

Protection for Minority Shareholders – Courts Prepared to Shift the Balance of Power

Under the typical Limited company constitution a minority shareholder has a very restricted ability to exert any influence over the Board of Directors. This is so even if the minority shareholding is very substantial such as 49.96%.

However minority shareholders have for a long time had the ability to complain to the Court that the Company's affairs are being conducted in a manner that is "unfairly prejudicial" to the interests of the members of the company generally or some part of those members.

It might be thought that an "unfair prejudice" claim is an arcane and cumbersome mechanism for minority shareholders to obtain redress where the company is being significantly mis-managed. However in a number of recent cases the Courts have made it clear that they are prepared to be flexible in the exercise of their powers to provide redress, so that the remedy is now available in a wide range of circumstances.

In order to bring a claim for unfair prejudice the minority shareholder must show that the affairs of the company have been conducted in an unfairly prejudicial manner, or that an actual or proposed act or omission of the company is or would be prejudicial.

The Courts have made it clear that the unfair prejudice remedy has an "elastic" quality that enables the Court to mould the concepts of unfair prejudice according to the facts of each case. Accordingly the Court will be flexible as to the nature and extent of the mis-management that is required in order to show that a remedy should be granted.

A further example of the Courts' flexibility when approaching an unfair prejudice claim is that there are few limits on the type of party that can be a target for the claim. Recent cases have demonstrated that the claim can be brought against:

- Current members of the company
- Former members
- Non-members
- Non-shareholding Directors
- Third parties

where they are responsible for the unfairly prejudicial conduct, have knowingly received a benefit resulting from the conduct, or they have given improper assistance to it.

The Court will also be prepared to allow a claim to proceed against a non-member if it is clear that the party was concerned in the acts complained of, or if that party is likely to be affected by the remedy that the minority shareholder is seeking.

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In addition, the remedies that the Court can order are flexible and have not been exhaustively defined by legislation (the Companies Act 2006). This means that for example it is open to the Court to make an order that the party who has caused or assisted in the mis-management of the company's affairs must pay damages to the company as compensation for the resulting loss. Similarly, where the Court decides that the appropriate remedy is for the minority shareholder's shareholding to be bought out, the Court can order that non-members are required to buy the shares.

In summary, the flexible approach taken by the Courts means that an unfair prejudice claim can in fact be a highly practical and effective form of redress for aggrieved minority shareholders.

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