Article

Privy Council Emphasizes the Primary Role of the Trial Judge as the Decision-Maker in Shareholders' Disputes – the Scope for Appellate Intervention is Limited.

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Summary

In the context of an unfair prejudice claim, the Privy Council recently overturned the decision of the Eastern Caribbean Court of Appeal and restored the decision of Leon J. of the Commercial Court of the British Virgin Islands, in effect ordering a mandatory buy-out, at a price to be determined by the court, of minority shareholdings by the majority shareholder whose acts were found to be oppressive, unfairly discriminatory and unfairly prejudicial to the minority, pursuant to section 184I of the BVI Business Companies Act. The Privy Council (per Lord Briggs) took the view that unless the trial court had taken into account factors that it should not have taken into account, or omitted to consider ones that should have been assessed, the hands of appellate judges are necessarily tied and can only interfere to correct errors of law or an irrational decision. The criticisms against undue appellate activism reinforce that discretionary decisions of trial judges in shareholders disputes will likely be endorsed or upheld in the end, so long as the decision is one that is within the parameters of a just and equitable judicial response to the facts.

Background

These proceedings comprised an unfair prejudice claim. The three Appellants and the Second Respondent ("**Mr Ming**") are siblings who fell out with each other since the 1970s and had a long history of disputes between them in relation to J.F. Ming Inc., the First Respondent, incorporated in the British Virgin Islands by their late grandfather as a holding company for a successful business in property development and leasing. The Appellants are minority shareholders; Mr Ming is a majority shareholder. Since the siblings' long and bitter litigation in Hong Kong concluded in May 2006 with a decision from the Court of Final Appeal made in favour of Mr. Ming, he has been in control of and in charge of J.F. Ming Inc. as its sole director.

J.F. Ming Inc., under the management of Mr Ming, had not provided financial statements to the Appellants for 8 consecutive years since May 2006, despite a requirement under the Articles of the company requiring them to be provided. There were no efforts on the part of the Appellants to obtain financial information during the 8 years. The very first general request for financial information was made casually over dinner by the Second Appellant in November 2013. It was not until March 2014 that one of the Appellants formally requested in writing for the financial statements to be provided pursuant to the Articles, and that request was made in order to negotiate a possible buy-out of her shares. In response to the request, Mr. Ming, using his majority votes, passed a members' resolution in April 2014 to prospectively and retrospectively waive the requirement for production of financial information as stipulated in the Articles (the "**Resolution**"). As a result, the Appellants commenced a claim in the BVI Commercial Court in May 2014 asserting that pursuant to section 184I of the BVI Business Companies Act, the resolution passed was oppressive, unfairly discriminatory and unfairly prejudicial to them as minority members of J.F. Ming Inc.

The cornerstone of the Appellants' case was the non-provision of financial information since May 2006, but their case extended to the way how Mr. Ming conducted the affairs of J.F. Ming Inc., including assertions that no dividends were declared, as well as other matters ranging from old to recent.

Initially, the relief sought by the Appellants was for financial information to be provided. The claim was amended very belatedly, shortly before trial started, to include, as a primary remedy, the extended relief of a buy-out of their minority shares in J.F. Ming Inc. Mr. Ming's position was that a Court-ordered buyout would be disproportionate and that even if unfair prejudice were to be found, an order for provision of financial information would be the appropriate relief, being the relief originally sought by the Appellants in this litigation.

Decision of Trial Judge at the BVI Commercial Court

The trial on liability and the form of remedy took place over seven days from 2015 to 2016, following which the trial judge, Leon J., found that the minority have made out their unfair prejudice claim. He showed significant sympathy towards the minority for their delay in demanding the financial information: *"It seems understandable that following the years of bitter litigation in Hong Kong, and the animosity between [them], [they] did not actively seek the financial information when [Mr. Ming] failed to provide them… In light of the bitter history, the Claimants cannot be faulted for not pressing for Financial Statements after [Mr. Ming] became the sole director in May 2006".* Leon J. rejected by submissions by Mr. Ming's counsel that the inaction amounted to a waiver of their rights to financial information; and held that the failure to provide financial information was oppressive, unfairly discriminatory and unfairly prejudicial to each of the Appellants in their capacities as members of the company.

Leon J. ordered Mr. Ming to provide the financial statements from the year 2006 onwards and for each year thereafter, but he considered that this being an order regulating future conduct of the company's affairs would be insufficient to remedy the unfair prejudice, or deal fairly with the situation which has occurred. In his words, *"neither the Court nor the parties have unlimited resources to deal with the inevitable disputes that will arise".* Given there is a complete breakdown of relationship and a long history of unfair prejudice, and the minority' lack of trust and confidence in Mr. Ming's future management of the company, he held the fairest and most sensible resolution must include a Court-ordered buy-out of the minority's shareholding so that there is a reasonably clean break. The further ordered the Resolution be set aside, and part of the Articles to be deleted to remove the possibility of any future waiver by Mr. Ming to provide financial information to the minority.

Decision of the Eastern Caribbean Court of Appeal

The major issue raised in the appeal was whether the trial judge exercised his discretion properly in ordering the buy-out as the main remedy.

The Court of Appeal took the view that a claim in unfair prejudice could not have been properly founded until the minority specifically requested that financial information be provided. Further, the Justices considered that the trial judge failed to take into account two aspects: firstly, the Appellants' prolonged failure to request information during 2006 to 2013; and secondly, their financial misconduct while briefly in control of the company, as material factors in his determination of the appropriate remedy. The Court of Appeal considered that the justice of the case did not warrant the making of a mandatory buy-out order; and the buy-out order was draconian and disproportionate to the wrongs committed. Since the trial court committed an error of principle, the Court of Appeal exercised the discretion afresh taking into account the totality of the circumstances, and held that an order requiring Mr. Ming to provide financial information was more appropriate and proportional.

The Privy Council's decision – To buy-out, or not to buy-out?

At the outset, the Privy Council defined the short question that is decisive of the appeal as this: whether the trial judge indeed made the errors identified by the Court of Appeal. If not, then the discretion as to remedy simply ought not be re-exercised.

In the end, the Lordships exercised appellate restraint and constraint. They considered that the Court of Appeal's criticisms of Leon J's reasoning in his exercise of discretion did not withstand analysis. At the remedy stage, the Court is entitled to have regard to any aspect of the facts as found, whether pleaded or unpleaded, about the history of the company, the relationship between the shareholders and directors, the realities and practicalities of the overall situation etc. Nothing is off-limits, subject only to the twin tests of relevance and weight. The Privy Council confirmed the prospective nature of the trial judge's jurisdiction by acknowledging that the trial court is entitled to look not only to the past, but also to what is likely to happen in the future.

Paragraph 20 of the dictum of Lord Briggs, which endorses the colorful metaphors in Lord Justice Lewison's dictum in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, is worth quoting in full:

"It is necessary at this point to bear in mind the well-settled constraints upon the appellate jurisdiction, when asked to re-exercise a discretion conferred upon the first instance judge. These constraints form part of a package, developed over many years, which ensure that the benefit of finality which should normally follow from the judicial determination of the parties' dispute is not rendered ineffective by undue appellate activism… The reasons for this approach are many. They include:

i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those fats are if they are disputed.

ii) The trial is not a dress rehearsal. It is the first and last night of the show.

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.

iv) *In making his decisions the trial judge will have regard to the whole sea of evidence presented to him, whereas an appellate court will only be island hopping.*

v) *The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*

vi) *Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."*

The Privy Council's remark on the importance of the warring shareholders' conduct is particularly noteworthy: *"the conduct of the applicant is in any particular case a factor of infinitely variable weight, on a scale from it being decisive at one end to being of no weight at all at the other. The question where it lies on that scale is a matter for the judge".*

The Privy Council further noted that even if the appellate court disagrees with the challenged decision of the trial judge, they will be constrained to conclude that, even though they would have reached a different conclusion, they cannot interfere. The Privy Council endorsed the trial judge's view that there was a clear case for ordering a buy-out. Accordingly, the buy-out order was restored.

Practical Implications

The decision of the Privy Council confirms the importance of finality and certainty of decisions made within the reasonable parameters of a trial judge's discretion. This will likely discourage warring shareholders' in dispute from protracted appellate proceedings, and may encourage them to focus more of their resources and attention on the trial itself, being "the first and last night of the show". At the same time, shareholders disappointed by the outcome of trial proceedings may wish to devote more time to explore different options for settlement with their opponents before commencing appeal proceedings. It will likely be an uphill battle for litigants of shareholders' disputes to convince an appellate court to depart from a discretion reached by a trial judge.

The authors of this article, Richard Evans and Emily So of Conyers Dill & Pearman represented the Second Respondent, Ming Shui Sum, throughout the proceedings, including before the Privy Council.

If you are interested in understanding more about this legal development, please feel free to contact your usual contact at Conyers or the below authors.

*The authors are both members of Conyers' **Asia Disputes & Restructuring Group (ADRG)** which is tasked to provide sophisticated Bermuda, British Virgin Islands and Cayman Islands litigation advice to clients connected to our multi-lingual (Cantonese, English and Mandarin speaking) team based in Asia. The ADRG integrates the most experienced and highest rated partner-led litigation teams in Asia, Bermuda, the British Virgin Islands and Cayman Islands providing seamless and comprehensive services across jurisdictions round the clock. Our advocates in these jurisdictions are leaders in their fields, recognised by all leading independent directories and our greater depth and range of expertise in the region distinguishes us from our competition and ensures that our clients receive comprehensive, reliable and thorough advice.*

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