FEBRUARY 2021

UPDATE

Unfair Prejudice: To buy-out or not to buy-out, that is the question (for the Judge's discretion)

Update prepared by Eleanor Morgan (BVI), Justine Lau (Hong Kong) and Jennifer White (Hong Kong)

The types of remedies that should be granted in a shareholder dispute was the main issue for determination in *Ming Siu Hung & Ors v JF Ming Inc and another*,[1] which arose in the context of an unfair prejudice claim in the British Virgin Islands (the **BVI**).

At first instance, the BVI High Court (the **High Court**) was satisfied that there had been unfairly prejudicial conduct by the majority shareholder and granted a buy-out order. The Court of Appeal (the **ECCA**) reversed the High Court's buy-out order but upheld the findings of unfairly prejudicial conduct. The Privy Council reversed the findings of the ECCA and, holding that a buy-out order was appropriate in the circumstances, it criticised unnecessary appellate interference with the discretion of first instance judges. When a finding of unfair prejudice is made, judges have very broad discretion to determine what relief is suitable and this discretion should not be interfered with.

Introduction

Section 184I of the BVI Business Companies Act, 2004 (the **Companies Act**) is a statutory remedy aimed at protecting minority shareholders from oppressive behaviour by the majority. It allows a shareholder who considers that the affairs of the company have been, are being or are likely to be, conducted in an oppressive, unfairly discriminatory or unfairly prejudicial way to apply to the High Court for relief.

In considering what is unfairly prejudicial, the High Court will carry out an objective test and examine a number of matters including a company's memorandum and articles of association (**M&A**), any shareholders' agreement, what the parties agreed when they became shareholders, the circumstances surrounding the conduct complained of and the general behaviour of the parties. There are various remedies available which include ordering that the company or another person purchase the minority shareholder's shares (known as a 'buy-out order'), regulating the future conduct of the company's affairs, appointing a receiver or liquidator to the company, or requiring compensation to be paid. See our guide on shareholders rights and remedies under BVI law here.

Background to the Ming Dispute

The Appellants were three siblings in the Ming family who, along with a number of other siblings including the Respondent, were shareholders in a BVI company (the **Company**). The Company was established by their late father, a wealthy Hong Kong property developer. Save for the Respondent, all other siblings (the **Siblings**) had been given 1,000 shares in the Company. The Respondent, however, had been given an additional 10,000 shares (the **Share Transfer**) because he had helped build up the business, which the Siblings only discovered when they sought to take over the Company after their father's passing.

[1] [2021] UKPC 1.

Protracted litigation ensued in Hong Kong when the Siblings challenged the validity of the Share Transfer, which the Respondent claimed was a gift, and the matter ended up before the Hong Kong Court of Final Appeal in 2006. Ultimately, the Respondent succeeded in that appeal and was successful in securing his position as majority shareholder of the Company.

The BVI Litigation

Background

Litigation in the BVI arose when, following his resumption of Company control in 2006, the Respondent refused to provide the Appellants with financial information in breach of article 120 of the Company's M&A. The Appellants did nothing about this until 2013, when one of them was considering selling her shares to the Respondent. In 2014, the Appellants sought financial information under threat of proceedings but the Respondent used his majority shareholding to pass resolutions waiving the Appellants' entitlement to such information, both past and future, under the M&A (the **Resolutions**).

The Appellants petitioned under section 184I seeking (i) the financial information, and (ii) that the Resolutions be set aside. They claimed that the Respondent had conducted the affairs of the Company in an oppressive, discriminatory and unfairly prejudicial manner to them as shareholders. The Respondent argued that because the Appellants had not worked for the shares, they could not expect any monetary return and thus there was no need for them to have financial information. The Respondent also claimed that the Appellants had waived their rights to financial information based on their delay in requesting it. By way of amended pleadings, the Appellants also alleged financial misconduct by the Respondent prior to 2006 and sought a buy-out of their shares.

The Court of First Instance

In 2016, Leon J in the High Court found that the Respondent had acted in an oppressive, discriminatory and unfairly prejudicial manner to the Appellants as shareholders within the meaning of s.184I of the Companies Act and he ordered that the Respondent buy the Appellants' shares in the Company at a price to be determined by the court (the **Buy Out Order**). Leon J was of the view that the Respondent's persistent refusal to provide financial information and the passing of the Resolutions was done for the improper purpose of benefitting himself and amounted to unfairly prejudicial conduct that was contrary to public morality.

Leon J considered that, on the facts before him, he had a broad discretion to apply a remedy that would either compel the Respondent to provide the information or one which, in addition, would deal fully with what he found would be a likely continuation of unfair prejudice against the Appellants. The best that could be achieved was therefore a buy-out of the Appellants' shares. Leon J's reasoning was based on *inter alia* the Respondent's (i) recurrent oppressive, unfairly discriminatory and unfairly prejudicial conduct, (ii) misguided beliefs on shareholders' rights, (iii) hardball tactics, and (iv) unjustifiable failure to provide financial information.

The Court of Appeal

The Respondent appealed Leon J's order to the ECCA and was successful in having the Buy-Out Order set aside.[2] However, the ECCA upheld Leon J's findings of unfairly prejudicial conduct and the first instance order that the Appellants' rights to information in the M&A be fully reinstated and the financial information provided. Setting aside the Buy-Out Order, the ECCA considered that it was appropriate to exercise remedial discretion afresh because Leon J had erred in his reasoning for failing to take into account certain aspects of the Appellants' conduct in the context of choosing the appropriate remedy (e.g. the Appellants' alleged financial misconduct whilst briefly in control of the Company and their delayed complaints about not receiving the financial information). The ECCA was therefore of the view that it was entitled and obliged to exercise fresh discretion and thus review the exercise of Leon J's discretion.

The matter was referred to the Privy Council by the Appellants to consider whether there were, in fact, errors in Leon J's reasoning. If not, the ECCA should not have re-exercised the discretion as to remedy and the Buy-Out Order should stand.

[2] By Blenman, Webster and Gonsalves JJA.

The Privy Council

The Privy Council (the **Board**) examined section 184I insofar as it expresses what the remedy for unfairly prejudicial conduct is. This remedy, which is similar to the remedy in the UK, is also different in two respects: (i) it includes conduct which is oppressive or discriminatory rather than just unfairly prejudicial, and (ii) it describes the very wide discretion as to remedies which requires that the chosen remedy must be one which the court thinks is just and equitable to grant. Whilst the Board held that requirement (i) was not relevant to the present case because Leon J was satisfied that the Respondent had engaged in each type of conduct, there was an additional element added to requirement (ii) that the remedy be 'equitable' (noting that it is implied that a remedy will be 'just').

At the remedy stage, it was agreed that a court is entitled to have regard to any factual aspect regarding the history of the company and the shareholders' relationship with each other and with directors. In relation to the choices to be made in the exercise of discretion, the Board said nothing was 'off limits', subject only to the tests of relevance and weight. In addition, a court should look to what might happen in the future and not just at past events or behaviour.

The Board cited *Grace v Biagioli*,[3] in which Patten J said '*...once unfair prejudice is established, the court is given a wide discretion as to the relief which should be granted.... the court has to look at all the relevant circumstances in deciding what kind of order it is fair to make. It is not limited merely to reversing or putting right the immediate conduct which has justified the making of the order*'.[4]

The Board noted that, in *Grace v Biagioli*, Patten J commented that a buy-out order is usually the most appropriate (and common form of) remedy, and he also cited (i) Oliver LJ *In Re Bird Precision Bellows Ltd*[5] who held that the appropriate remedy for unfair prejudice is one which would '*...put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company*' and (ii) Lord Hoffman in *O'Neill v Phillips*[6] who said '*...there is no room for a no fault divorce, nothing less than a clean break is likely in most cases of proven fault to satisfy the objectives of the court's power to intervene*'.

The Board held that these principles 'chimed' with Leon J on the facts and it did not see any useful purpose in seeking to resolve the difference about the types of cases in which a buy-out order has become the usual remedy. If a buy-out order has become widely used, it will be because of the particular facts of a large number of cases make it the most appropriate remedy in each of them. The Board also said '*...at the highest, it may be said that it would usually be an uphill struggle for an appellate court to conclude that such a remedy... was out of the reasonable confines of a discretionary judicial response to the facts*'.[7] This, however, was not how the ECCA had approached the present case.

With regard to the ECCA's view that Leon J had ignored important facts, the Board said that whilst the conduct of an applicant is a factor of infinitely variable weight, on a scale from decisive to bearing no weight at all, where it lies on that scale is a matter for the (first instance) judge. The Board highlighted the constraints on the appellate jurisdiction when asked to re-exercise discretion conferred on a first instance judge. These constraints ensure that the benefit of finality is not unduly rendered ineffective by appellate interference. As stated in *Fage UK Ltd v Chobani UK Ltd*[8] '*The trial is not a dress rehearsal. It is the first and last night of the show*'. If an appellate court is asked to review the decision of a trial judge (who, having considered all facts and disregarded the irrelevant ones) based on the exercise of discretion, the review of the appellate court will be benign.

Bearing that appellate restraint in mind (which affects both the Board and the ECCA), the Board turned to the two issues that the ECCA claimed Leon J had left out of account and found that Leon J had, in fact, considered the two issues but had decided not to give them any weight on the question of remedies, as he was entitled to do. The ECCA's view was that because Leon J had erred in principle and exercised his discretion improperly, it had to exercise discretion afresh. However, the Board held that the ECCA's criticism

---

[3] [2006] 2 BCLC 70 at [26].

[4] *Ibid* at [73].

[5] [1985] BCLC 493.

[6] [1999] 1 WLR 1092.

[7] At [17].

[8] [2014] EWCA Civ 5.

of Leon J did not stand and a view that a judge should have given 'more weight' to a matter was not within the scope of appellate review. Matters of weight were matters for a trial judge. On the basis that there had been no demonstration of a need for appellate intervention, the Board upheld the appeal and reinstated the Buy-Out Order.

Conclusion

The decision of the Board serves as another useful reminder that appellate courts should be circumspect in overturning a first instance judge's exercise of discretion (see our update on *Chu v Lau* here, which addresses a similar point). In cases of unfair prejudice, once the court is satisfied that unfairly prejudicial conduct has occurred, it has a very broad and unfettered discretion as to what relief should be granted.

Contacts

Eleanor Morgan
Partner, Mourant Ozannes
British Virgin Islands
+1 284 852 1712
eleanor.morgan@mourant.com

Justine Lau
Partner, Mourant Ozannes
Hong Kong
+1 852 3995 5749
justine.lau@mourant.com

Jennifer White
Senior Associate, Mourant Ozannes
Hong Kong
+852 3995 5747
jennifer.white@mourant.com

2021934/79 99 2 46 6/1