Relates to director's competence in managing the company. Traditionally, the duty has been minimal - director is judged according to his own knowledge and experience:

Re City Equitable Fire Insurance Co Ltd (Case 83)

Re Brazilian Rubber Plantations & Estates (Case 84)

Dorchester Finance Co Ltd v Stebbing (Case 85)

More recent cases suggest a move to a tougher standard - the level of skill reasonably to be expected from a person undertaking the same duties.

Norman v Theodore Goddard (Case 86)

Re D'Jan of London Ltd (Case 87)

5. **Vacation of Office by Directors**

(a) Age

A director of a public company must normally retire when he reaches the age of 70, unless:

- Articles of the company provide otherwise, or

- Shareholders approve his continued appointment.

(b) Retirement under the Articles

Table A, Art 81 - a director must vacate office if:

- he becomes bankrupt or insane

- he becomes disqualified

- he is absent from board meetings for more than six months without permission.

Director can also resign by giving notice.

(c) Dismissal

CA 1985, s.303 - a director can be dismissed at any time by an ordinary resolution of the company - this cannot be overridden by the articles or director's service contract.

Special notice must be given of a resolution to remove a director and the director has the right to make representations at the meeting.

The articles may give a director's shares special voting rights - this may defeat the operation of s.303:

Bushell v Faith (Case 88)

IX. MAJORITY RULE AND MINORITY PROTECTION

The general rule in company law is that the wishes of the majority will prevail.

1. **The Rule in Foss v Harbottle**

Foss v Harbottle (Case 89)

When a wrong is done to a company, it is for the company to decide what action to take.

The courts will not usually hear an action brought by a member or members of the company.

(a) Reasons for the Rule

(i) The Proper Plaintiff Principle

The company is the proper plaintiff (pursuer) in any action to right a wrong against it.

(ii) The Internal Management Principle

The courts will not interfere with the internal management of a company. It is for the company to decide whether it is being properly managed.

(iii) Irregularity Principle

A member cannot sue to rectify a mere informality where the act would be within the company's powers if done properly and the wishes of the majority are clear.

(b) Problems with the Rule

The majority of shares often belong to directors.The majority are in the best position to prejudice the company - then decide that the company will not bring an action against them.

There is thus a need for minority protection - enforcement of minority rights falls into three main categories.

2. **Exceptions to the Rule in Foss v Harbottle**

(a) Preliminary Points

A number of matters must be established first:

(i) The company is entitled to the remedy - shareholder cannot have a wider right to bring an action than the company itself would have had.

(ii) It is not possible to petition under CA s.459 or IA 1986 s.122(1)(g) (these will usually be easier).

(iii)The action falls within one of the recognised exceptions to the Rule in Foss v Harbottle.

(iv) It is not possible to obtain authority to bring an action in the company's name (i.e. must show the company has decided not to sue).

(b) The Recognised Exceptions

Edwards v Halliwell (Case 90) identified four exceptions:

- Fraud on the minority by wrongdoers in control

- Invasion of members personal rights

- Ultra vires acts

- Material procedural irregularities

In reality, only the first of these is a true exception to Foss - the others are cases where the Rule has no application.

(i) Fraud on the Minority by Wrongdoers in Control

"Control" = voting control (50% + 1 vote) - but some suggestion that de facto control is enough:

Prudential Assurance v Newman Industries (Case 91)

"Fraud" = unconscionable use of majority power resulting in loss to or discrimination against the minority.

Negligence is not enough to amount to fraud:

Pavlides v Jensen (Case 92)

But "self-serving" negligence might be:

Daniels v Daniels (Case 93)

Oppression of the minority will be regarded as fraud:

Menier v Hooper's Telegraph Works (Case 94)

Cook v Deeks (Case 82)

Also conduct which is an abuse of majority powers:

Estmanco v GLC (Case 95)

(ii) Invasion of Personal Rights

Invasion of the shareholder's personal rights is not really an exception to the rule in Foss v Harbottle - because the shareholder would be the proper person to bring the action:

Wood v Odessa Waterworks Co (Case 47)

Salmon v Quinn & Axtens Ltd (Case 51)

(iii) Illegal or Ultra Vires Acts

Any shareholder is entitle to bring an action to restrain the company from doing something which is outside the company's objects.

(iv) Material Procedural Irregularities

General rule that the courts will not interfere with the internal management of a company when an action is brought by a shareholder does not apply if the act done by the company was one which required a special majority which was not obtained.

If this exception did not exist, the company would be able to act in breach of its own constitution.

Edwards v Halliwell (Case 90)

3. **Unfairly Prejudicial Conduct**

(a) Companies Act 1985 s.459

This allows a shareholder to petition the court where the company is being managed in a way that is unfairly prejudicial to the interests of some of the members. (but only to his interests in his capacity as a member).

(b) Meaning of "Unfairly Prejudicial"

The Act does not define this, but:

(i) Test is concerned with effect of conduct, not motive:
Re Bovey Hotel Ventures Ltd (Case 96)
(ii) The conduct must be both unfair and prejudicial.
Re Saul Harrison & Sons plc (Case 97)
(iii) The words are flexible in meaning.

(c) Clean Hands

No bar to petition that the pursuer's own conduct has not been beyond reproach - no requirement for "clean hands".

Re London School of Electronics (Case 98)

(d) Irregularity Principle

The court will not hear a petition under s.459 brought on the basis of a procedural irregularity that could easily be rectified. (As in Browne v La Trinidad (Case 66) and Bentley Stephens v Jones (Case 67))

(e) Grounds for a s.459 Petition

(i) Exclusion from Management

Dismissing a member of a quasi-partnership from the office of director may amount to unfairly prejudicial conduct:

Re a Company (Case 99)

Re Ghyll Beck Driving Range Ltd (Case 100)

(ii) Diversion of Business

Where majority diverts business of the company elsewhere to benefit the majority but prejudice the minority.

Re London School of Electronics Ltd (Case 98)

(iii) Non-Payment of Dividends

Majority pay themselves high directors' salaries but the company pays no or very low dividends.

Re Sam Weller & Sons Ltd (Case 101)

(iv) Dilution of Minority

Majority allots shares to dilute percentage of shares and thus voting power held by minority.

Re D & R Chemicals Ltd (Case 102)

(v) Serious Mismanagement

Bad management would not normally be grounds for a s.459 petition - but there is some suggestion that it might be if serious enough:

Re Elgindata Ltd (Case 103)

Limits to the s.459 petition:

The concept that members have a legitimate expectation that the company will be run in a was that differs from the articles of association will not normally apply to a public company:

Re Astec BSR plc (Case 104)

The concept that breach of a legitimate expectation could give rise to a petition based on s.459 was given a more restricted interpretation by the House of Lords in:
O'Neill v Phillips (Case 105)

(f) Remedies

The court has wide discretion - it can grant any order it thinks fitting in the circumstances. In particular, it can:

- regulate the future affairs of the company.

- order the company to bring civil proceedings.

- order the purchase of the aggrieved shareholder's shares. (The most common remedy).

4. **Just and Equitable Winding Up**

Insolvency Act 1986, s.122(1)(g) - a company may be wound up by the court if the court is of the opinion that this would be just and equitable.

(a) Locus standii (Who can petition)

Any shareholder provided he has had his shares for at least 6 months during the eighteen months prior to bringing the petition, or have inherited them, or have obtained them by direct allotment from the company.

(b) "Just and Equitable"

This is not defined by the Act - the courts have described it as a broad and flexible concept. "Clean hands" are essential for a s.122(1)(g) petition.

(c) Grounds for Granting the Petition

(i) Breakdown of Mutual Trust and Confidence

Most s.122(1)(g) petitions are brought by members of quasi-partnerships. Court will probably grant the petition if it is evident that the members have lost confidence in each other and can no longer work together:

Re Yenidje Tobacco Co Ltd (Case 106)

(ii) Exclusion from Management

This also applies only to quasi-partnership companies, where the members have a legitimate expectation of taking part in the management of the company.

Ebrahimi v Westbourne Galleries Ltd (Case 107)

(iii) Lack of Probity of Directors

Where shareholders have joined a small family company or quasi-partnership on the basis that it will be managed in a certain way and this has not been done, the petition may be granted where the shareholders have lost confidence in the management.

Loch v John Blackwood (Case 108)

Jesner v Jarrad Properties Ltd (Case 109)

The court is unlikely to grant a winding up order if the petitioner could have had an equally viable remedy under s.459. Winding up is a drastic remedy.

(d) Effect of Presentation of Petition

(i) Presentation of the petition freezes the companies affairs while the matter is decided.

(ii) The company can apply for a validating order, which will allow it to carry in business pending a decision.

(iii) The company can take out a cross-undertaking for damages against the petitioner - the petitioner would then be liable for any loss suffered by the company because of the petition if the petition eventually fails.