0
366675	Michael Deeney Transport Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366676	BCSS Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366677	Edinburgh Property Partners Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366678	Sporting Idols Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366679	None							
366680	Crown Chip Shop Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366681	None							
366682	Food Creations (Livingston) Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366683	Aquablaze FM Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366684	Elliptical Interiors Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366685	Tarkenter Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366686	Make Design Studio Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366687	None							

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366688	Westglide Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366689	Perth Honda Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366690	None							
366691	Stepper Solutions Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366692	Illuminations Transport Services Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366693	The Pitches (Services) Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366694	Longhill Wind Energy Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366695	Mylocal5aday Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366696	Home Max Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366697	Pulse8 (EK) Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366698	Linlithgow PC Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366699	Set Retail Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366700	Morgan Johnson Projects Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366701	Artizan Consulting Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366702	None							
366703	Golden Acre Contracts Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366704	Davidson Contracts Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366705	None							
366706	GLC Electrical Services Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366707	Secure Contracts Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Change d Articles Since?	Entrenchment	Director Powers	Director Removal
366708	P Wizard Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366709	The New Elgin Salon Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366710	ALM Planning Solutions Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366711	None							
366712	Fluidrill Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366713	Packer Signbox Centre Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366714	None							
366715	Partners 7 (Maintenance Company) Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366716	Partners 4 Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366717	Fresh Television Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366718	None							
366719	Taste Great Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366720	None							
366721	Trinity Computer Consultants Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366722	K Thorburn Pipework Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366723	Baltransa Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366724	McCann Estates Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366725	Partners 5 Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366726	Philip Milne Marine Services Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366727	None							
366728	China Express Livingston Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366729	Kasa International Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366730	Ivanco Trading Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366731	Mor @ Glenmore Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366732	Gerry Granger Consulting Ltd	Ltd	12-Oct-09	New	FALSE	0	0	0
366733	ASM Solutions (Aberdeen) Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366734	Ronades Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366735	Archid Architects Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366736	JK Spice Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366737	Mark Evans Limited	Ltd	12-Oct-09	New	FALSE	0	0	0
366738	None							
366739	FVS Engineering Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366740	Greig Melville Associates Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366741	M.A.E. Building Solutions Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366742	Carascoy Safety and Environmental Services Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366743	G Spratt Accountancy Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366744	Pronom Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366745	Systematic Training Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366746	Systematic IT & Training Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366747	None							
366748	Four Chapel Street Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366749	Thistle Technologies Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366750	Bye Management Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366751	None							
366752	Customfit Joiners & Builders Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366753	None							
366754	GRP Stormroofs Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366755	A1 Cake Mixes Limited	Ltd	13-Oct-09	New	TRUE	0	0	0
366756	Edinburgh Laser Optics Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366757	Change Management (Borders) Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366758	JRTraders Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366759	None							
366760	Taylor Ventilation Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366761	L'Ashoz Limited	Ltd	13-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366762	Accident Repair Centre (Scotland) Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366763	DCM Fire Protection Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366764	Thermal Transfer Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366765	None							
366766	Skypoint Marketing Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366767	Euro Marine Consultants Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366768	Proven Designs Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366769	Osprey Inspection Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366770	Traffic Giant Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366771	None							
366772	Peprime Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366773	None							
366774	Athar Oilfield Services Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366775	NPAC Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366776	NFPM Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366777	NFSC Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366778	DGAT Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366779	GAFY Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366780	Mr He C.T.A. Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366781	Taste of China (Edinburgh) Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366782	New Age Retailing Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366783	Scotia Law Training Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366784	None							
366785	GCF Financial Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366786	None							
366787	L5 Systems Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366788	JPW Bars Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366789	Siganoth Leisure Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366790	SJB Logistics Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366791	The Beauty Store (Scotland) Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366792	Nautricity Limited	Ltd	13-Oct-09	New	TRUE	0	0	0
366793	Megatech Projects Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366794	None							
366795	Stewart Linked Services Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366797	West Scales	Unlimited						
366798	Ennis Inns Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366799	Ikonik Sports Management Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366800	Ikonik Sports Limited	Ltd	13-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366801	Back for Good Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366802	Gramic Engineering (Scotland) Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366803	Southwest Consulting & Training Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366804	Gallagher Cunning Consulting Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366805	Young & Son Holdings Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366806	MA Reid Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366807	Photo Zone Studios Limited	Ltd	13-Oct-09	New	FALSE	0	0	0
366808	None							
366809	Airts Optimisation Ltd	Ltd	13-Oct-09	New	FALSE	0	0	1
366810	None							
366811	Bing Design Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366812	Oceans 7 Recruitment Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366813	Special FX Ltd	Ltd	13-Oct-09	New	FALSE	0	0	0
366814	Scallywags Indoor Activity Centre Ltd	Ltd	14-Oct-09	New	FALSE	0	0	0
366815	Thai Spa Health & Beauty Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366816	None							
366817	Saivenkat Limited	Ltd	14-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366818	Alba Tayside Ltd	Ltd	14-Oct-09	New	FALSE	0	0	0
366819	Eaglestone Contracts Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366820	Professional Landlord Services Ltd	Ltd	14-Oct-09	New	FALSE	0	0	0
366821	None							
366822	John Blackhall Ltd	Ltd	14-Oct-09	New	FALSE	0	0	0
366823	Invision Contractors Ltd	Ltd	14-Oct-09	New	FALSE	0	0	0
366824	Three in One (Scotland) Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366825	None							
366826	Northdyke Associates Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366827	Greenfish Energy Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366828	None							
366829	Macdonald Air Products Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366830	Forth Valley Auto Breakers Ltd	Ltd	14-Oct-09	New	FALSE	0	0	0
366831	None							
366832	Caifer Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366833	Ballantrae Hotels Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366834	Baronial Healthcare Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366835	Kingsburgh SCM Enterprises Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366836	Hi-Innovation Ltd	Ltd	14-Oct-09	New	FALSE	0	0	0
366837	Hi-Sports Performance Ltd	Ltd	14-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Change d Articles Since?	Entrenchment	Director Powers	Director Removal
366838	Barker Helme Ltd	Ltd	14-Oct-09	New	FALSE	0	0	0
366839	Hibrids Ltd	Ltd	14-Oct-09	New	FALSE	0	0	0
366840	Intelligent Reverse Logistics Ltd	Ltd	14-Oct-09	New	FALSE	0	0	0
366841	None							
366842	Blackstone Properties Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366843	Emiris Ltd	Ltd	14-Oct-09	New	FALSE	0	0	0
366844	City Church Aberdeen	Limited by Guarantee						
366845	None							
366846	Cumbria Distillers Ltd	Ltd	14-Oct-09	New	FALSE	0	0	0
366847	Construction & Property Group Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366848	Catherine Lynn (Bridal) Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366849	Wing Chau Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366850	IME (Scotland) Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366851	None							
366852	None							
366853	Willpower (Scotland) Ltd	Ltd	14-Oct-09	New	FALSE	0	0	0
366854	LGU Championships Limited	Ltd	14-Oct-09	New	TRUE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366855	Bartox Consulting Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366856	Labqi Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366857	None							
366858	Projecting Ltd	Ltd	14-Oct-09	New	FALSE	0	0	0
366859	None							
366860	Darawin Aviation Service Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366861	SKO Footwear Limited	Ltd	14-Oct-09	New	FALSE	0	0	0
366862	All Points Access Ltd	Ltd	14-Oct-09	New	FALSE	0	0	0
366863	Aurora Utilities Ltd	Ltd	14-Oct-09	New	FALSE	0	0	0
366864	None							
366865	None							
366866	None							
366867	Stenton Agricultural Company Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366868	James Semple Electrical Ltd	Ltd	15-Oct-09	New	FALSE	0	0	1
366869	None							
366870	Sigmamunro Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366871	None							

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366872	Partners 7 (Building Contracting) Company Ltd	Ltd	15-Oct-09	New	FALSE	0	0	0
366873	Hostwave Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366874	Almondvale Foods Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366875	Elements Foods Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366876	Fraser Street Centre Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366877	Drummond Building Ltd	Ltd	15-Oct-09	New	FALSE	0	0	0
366878	JLM Plumbing and Gas Services Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366879	Barra Consulting Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366880	The Original Loch Ness Monster Exhibition Centre Ltd	Ltd	15-Oct-09	New	FALSE	0	0	0
366881	Kinross Property Ltd	Ltd	15-Oct-09	New	FALSE	0	0	0
366882	None							
366883	McCrindle NDT Service Ltd	Ltd	15-Oct-09	New	FALSE	0	0	0
366884	Neil McPhee Ltd	Ltd	15-Oct-09	New	FALSE	0	0	0
366885	Dent Dynamics Limited	Ltd	15-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Change d Articles Since?	Entrenchment	Director Powers	Director Removal
366886	Solidsys Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366887	None							
366888	DT Adamson Ltd	Ltd	15-Oct-09	New	FALSE	0	0	0
366889	Tag Computing Ltd	Ltd	15-Oct-09	New	FALSE	0	0	0
366890	Tailored Lettings Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366891	Inverness Tailor Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366892	Garhat Ltd	Ltd	15-Oct-09	New	FALSE	0	0	0
366893	None							
366894	Deeside Road Construction Limited	Ltd	15-Oct-09	New	TRUE	0	0	0
366895	Colin Russell Ltd	Ltd	15-Oct-09	New	FALSE	0	0	0
366896	Howard Bedding Centre Ltd	Ltd	15-Oct-09	New	FALSE	0	0	0
366897	Fulshaw Roofing (Stewarton) Ltd	Ltd	15-Oct-09	New	FALSE	0	0	0
366898	Strathlaw Admin Ltd	Ltd	15-Oct-09	New	FALSE	0	0	0
366899	Time Fitness (Glasgow) Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366900	None							
366901	None							
366902	None							
366903	None							

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366904	Brennan Contracting Services Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366905	None							
366906	Spice Lounge (Scotland) Ltd	Ltd	15-Oct-09	New	FALSE	0	0	0
366907	Moyes Farms Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366908	Carers of East Lothian	Limited by Guarantee						
366909	Broomco (4204) Ltd	Ltd	15-Oct-09	New	FALSE	0	0	1
366910	LN2 Services.com Ltd	Ltd	15-Oct-09	New	FALSE	0	0	0
366911	CPR Maintenance Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366912	DRSL Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366913	Hancock Inspection Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366914	B.S. Properties (Scotland) limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366915	Esslemont & Associates Ltd	Ltd	15-Oct-09	New	FALSE	0	0	0
366916	Robert Ormiston Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366917	William Cumming and Son Ltd	Ltd	15-Oct-09	New	FALSE	0	0	0
366918	Hillswick Shop Ltd	Ltd	15-Oct-09	New	FALSE	0	0	1

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366919	4L Energy Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366920	Mr Fong Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366921	None							
366922	None							
366923	None							
366924	Aerotechconsultancy Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366925	Dave Bradshaw Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366926	Water Lilies Limited	Ltd	15-Oct-09	New	FALSE	0	0	0
366927	None							
366928	None							
366929	AC Leisure Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366930	Verity & Genevieve Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366931	Gary Jacobs Publishing Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366932	Indigo Social Media Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366933	VLVS Direct Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366934	None							
366935	Miceli Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366936	Lejenda Developments Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366937	B No. 1 Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366938	Contin Village Stores Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366939	Soirbheas Trading Ltd	Ltd	16-Oct-09	New	TRUE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366940	NBDC Ltd	Ltd	16-Oct-09	New	FALSE	0	0	1
366941	None							
366942	Curtains by Janelle Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366943	Leo's Beanery Limited	Ltd	16-Oct-09	New	FALSE	0	0	1
366944	GWF Industrial Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366945	None							
366946	The Rehab Indicator Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366947	A.R.N. Energy Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366948	Zphyr Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366949	None							
366950	Taktal Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366951	Hometech Energy Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366952	Petrorix Oil and Gas Services Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366953	ELM Medical Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366954	None							
366955	Sew-Personalise It Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366956	None							

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366957	One Tree Furniture Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366958	The Token & Voucher Company Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366959	Lewelis Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366960	RLB Telecom Ltd	Ltd	16-Oct-09	New	TRUE	0	0	0
366961	Dokron Management Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366962	Oligodendrogliocyte General Business Support Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366963	West Port Agency Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366964	Crail Community Interest Company	Limited by guarantee						
366965	Collessie Feeds Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366966	Intelligent Alternatives Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366967	None							
366968	Mark Seaton Holdings Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366969	E Capstaff Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366970	Had Training Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366971	Augmentor Consulting Limited	Ltd	16-Oct-09	New	FALSE	0	0	1

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366972	MFG Cost Consultants Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366973	The Camp (Scotland) Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366974	Jabw Consulting Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366975	Chi Cube Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366976	Solutions Through Partnership Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366977	George A Adams Consultancy Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366978	Sakura Scotland Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366979	Primary Editions Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366980	BCB Engineering Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366981	Flooding Risk Assessments Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366982	Wi-Link Solutions Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366983	Kilt Station Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366984	Colin Logan Building Contractors Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366985	Brooks Consulting Solutions Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366986	Rocket Vintage Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
366987	Gunn Plumbing Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366988	Webtechglobal Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366989	Nationwide Debt Advisors Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366990	None							
366991	Scottish Latvian Foundation Limited	Limited by guarantee	16-Oct-09					
366992	Stratus Consultants Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366993	Giffnock News Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366994	GHD Interiors Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366995	KR (GB) Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366996	Sniper Exhausts Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
366997	Greig Avinou Travel Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
366998	None							
366999	John Douglas Training Consultants Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
367000	Ignite Solutions (UK) Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
367001	1st Pass Driving School Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
367002	McMullan Pubs Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
367003	None							

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367004	Eternal Power Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
367005	Balinakill Country House Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
367006	Go People Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
367007	None							
367008	None							
367009	Alba Photonics Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
367010	Clyde Instyles Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
367011	Leiojo Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
367012	None							
367013	Prima Blinds Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
367014	Studio Ecosse Limited	Ltd	16-Oct-09	New	FALSE	0	0	0
367015	Alliste Ltd	Ltd	16-Oct-09	New	FALSE	0	0	0
367016	None							
367017	D. Hume IT Support Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367018	None							
367019	None							
367020	Heavenly Beads Limited	Ltd	19-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367021	Rosebank Mobile Park Homes Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367022	None							
367023	Sun Invest International Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367024	Road Traffic Consultancy Ltd	Ltd	19-Oct-09	New	FALSE	0	0	0
367025	None							
367026	Mint Energy Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367027	Mile End Quarter Enterprise Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367028	Assured Micro Ltd	Ltd	19-Oct-09	New	FALSE	0	0	0
367029	Derjenn Consultancy Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367030	Online Law Scotland Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367031	Walk with Destiny Ltd	Ltd	19-Oct-09	New	FALSE	0	0	0
367032	Five Publishing Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367033	Lundin Links Hotel Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367034	Premier Hydroponics Limited	Ltd	19-Oct-09	New	FALSE	0	0	1
367035	None							
367036	None							
367037	A1 Chiro Ltd	Ltd	19-Oct-09	New	FALSE	0	0	0
367038	None							

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367039	Licence Holders Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367040	Willow Global Sourcing Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367041	None							
367042	None							
367043	New Link Right Trading Ltd	Ltd	19-Oct-09	New	FALSE	0	0	0
367044	FKS Business Services Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367045	Borr1 Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367046	Lime Chilli Media Ltd	Ltd	19-Oct-09	New	FALSE	0	0	0
367047	Jamber Limited	Ltd	19-Oct-09	New	TRUE	0	0	0
367048	Highland Electrical Services Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367049	None							
367050	Country Flavours (Alford) Ltd	Ltd	19-Oct-09	New	FALSE	0	0	0
367051	Secure Application Networks Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367052	Andrea Wood Transport Ltd	Ltd	19-Oct-09	New	FALSE	0	0	0
367053	Gyle Management Company Limited	Ltd	19-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367054	Barcode (UK) Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367055	Profactor Pharma Ltd	Ltd	19-Oct-09	New	TRUE	0	0	0
367056	Shewalton Fabrication Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367057	Clyde Storage Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367058	None							
367059	Carillon Audio Systems Ltd	Ltd	19-Oct-09	New	FALSE	0	0	0
367060	Active Online Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367061	Macleod Business Consulting Ltd	Ltd	19-Oct-09	New	FALSE	0	0	0
367062	Noshnoshnosh Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367063	None							
367064	Kerr Procurement Initiatives (KPI) Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367065	The Sweetie Bar Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367066	Pol-Scot Contracts Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367067	Lonico Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367068	Set Company Glasgow Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367069	Greenhill Renewables Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367070	Profesionail Services Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367071	Angela Doherty Sales Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367072	Love Cinnamon Limited	Ltd	19-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367073	None							
367074	HA Scotland Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367075	Vector BPM Focus Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367076	Fetal Screening Centre Scotland	Limited by Guarantee						
367077	KBB Scotland Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367078	Chocolate and Love Ltd	Ltd	19-Oct-09	New	TRUE	0	0	0
367079	CJackson2U Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367080	None							
367081	Strathaven Dynamos AFT Ltd	Limited by Guarantee						
367082	None							
367083	SDB Planning Service Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367084	None							
367085	None							
367086	Boyd Quality Control Services Limited	Ltd	19-Oct-09	New	FALSE	0	0	0
367087	Rod McKinnon Consultancy Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367088	None							
367089	Richman Kitchen Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367090	Orkmill Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367091	Engineering & Energy Investment Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367092	None							
367093	None							
367094	My Big Fat Greek Kitchen Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367095	None							
367096	RQT Precision Engineering Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367097	Sustainable Innovation Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367098	The Natural Fuel Company Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367099	UK Project Management International Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367100	Bl1nk Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367101	Carron Motor Company Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367102	Ciara Fabrications Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367103	City Motor Sales Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367104	None							
367105	FW Technology Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367106	TA Construction Services	Ltd	20-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367107	A2Z Electrical (Scotland) Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367108	Eyebright Limited	Ltd	20-Oct-09	New	TRUE	0	0	0
367109	Digitalmud Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367110	Farang Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367111	Frank Goodall Enterprises Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367112	M. Horsburgh Plumbing and Heating Services Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367113	Tried and Trusted Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367114	Lynda K. Hayter Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367115	Skills for Change Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367116	Smybiat Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367117	WJS Electrical Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367118	None							
367119	None							
367120	Breck Property Consultants Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367121	Lochglen Whisky Company Ltd	Ltd	20-Oct-09	New	TRUE	0	0	0
367122	Sim Nav Foods Limited	Ltd	20-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367123	None							
367124	Carrington Solutions (UK) Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367125	CDS Forwarding Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367126	Go Supplements Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367127	Hainey Engineering Service Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367128	Kennedy & Co Property Limited	Ltd	20-Oct-09	New	FALSE	0	0	1
367129	Perth Ironmongery Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367130	Wecomparesupplements Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367131	None							
367132	Birrell Electrical Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367133	Hillside Kendal Investments Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367134	Hot Audio Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367135	Independent One 2 One Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367136	K M Electrical Rope Access Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367137	Prop Properties Limited	Ltd	20-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367138	Drillsafe BP Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367139	Glasgow Regeneration Agency 2011 Limited	Limited by Guarantee						
367140	Charge Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367141	Major Building Services Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367142	None							
367143	None							
367144	None							
367145	SCW Cars Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367146	Aegon EDC Limited	Ltd	20-Oct-09	New	TRUE	0	0	1
367147	Amasha Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367148	Wireless Network Solutions Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367149	Hinge & Bracket Scotland Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367150	Miss Lee Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367151	T Kerr Consultancy Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367152	Allstars Boxing Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367153	Begley Consulting Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367154	Belac Limited	Ltd	20-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367155	G & A Distribution Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367156	CGL (Oban) Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367157	Hyphen Digital Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367158	MPA Plant & Vehicle Hire Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367159	Body Morph Fitness Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367160	Craig R Hogarth Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367161	Eagle Mill Capital Limited	Ltd	20-Oct-09	New	TRUE	0	0	0
367162	JAID Developments Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367163	None							
367164	Riniva Ltd	Ltd	20-Oct-09	New	FALSE	0	0	0
367165	None							
367166	Zest Lifestyle Management Limited	Ltd	20-Oct-09	New	FALSE	0	0	0
367167	Edinburgh Juice Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367168	Glenisla Hotels Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367169	Ralendrick Limited	Ltd	21-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Change d Articles Since?	Entrenchment	Director Powers	Director Removal
367170	Cluny Associates Limited	Ltd	21-Oct-09	New	TRUE	0	0	0
367171	Eighthplate Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367172	Seventhplate Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367173	None							
367174	None							
367175	None							
367176	None							
367177	2S Joinery Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367178	Saltire Taxis Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367179	Project Consultancy & Coaching Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367180	OLTP Systems Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367181	TS Print Solutions Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367182	None							
367183	None							
367184	None							
367185	None							

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367186	Majestic Miles Homes Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367187	Beijing Edinburgh Co Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367188	None							
367189	QCH Training Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367190	Novo Med Health Care UK Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367191	None							
367192	Enjoy Furniture Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367193	None							
367194	Azk Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367195	Craft World (Scotland) Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367196	None							
367197	Innes Access & Construction Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367198	Chase Telecom Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367199	The Hardwood Flooring Company Scotland Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367200	FG & Company Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367201	Amica (Scotland) Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367202	Beautique (Ellon) Limited	Ltd	21-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367203	Helix Well Ops Offshore Services Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367204	None							
367205	None							
367206	Rayyan Traders Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367207	Polar Weld Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367208	Eagle Contracts (Scotland) Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367209	TLC Distribution Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367210	Afton Glen Meats Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367211	None							
367212	Ramsay Associates Ltd	Ltd	21-Oct-09	New	FALSE	0	0	1
367213	None							
367214	Avon Homecare Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367215	Cameron & Co Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367216	Kingseat Consultants Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367217	Alpha Art Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367218	SME Law Limited	Ltd	21-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367219	Aable Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367220	Zenith Risk Management Ltd	Limited by guarantee						
367221	GN Salons Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367222	Anthony Godfroid Language School Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367223	IT Management Consultants Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367224	None							
367225	Gemini Internet Sales Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367226	Amarysso Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367227	Firash Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367228	None							
367229	Oilfield Enterprises Ltd	Ltd	21-Oct-09	New	TRUE	0	0	0
367230	Tomgov Property Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367231	Eve's Resources Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367232	Aegir Wave Power Limited	Ltd	21-Oct-09	New	TRUE	0	0	0
367233	None							
367234	None							
367235	Bowers Enterprises Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367236	R & T (Scotland) Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367237	Fluid Assets Ltd	Ltd	21-Oct-09	New	FALSE	0	0	0
367238	Relbeach Limited	Ltd	21-Oct-09	New	FALSE	0	0	0
367239	None							
367240	John Charles Enterprises Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367241	Rosehall Consulting Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367242	Knightsbridge Network Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367243	JL Ales Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367244	Aberfeldy Groundworks Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367245	Sangster Design Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367246	Wylline Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367247	Bargain Gift Centre Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367248	None							
367249	Oak Tree Loch Lomond Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367250	Global People Solutions Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367251	Curry Palace (Glasgow) Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367252	Camjack Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367253	Kingdom Energy Services (Consultancy) Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367254	Kingdom Energy Services Limited	Ltd	22-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367255	Ittou Services Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367256	Evision Business Solutions Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367257	Sound Arena Limited	Ltd	22-Oct-09	New	FALSE	0	0	1
367258	Doncourt Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367259	None							
367260	Ductwork Erection Services Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367261	JMD Commercial Development Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367262	Ayegear Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367263	Perth Station Taxis Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367264	Power Adapters UK Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367265	Window Vision Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367266	None							
367267	None							
367268	L and L Contracts Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367269	Experience4X4 Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367270	Patrick Cox Consulting Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367271	Kingdom Energy Services (Holdings) Limited	Ltd	22-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367272	Morrice Construction Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367273	The Glasgow Stove Company Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367274	None							
367275	None							
367276	Silk Consulting Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367277	ETL Pro Tiling Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367278	Impex Direct Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367279	None							
367280	McKinnon Associates Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367281	Luigi's Lazio Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367282	Tontine (Scotland) Ltd.	Ltd	22-Oct-09	New	FALSE	0	0	0
367283	Swiftalpha Solutions Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367284	Poplar Building & Drainage Supplies Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367285	C.M.I.S. Consultancy Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367286	The Recruitment Line Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367287	Commercial Laundry Service (C.L.S.) Limited	Ltd	22-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Change d Articles Since?	Entrenchment	Director Powers	Director Removal
367288	Ghana Renewables Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367289	North Berwick Highland Games	Limited by Guarantee						
367290	Parrot Trust Scotland	Limited by Guarantee						
367291	Kevin Campbell Golf Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367292	Money Puzzle Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367293	None							
367294	Graham Bell Timber Harvesting Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367295	Mijou Consultancy Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367296	Whitechester Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367297	Boston Telecom Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367298	Best Healthcare Consulting Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367299	ECO Exhibition Modules Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367300	Alanbeck Product Design Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367301	James Sherry (Funeral Directors) Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367302	Streaks Ahead Uni-Sex Salon Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367303	Dalriadian Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367304	Bright Care At Home Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367305	Clan Alba Products Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367306	Milne & Robson Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367307	None							
367308	None							
367309	None							
367310	None							
367311	West Developments (Scotland) Limited	Ltd	22-Oct-09	New	FALSE	0	0	1
367312	K. M. Consultants & Associates Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367313	Sanderson Publishing Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367314	None							
367315	P McMillan Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367316	Moark Limited	Ltd	22-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367317	CatherineH1590 Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367318	Inchyra Property Investments Limied	Ltd	22-Oct-09	New	FALSE	0	0	0
367319	J D McBurney Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367320	S & D Home Improvements Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367321	John Swan Transport Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367322	D1 Salon Ltd	Ltd	22-Oct-09	New	FALSE	0	0	0
367323	WJCM Service Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367324	Los Cardos Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367325	None							
367326	Dornie Consulting Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367327	Refrigeration Solutions (UK) Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367328	RPJ Wiseman Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367329	Salendrick Limited	Ltd	22-Oct-09	New	FALSE	0	0	0
367330	None							
367331	None							
367332	Doorstop (Glasgow) Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0
367333	DS Engineering Service Limited	Ltd	23-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367334	Carlton Joinery Products Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0
367335	Lanarkshire Inspection Services Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367336	Ice 24/7 Delivery Service Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367337	None							
367338	Dr A Baloch Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367339	None							
367340	Maccoll Design Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367341	Sticky Icky's Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0
367342	C&P Joiners Ltd.	Ltd	23-Oct-09	New	FALSE	0	0	0
367343	Glenn Buchan Engineering Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367344	Agripa Limited	Ltd	23-Oct-09	New	TRUE	0	0	0
367345	Aberdeen Blind Specialists Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0
367346	Huntershill Garden Centre Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367347	Roberton Solutions Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0
367348	None							
367349	Dread Services Scotland Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0
367350	Konishi Gaffney Architects Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Change d Articles Since?	Entrenchment	Director Powers	Director Removal
367351	U D Nwachukwu and Sons Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367352	The Wee Camper Company Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0
367353	Hozanna Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367354	None							
367355	Care Visions Asia Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0
367356	Merchant Commercial Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367357	Illetrop Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367358	Our Hydro Limited	Ltd	23-Oct-09	New	FALSE	0	0	1
367359	HNW Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367360	Lothian Shelf (674) Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367361	Lucky House Dundee Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367362	David McIntyre Photography Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367363	Neighbours Kitchen Dundee Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367364	None							
367365	None							
367366	Construction Surveying Limited	Ltd	23-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367367	None							
367368	Lo-Base Shoes Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367369	Stephen Joyce Consultancy Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0
367370	GSA Construction Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0
367371	L. R. Executive Travel Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0
367372	Envitech Europe Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0
367373	None							
367374	CCA Holidays Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0
367375	David Wood (Scotland) Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0
367376	None							
367377	EflooringUK Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367378	None							
367379	Scott Materials Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367380	Smarta Auto Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0
367381	None							
367382	None							

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367383	B & F Builders Company Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367384	None							
367385	Kenny Gibson Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367386	D W Mackay Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367387	None							
367388	None							
367389	None							
367390	INDNT Management Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367391	The Web Mill Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0
367392	UDNY Community Trust Company Limited	Guarantee						
367393	Queensferry Systems Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367394	Scotpak Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367395	Rowardennan Hotel Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0
367396	Artemis Financial Solutions Limited	Ltd	23-Oct-09	New	FALSE	0	0	0
367397	Toshiba Solutions Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367398	Litmus Strategy Ltd	Ltd	23-Oct-09	New	FALSE	0	0	0
367399	None							
367400	Eagle Contracting Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367401	Aerial Photography Solutions Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367402	None							
367403	Property Storage Services Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367404	Videowizards Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367405	CM Electrical (Scotland) Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367406	Event Den Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367407	None							
367408	None							
367409	Eco Project Management Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367410	UK Water Connection Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367411	UK Electricity Connection Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367412	SMS Data Management Limited	Ltd	26-Oct-09	New	TRUE	0	0	0
367413	Aston Prestige Ltd	Ltd	26-Oct-09	New	FALSE	0	0	1

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367414	None							
367415	None							
367416	The American School of Performing Arts Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367417	Bang The Drum Designs Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367418	Davidson Brothers Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367419	Verso Economics Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367420	K2L Limited	Ltd	26-Oct-09	New	TRUE	0	0	0
367421	Essential Document Control Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367422	Briarbrae Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367423	None							
367424	None							
367425	Lochside Electrical Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367426	Envirocrumb Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367427	G1 TLE Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367428	Harris Partners Limited	Ltd	26-Oct-09	New	FALSE	0	0	1
367429	Loch Lomond Brewery Limited	Ltd	26-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Change d Articles Since?	Entrenchment	Director Powers	Director Removal
367430	Piggot's Joinery Services Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367431	Thomson Rail Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367432	RKL Engineering Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367433	Lismore Property Limited	Ltd	26-Oct-09	New	TRUE	0	0	0
367434	EMEA Networks Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367435	SJJHScotland Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367436	Dolly & Mop Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367437	First-Dawn Consultancy Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367438	Chris's Crack Inspection Limited	Ltd	26-Oct-09	New	FALSE	0	0	1
367439	Proteus Dynamic Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367440	Woody's Flooring Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367441	AGM (UK) Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367442	Truly Independent Ltd	Ltd	26-Oct-09	New	TRUE	0	0	0
367443	Nairn Construction Solutions Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367444	Antonine Property Investments Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367445	Even Time Business Consultancy Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367446	None							
367447	Dowling Engineering Services Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367448	CRA Software Solutions Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367449	Arcadian Actuarial Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367450	None							
367451	Care Visions Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367452	Cowglen Sports Complex	Guarantee						
367453	Pint Sized Planet Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367454	KDL Enterprises Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367455	Daenku Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367456	None							
367457	HSL Solutions Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367458	John M Taylor (Paisley) Ltd	Ltd	26-Oct-09	New	TRUE	0	0	0
367459	Encyclopaedia Europaica Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367460	J M T Audit Ltd	Ltd	26-Oct-09	New	TRUE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367461	Martin Property Care Limited	Ltd	26-Oct-09	New	FALSE	0	0	1
367462	None							
367463	Kemba Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367464	Acumen Capital Enterprise Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367465	Philip Baxendale Employee Ownership Foundation	Guarantee						
367466	Coughtrie International Limited	Ltd	26-Oct-09	New	TRUE	0	0	0
367467	BK2 Ltd.	Ltd	26-Oct-09	New	FALSE	0	0	0
367468	Oakbank Property Management Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367469	PPPP Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367470	Glasgow Merchant Pubs (Property) Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367471	Tinto Park Moto Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367472	None							
367473	Kwik Construction Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367474	Ardencaple Trading Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367475	Evans Learning Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367476	E Gates Developments Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367477	Better Buffets Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367478	None							
367479	Collingwood Enterprises Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367480	None							
367481	SEC Consultants Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367482	Allegro (City) Limited	Ltd	26-Oct-09	New	FALSE	0	0	1
367483	None							
367484	Fairhill Cantonese Cuisines Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367485	Gemicon Group Limited	Ltd	26-Oct-09	New	FALSE	0	0	0
367486	Big Tree Campervans Ltd	Ltd	26-Oct-09	New	FALSE	0	0	0
367487	None							
367488	Strictly Aquatics Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367489	None							
367490	Green Highland Renewables (Achnacarry) Ltd	Ltd	27-Oct-09	New	TRUE	0	0	0
367491	Brooklyn Graphics Ltd	Ltd	27-Oct-09	New	TRUE	0	0	0
367492	Heating Scotland Limited	Ltd	27-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367493	Enefem Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367494	Eco Insolate Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367495	None							
367496	Alba Technologies Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367497	Tayside Investments Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367498	Top of the Mops All Trades Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367499	Jaman Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367500	Gain Projects Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367501	Susan Birrell Hair & Beauty Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367502	Mou Consultancy Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367503	GKR Engineering Solutions Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367504	Stepping Stones For Life (Tuition) Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367505	None							
367506	Nomad Beat Ltd	Guarantee						
367507	None							
367508	Jessops Electrical Services Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367509	GOST Electrical Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367510	Betsim Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367511	Abbey Electrical Stirling Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367512	Corinthian SRC Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367513	Berat (Forres) Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367514	BJD Marine Services Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367515	Deelaney Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367516	Wellvention Limited	Ltd	27-Oct-09	New	TRUE	0	0	0
367517	WGWS Realisations Limited	Ltd	27-Oct-09	New	TRUE	0	0	0
367518	Aquashield Thermal Coatings Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367519	None							
367520	McNeil Cleaning & Gardening Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367521	None							
367522	Modect Limited	Ltd	27-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367523	Eredene Infrastrcture Fund II Founder Partner GP Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367524	RHL 123 Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367525	None							
367526	Spirit Motortransport Limited	Ltd	27-Oct-09	New	TRUE	0	0	0
367527	Revere Scotland Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367528	Eurotrans 2 Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367529	BJS Associates Limited	Ltd	27-Oct-09	New	TRUE	0	0	0
367530	None							
367531	Dennison Fishing Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367532	Viacoss Management Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367533	Peace of Mind Counselling Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367534	None							
367535	South West Mechanical Services Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367536	Central Window Cleaning Company (Scotland) Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367537	C & C Construction (Carluke) Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367538	Watkins Draughting Limited	Ltd	27-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367539	Squeak Childcare Solutions Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367540	Ruby For Scotland Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367541	Halal Marketing Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367542	Hidden Highlands Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367543	Edinburgh Property Letting Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367544	Burnlake Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367545	VFM (Irvine) Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367546	None							
367547	Prophet Titanium No.1 Ltd	Ltd	27-Oct-09	New	TRUE	0	0	0
367548	Giarina Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367549	None							
367550	SF3076 Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367551	IGL Builders Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367552	Desmill Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367553	Blackview Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367554	None							
367555	None							

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367556	FM Promotions (Scotland) Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367557	None							
367558	None							
367559	Bullitt Music Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367560	Grange Contracts Scotland Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367561	Oakland Enterprises Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367562	Ross Craig Services Ltd	Ltd	27-Oct-09	New	FALSE	0	0	0
367563	Smart Metering Systems plc	plc						
367564	Abergamecom2 Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367565	Abergamecom1 Limited	Ltd	27-Oct-09	New	FALSE	0	0	0
367566	Tow Frame Recovery Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367567	None							
367568	Gordon Craig Associates Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367569	Gatica International Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367570	Lamberton Stores Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367571	Medley International Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367572	Hamilton Surveyors Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367573	None							
367574	None							
367575	None							
367576	Tech-Ord Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367577	Gwilt Consulting Limited	Ltd	28-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367578	None							
367579	Goretecs Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367580	Wallace Quinn Nominees Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367581	Argyll & Bute Environmental Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367582	Stobie Business Development Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367583	The Ferry MOT Centre Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367584	Angus Airport Travel Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367585	None							
367586	H V Robertson Electrical Services Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367587	Charly's Parlour Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367588	R Squared Design Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367589	J C C Cleaning Services Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367590	Loni Chambers Limited	Ltd	28-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367591	Fian Black Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367592	None							
367593	Queen Bee Baking Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367594	Hemi - P	Guarantee						
367595	MJC Projects Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367596	AGM Aerials Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367597	None							
367598	2 Install Furniture Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367599	Duncarron	Guarantee						
367600	Chatham House Equities Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367601	Mike Ward Associates Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367602	Artists Villages Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367603	Carlops Consulting Services Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367604	Fayre Trade Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367605	Bryon Callum Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367606	None							
367607	S & S Vehicle Repairs Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367608	None							
367609	None							

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367610	Summers Plumbing & Heating Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367611	None							
367612	Audi Technik Centre Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367613	Angies Express Taxi Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367614	Cambuslang MOT & Diagnostics Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367615	Swiftlink Oil & Gas Consulting Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367616	Resellerdirect Media Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367617	Gloucester Quays Foods Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367618	None							
367619	Buildtime Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367620	Price Properties (Scotland) Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367621	None							
367622	Alistair Corcoran (Builder) Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367623	Celtic Heart Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367624	Balog Computers Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367625	Kirkcaldy Auto Services Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367626	An Cafe Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367627	Campbell & Gibson Dental and Implant Practice Limited	Ltd	28-Oct-09	New	TRUE	0	1	1
367628	The Wee Deli Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367629	Hasan Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367630	None							
367631	Dragonfly Development Contracts Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367632	Emmer Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367633	PDR Building & Repair Services Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367634	Park Innovation Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367635	Mackenzie Harris Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367636	None							
367637	Ledgends Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367638	None							
367639	None							
367640	AES [Equipment Cleaning] Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367641	EJH Edinburgh Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367642	Ho Hoful Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367643	Upper Deeside Property Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367644	Flavell Steel Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Change d Articles Since?	Entrenchment	Director Powers	Director Removal
367645	Ignited Thought Ltd	Ltd	28-Oct-09	New	FALSE	0	0	0
367646	Maria's Cafe Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367647	Advanced Breathing Equipment Logistics Engineering Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367648	Splitsong Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367649	Beward of the Dogs Limited	Ltd	28-Oct-09	New	FALSE	0	0	0
367650	None							
367651	Tait Global Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367652	Mac3 Construction Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367653	Boylan Propertycare Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367654	Carlindean Equipment Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367655	Merlin Contracts (Scotland) Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367656	News Plus (Glasgow) Limited	Ltd	29-Jan-09	New	FALSE	0	0	0
367657	None							
367658	None							
367659	Brooks and Lyndhurst Ltd	Ltd	29-Jan-09	New	FALSE	0	0	0
367660	Feva Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367661	Things Made Out of Other Things Limited	Ltd	29-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367662	Renfer Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367663	HMS (798) Limited	Ltd	29-Oct-09	New	FALSE	0	1	1
367664	Glasgow Music Studios Limited	Ltd	29-Oct-09	New	FALSE	0	1	1
367665	Timeshare Options Limited	Ltd	29-Oct-09	New	TRUE	0	0	0
367666	Appin Engineering Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367667	Coliver Ltd	Ltd	29-Oct-09	New	TRUE	0	0	0
367668	Baz Mech Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367669	None							
367670	None							
367671	Andrew Lynch Antiques Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367672	Karick Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367673	Ironside Systems Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367674	None							
367675	None							
367676	Telephone Services International Corp. Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367677	Caledon Properties Limited	Ltd	29-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Change d Articles Since?	Entrenchment	Director Powers	Director Removal
367678	Brandon Trading Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367679	Eston Investments Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367680	Oakwood Out of School Care Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367681	Fenex Oilfield Services Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367682	Trac Advantedge Limited	Ltd	29-Oct-09	New	FALSE	0[862]	0	0
367683	Lao Wai Technology Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367684	Lumiradx Technology Ltd	Ltd	29-Oct-09	New	TRUE	0	0	0
367685	Building Specifications Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367686	B. C. S. Facilities Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367687	Leanmonth Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367688	Munro Bagger Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367689	Scot-Fit Mahes Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367690	None							

[862] This company purported to entrench an article of association in its incorporation form, but no such article was actually entrenched.

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367691	None							
367692	Fao27 Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367693	Mitchell Star Trading Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367694	Icoretec Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367695	J & D Joiners Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367696	Team Installation Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367697	HJL Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367698	International Go-Getters Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367699	None							
367700	None							
367701	None							
367702	Simpson Developments (Highland) Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367703	Youngs Global Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367704	SVR Consultants Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367705	North Star Electric Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367706	None							
367707	None							
367708	Earth Power Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367709	None							
367710	Clannach Limited	Ltd	29-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367711	Harry's Chippy Ltd	Ltd	29-Oct-09	New	TRUE	0	0	0
367712	Aberration Ltd	Ltd	29-Oct-09	New	TRUE	0	0	0
367713	None							
367714	Shandwood Eng Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367715	ACA Property Maintenance Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367716	Gigha Halibut III Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367717	Harper Facilities Services Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367718	Lisa Barclay Accountancy Service Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367719	Quantum Technical Solutions Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367720	GS Corporate Risk Services Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367721	Fast Sports Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367722	TRD Electrical Contracting Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367723	Cryo-Mac Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367724	L & M Transport (Motherwell) Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367725	Garnal Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367726	Drummond Civil Engineers Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367727	Apsis Solutions Limited	Ltd	29-Oct-09	New	TRUE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367728	Cabochon Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367729	Fabscots Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367730	None							
367731	L'eau Locale Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367732	Dryburgh Associates Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367733	Line Out Communications Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367734	Creative Contracts (Scotland) Ltd	Ltd	29-Oct-09	New	FALSE	0	0	0
367735	North East Motocross Limited	Ltd	29-Oct-09	New	FALSE	0	0	0
367736	None							
367737	Iqontact Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367738	S6S Suppliers of Natural Stone Limited	Ltd	30-Oct-09	New	TRUE	0	0	1
367739	HCP 1 (Glasgow) Limited	Ltd	30-Oct-09	New	TRUE	0	0	1
367740	Glencoe Mountain Experience Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367741	None							
367742	Capital PHC Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367743	Facilities and Project Management Solutions Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367744	MCA Interpreting Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367745	Crescent Print Edinburgh Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367746	Sky 2 Sea Expeditions Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367747	Jass Solutions Limited	Ltd	30-Oct-09	New	TRUE	0	0	0
367748	Better Business Health Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367749	Scots Reunited Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367750	None							
367751	M & C Reid Joiners Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367752	None							
367753	None							
367754	Kingdom Hydrophonics Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367755	The Trophy Centre (Glasgow) Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367756	Fitness and Wellness Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367757	The Salon Condorrat Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367758	Burns Outsourcing Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367759	AVW Autocentre Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367760	Waterside Fine Foods Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367761	Bowpark Exploration UK Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367762	Amcows 62 Limited	Guarantee						
367763	Speyside Property Services Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367764	Inspiration Window & Cleaning Services Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367765	Business Safety Support Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367766	Achieve Financial Planning Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367767	I Drive (GB) Limited	Ltd	30-Oct-09	New	FALSE	0	0	1
367768	Damside Garage Limited	Ltd	30-Oct-09	New	FALSE	0	0	1
367769	Barry's Mechanical Services Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367770	Almada Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367771	The Airlink Foundation Limited	Guarantee						
367772	Gem Building Contractors Limited	Ltd	30-Oct-09	New	TRUE	0	0	0
367773	Osito Nursey Limited	Ltd	30-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367774	None							
367775	None							
367776	Fluk Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367777	M&M Fire Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367778	Ukbargainstores Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367779	Bullinreich Trust Limited	Guarantee						
367780	S W Greenock Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367781	Apex Generators Limited	Ltd	30-Oct-09	New	TRUE	0	0	0
367782	Koala Clip Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367783	The Lobster & Ship Hotel Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367784	Evans Consultants Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367785	Thoben Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367786	Zino Projects Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367787	None							
367788	Alba Survey Solutions Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367789	Connect Language Academy Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367790	Stephen Ettles Joinery Limited	Ltd	30-Oct-09	New	FALSE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367791	Max Electronic Systems Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367792	Freeflow Powersports ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367793	Leslie Austin Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367794	Ferguson St Vincent (Glasgow) Limited	Ltd	30-Oct-09	New	TRUE	0	1	1
367795	None							
367796	None							
367797	K McKeown Buildings Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367798	None							
367799	Wrap N Roll (Dundee) Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367800	Forsa Energy Services Limited	Ltd	30-Oct-09	New	FALSE	0	1	1
367801	None							
367802	CCL Power Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367803	Thomson Roddick Scottish Auctions Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367804	Sketch (Scotland) Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367805	G. H. M. Electrical Services Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367806	Infokin Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367807	Marine Biopolymers Ltd	Ltd	30-Oct-09	New	TRUE	0	0	0

Company Number	Company Name (Latest)	Type of Company	Date of Incorporation	Incorporated in Old Form or New Form?	Changed Articles Since?	Entrenchment	Director Powers	Director Removal
367808	None							
367809	Salon Alternatives Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367810	European Grain Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367811	Music Dynamix Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367812	Electrical Maintenance and Installation Services Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367813	Jteleco Ltd	Ltd	30-Oct-09	New	FALSE	0	0	0
367814	Glasgow TV Productions Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367815	Stornoway Shipping Limited	Ltd	30-Oct-09	New	FALSE	0	0	0
367816	IT Global Support Limited	Ltd	30-Oct-09	New	FALSE	0	0	0

Table 2
Director Removal on Incorporation

Company Number	Purpose of Removal
366440	Unanimous director removal
366499	Repetition of statutory test only
366501	Repetition of statutory test only
366528	Repetition of statutory test only
366563	Unanimous director removal
366564	Unanimous director removal
366565	Unanimous director removal
366566	Unanimous director removal
366567	Unanimous director removal
366568	Unanimous director removal
366809	Repetition of statutory test only
366868	Repetition of statutory test only
366909	Notice of removal by majority
366918	Removal by specified shareholder and removal by other directors for cause
366940	Repetition of statutory test only
366943	Repetition of statutory test only
366971	Notice of removal by majority
367034	Repetition of statutory test only
367128	Repetition of statutory test only
367146	Notice of removal by majority
367212	Repetition of statutory test only
367257	Repetition of statutory test only
367311	Repetition of statutory test only
367358	Removal by specified shareholder and removal by other directors for cause
367413	Repetition of statutory test only
367428	Repetition of statutory test only
367438	Repetition of statutory test only
367461	Repetition of statutory test only
367482	Repetition of statutory test only
367627	Specified shareholders are able to remove directors appointed by them
367663	Removal by notice from majority (75%)
367664	Removal by notice from majority (75%)
367738	Notice of removal by majority
367739	Notice of removal by majority
367767	Repetition of statutory test only
367768	Repetition of statutory test only
367794	Removal by notice from majority (75%)

367800	Removal by notice from majority (75%)

Table 3

Sample Group Amendments

Company Number	Number of Post-Incorporation Amendments	Which amendment is this?	Entrenchment	Directors Powers	Director Removal
367055	2	2	0	0	1 (Cessation of employment or removal by appointer)
367442	1	1	0	0	0
367807	1	1	0	0	0
367108	1	1	0	0	0
367146	1	1	0	0	1 (Removal by notice from the majority shareholders)
367433	2	2	0	0	1 (Nominated directors representing certain classes can be removed by those classes)
366674	1	1	0	0	0
366593	1	1	0	0	1 (Nominated directors representing certain classes can be removed by those classes)
366595	1	1	0	0	0
367627	2	2	0	1 (Restricted actions by reference to a private shareholders' agreement)	1 (Nominated directors representing certain classes can be removed by those classes)
366564	1	1	0	1 (90% shareholder override)	1 (Unanimous director removal)
366566	1	1	0	1 (90% shareholder override)	1 (Unanimous director removal)
367121	1	1	0	0	1 (Individual has right to remove directors)
367491	1	1	0	0	0
366647	1	1	0	0	0

Company Number	Number of Post-Incorporation Amendments	Which amendment is this?	Entrenchment	Directors Powers	Director Removal
367738	2	2	0	0	1 (Notice of removal by majority)
367739	1	1	0	0	1 (Notice of removal by majority)
366463	1	1	0	0	0
366487	1	1	0	0	0
366510	1	1	0	0	0
366514	1	1	0	0	0
366583	1	1	0	0	0
366629	1	1	0	0	0
366755	3	3	0	0	1 (Repetition of statutory test only)
366792	1	1	0	0	1 (Nominated directors representing certain classes can be removed by those classes)
366894	1	1	0	0	0
366939	1	1	0	0	1 (Removal by directors for cause)
366960	1	1	0	0	0
367047	1	1	0	0	0
367078	1	1	0	0	0
367161	1	1	0	0	0
367170	1	1	0	0	1 (Notice of removal by majority of one class of shares)
367229	1	1	0	0	0
367232	1	1	0	0	1 (Nominated directors representing certain classes can be removed by those classes)
367344	1	1	0	0	0
367412	1	1	0	1 (90% shareholder override)	1 (Unanimous director removal)
367458	2	1	0	0	1 (Breach of private shareholders' agreement)
367460	2	1	0	0	0
367466	2	1	0	0	0
367490	2	1	0	1 (Restricted actions by reference to	1 (Nominated directors representing certain

Company Number	Number of Post-Incorporation Amendments	Which amendment is this?	Entrenchment	Directors Powers	Director Removal
				a private shareholders' agreement)	classes can be removed by those classes)
367526	1	1	0	1 (50% shareholder override)	1 (Notice of removal by majority shareholders)
367529	1	1	0	0	0
367547	1	1	0	0	0
367665	1	1	0	1 (90% shareholder override)	1 (Unanimous director removal)
367711	1	1	0	0	0
367712	1	1	0	0	0
367727	1	1	0	0	0
367747	1	1	0	0	0
367772	1	1	0	0	0
367781	2	1	0	0	1 (Nominated directors representing certain classes can be removed by those classes)
367420	2	1	0	1 (75% shareholder override)	1 (Notice of removal by 75% shareholders)
367794	1	1	0	1 (75% shareholder override)	1 (Notice of removal by 75% shareholders)
367517	1	1	0	0	1 (Nominated directors representing certain classes can be removed by those classes)
366425	1	1	0	0	0
366432	2	1	0	0	1 (Nominated directors representing certain classes can be removed by those classes)
366433	1	1	0	0	0
366427	1	1	0	0	0
366569	3	1	0	0	0
366562	2	1	0	1 (100% shareholder override)	1 (Notice of removal by 100% of shareholders)
366854	2	1	0	0	0

Company Number	Number of Post-Incorporation Amendments	Which amendment is this?	Entrenchment	Directors Powers	Director Removal
367516	2	1	0	0	0
367667	1	1	0	0	0
367684	1	1	0	0	0
366755	3	2	0	0	0
366755	3	1	0	0	0
366569	3	3	0	0	1 (Majority director removal)
366569	3	2	0	0	1 (Majority director removal)
367516	2	2	0	1 (100% shareholder override)	1 (Notice of removal by 100% of shareholders)
366854	2	2	0	0	0
366562	2	2	0	1 (100% shareholder override)	1 (Notice of removal by 100% of shareholders)
366432	2	2	0	0	1 (Nominated directors representing certain classes can be removed by those classes)
367420	2	2	0	0	1 Nominated directors representing certain classes can be removed by those classes)
367781	2	2	0	0	1 (Notice of removal by majority shareholders)
367490	2	2	0	1 (Restricted actions by reference to private shareholders' agreement)	1 (Nominated directors representing certain classes can be removed by those classes)
367466	2	2	0	0	1 (Notice of removal by majority)
367460	2	2	0	0	0
367738	2	1	0	0	1 (Notice of removal by majority)
367627	2	1	0	1 (75% shareholder override)	1 (Notice of removal by majority)
367433	2	1	0	0	1 (Nominated directors representing certain

Company Number	Number of Post-Incorporation Amendments	Which amendment is this?	Entrenchment	Directors Powers	Director Removal
					classes can be removed by those classes)
367055	2	1	0	0	1 (Cessation of employment or removal by appointer)
367458	2	2	0	0	1 (Breach of private shareholders' agreement)

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