

Shareholder Remedies

There are two distinct ways shareholders have their interests protected. Firstly, minority shareholders are protected in the overall conduct of the company through equitable restraints on the majority voting power in a general meeting. Secondly, individual shareholders are afforded remedies in common law and through statute to vindicate their rights vis-à-vis the rights of the company's controllers.

Equitable Limitations

Sometimes the 'tyranny of the majority' in a company damages the interests of other shareholders. This can occur in a number of situations:

- when the directors make an appropriation of corporate property or rights;
- where the general meeting is unwilling to sue and is controlled by wrongdoers;
- when there is an alteration of the company constitution; and
- when the directors do not act in good faith

Under the general law, in these situations the general meeting may be able to commence proceedings, or an individual shareholder may bring an action to vindicate the interests of the company. Recently, the *Corporations Law* has expanded the ways shareholders can bring individual actions.

The Statutory Remedy for Oppression

The oppression remedy in Pt 2F.1 of the *Corporations Law* has been expanded to provide wide grounds of relief.

Where the conduct of the company is oppressive, unfairly discriminatory or unfairly prejudicial, a shareholder has a legitimate foundation for complaint. The statutory concern is directed to instances or courses of conduct amounting to an unjust detriment to the interests of a member or members of the company. It follows that it is not necessary for a complainant to point to any actual irregularity or to an invasion of his legal rights or to a lack of probity or want of good faith towards him on the part of those in control of the company.¹

The operation of Part 2F.1 may be attracted to a decision made by directors which is made in good faith for a purpose within the directors' power but which reasonable directors would think to be unfair. The test of unfairness is objective and it is necessary, though difficult, to postulate a standard of reasonable directors possessed of any special skill, knowledge or acumen possessed by the directors. It is also relevant to consider the size of the company and the duties the company's constitution sets out for the director.

The court has broad powers to make orders in response to a shareholder who has suffered oppression. Section 233 of the *Corporations Law* lists the range of orders which may be sought. The Court can: wind up the company, modify or repeal the company's constitution, regulate the future conduct of the company, or appoint a receiver to any or all the company's property.² So broad are the powers of the court, that in *Re Spargos Mining NL* (1990) 3 ACSR Murray J ordered the replacement of the elected board of Spargos, with a board of his own choosing.

Compulsory Liquidation Remedies

In the compulsory liquidation remedy the court can order winding up of the company if:

- the court is of the opinion that it is just and equitable that the company be wound up (s 461(k)).
- affairs of the company are being conducted in a manner that is oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member, or is contrary to the interests of the company as a whole (s 461(f)).

¹ *Thomas v HW Thomas Ltd* (1984) 2 ACLC 610

² This list is not conclusive

- directors have acted in affairs of the company in their own interest rather than in the interests of the members as a whole, or in any other manner whatsoever that appears to be unjust or unfair to other members (s 461(e)).
 - an act or omission, or proposed act/omission, by or on behalf of the company, or a resolution or proposed resolution of a class of members of the company, was or would be oppressive or unfairly prejudicial to, or unfairly discriminatory against, a member, or members or was (or would) be contrary to the interests of the members as a whole (s 461(g)).
- the particular section the offensive conduct relates to.
- Negotiation between parties with differing interests should be fostered wherever possible and actions in court should be a last resort.

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Where the company has abandoned its main objects, or has entered upon activities beyond the general intentions of its incorporators (this is called failure of substratum), the court may order winding up of the company under the just and equitable ground (as mentioned above). The just and equitable clause enables a shareholder to have a liquidator (under court supervision) investigate, recover company property and distribute any surplus among members. Sometimes this has only a marginal advance over the situation of the minority, so the court has the power for wider orders under the oppression remedy.

It may be that the just and equitable ground is an essential remedy only in instances of irreconcilable differences between the parties. Before the court makes an order under the just and equitable clause, they adjourn and this allows the parties to reach a compromise before the final order is given. This is because the court is extremely reluctant to wind up a solvent company.

Where a shareholder petitioning for a winding up order on the just and equitable ground or under s 461(k) is also entitled to relief by some other means and is acting unreasonably in not pursuing that alternative remedy, the petitioner loses his or her entitlement to a winding up order: s 467(4).

Conclusion

Shareholders have a number of options to choose from when they have experienced oppressive or unfair conduct by the company or its directors. They include orders to wind up the company, appoint a receiver to the company, and restraining a person from doing an act, or requiring a person to do an act. The most important factor the court looks to is fairness. This involves weighing the conflicting interests of different groups within the company. It is a matter of balancing all the interests in terms of policies underlying the *Corporations Law*, and

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