

Companies Act 2014

Shareholders - Legal Issues and Disputes

Norman Fitzgerald
Eversheds

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Introduction

- Companies Act, 2014 – radical changes across many areas including corporate structure, insolvency process etc
- Shareholder rights and protections also dealt with - subtle but significant changes
- Backdrop of previous legislative change from 2001 to deal with perceived need for a response to corporate misconduct – ODCE, offences, enforcement
- Period of recession/corporate failures and focus on director misconduct

Today we will look at:

- What are the changes?
- Distribution of Power in a Company
- Types of Shareholder Disputes
- Focus on Oppression of Minority Actions and recent cases
- Are there alternatives to litigation?



Main Changes for Shareholder Rights / Protections

- Directors Duties - codified (s 228)
 - Offences – categorised and codified (s 871)
- Oppression - restated and new remedy (s 212)
 - Office of the Director of Corporate Enforcement may apply for winding up in cases of serious misconduct (s 569)

Directors Duties

- Codification / Clarification of Directors Duties
- Duties owed to company not shareholders (s 227)
- Relevant Duties (s 228)
- Duties of interest to shareholders:
 - Not to misuse the company's property, information or opportunities (s 228(1)(d));
 - Avoid conflicts of interest (s 228(1)(f)); and
 - Have regard to members' interests (s 228(1)(h)).

Offences

- Four-fold classification of all criminal offences (s 871)
 - **Category 1** – conviction on indictment - imprisonment for a term of up to 10 years and/or a fine of €500,000

Examples: Knowingly being a party to the carrying on of the business with intent to defraud creditors (s 722)

- **Category 2** - conviction on indictment - imprisonment for a term of up to 5 years and/or a fine of €50,000

Examples: Failure to make full disclosure to a liquidator in a winding up; Any person who is restricted or disqualified that acts in relation to a company in a way that he/she has been prohibited from doing (s 855); An officer of a company entering into an arrangement that breaches the prohibition on loans to directors (s 239); Any person that falsely and deceitfully personates any owner of any share or interest in the company and tries to obtain the share, receives money due to the owner, or votes at a meeting as if he were the lawful owner (s 101)

Offences

- **Category 3** – summary offence - imprisonment of a term of up to six months and/or a Class A fine

Examples: Failure of a liquidator to inform the court about a restricted director acting in contravention of a restriction order “as soon as practicable” (s 821); Failure of a restricted director to give a company written notice of his status as a restricted director (s 825); failure by directors in their duty to notify of interests in the company (S 261 – 266)

- **Category 4** – summary offence - only punishable by a Class A fine

Examples: Contravention of the provision on allotment of shares (s 70)

Oppression of Minority

- Concept of oppression largely re-stated (s 212)
- Court empowered to award compensation (s 212 (3)(d))
- Court can order winding up on just and equitable grounds - restated (s 569)
- Power for the Director of Corporate Enforcement to petition the Court to wind up a company if in public interest (s 569 (1)(g))

Shareholder Disputes – Distribution of Power

- Rights and duties governed by law and by constitutional documents of company
- Ultimate power vested in shareholders but power to manage is given to the directors
- Majority rule
- Shareholder rights and entitlements
 - Removal of director (extended notice)
 - The right to receive a dividend (if one is declared)
 - To attend and vote at shareholder meetings
 - To receive Company documents
 - To receive Company accounts
 - To attend at an AGM
 - 10% may convene EGM



Shareholder Disputes – Type of Disputes

1. Management Disputes
2. Personal Disputes – eg Divorce of directors, succession
3. Misfeasance / Misconduct Disputes – eg loans to directors, diversion of commercial opportunity



Remedies

- Derivative Action (*Foss v Harbottle*)
- Oppression / disregard of minority interests (s 212)
- Winding up on just and equitable grounds (s 569)



Oppression / Disregard of Minority Interests

What is Oppression?

"Any member of a Company who complains that the affairs of the Company are being conducted or that the powers of the Directors of the Company are being exercised (a) in a manner oppressive to him or any of the members (including himself or herself) or (b) in disregard of his or her or their interests as members, may apply to the Court for an Order under this section" (s 212).

Test for Oppression

- In *Re Greenore Trading Limited* [1985] IR 613, Keane J. described oppression as conduct which is *“burdensome, harsh and wrongful”*.
- Barrington J. repeated this and also referred to *“conduct which involves lack of probity or fair dealing towards some members of the company”*.
- Oppressive act does not need to be unlawful
- Court will look for a multiplicity of oppressive acts
- Unwise, inefficient or even careless decisions do not amount to oppression
- An objective test
- Court look at history and structure



Examples of Oppressive Actions

- **Suspending** the Petitioner from duties as director; **Obstructing** preparation of company accounts; **Undermining** the Petitioner's reputation; **Acting unilaterally** in disregard of the Petitioner's entitlement; **Collaborating or conspiring** against the interests of the Petitioner
- **Disrupting** management meetings; **Harassing** the Petitioner; **Committing a fraud** on the company; **Misleading** a Revenue Investigation; **Contriving a grievance**; **Wasting** company resources; **Unfairly allocating** remuneration and bonuses; **Unauthorised appointment** of further independent directors; **Use de facto control** over the board to depart from the relationship of equality and/or partnership; **Refusing to recognise** a "Shareholder Agreement"; **Preventing reasonable access** to all the books and records of the Company
- **Breaching of the underlying relationship, trust, equality and mutual confidence** (quasi partnership)



Oppression – case law

Re SIAC Construction Ltd; Feighery & Feighery (25/02/98 unreported), High Court (Laffoy J)

- Removal of Director
- It was held that the Court had no jurisdiction to grant an injunction to restrain the Company, in general meeting, resolving to remove a Director, as the effect of such relief would be to restrain the exercise of the Company's statutory right pursuant to s. 182(1) of the Act of 1963 (now Section 146 of the Act)
- Laffoy J. held that the balance of convenience favoured the refusal of the injunctive relief sought

Oppression – case law

Re Greenore Trading Company Ltd [1980] ILRM 94 (“burdensome, harsh and wrongful”)

- Acquisition by a shareholder / director of the shares of another member, partly with money paid out of the company, for the purpose of obtaining a 75% shareholding in the company
- Keane J. noted that the payment by the Company of the £14,500 constituted “....conduct of such a nature as to justify and indeed require the making of an Order under Section 205(3)”.
- Keane J. stated that “the patent misapplication of the Company’s monies for the purpose of giving Mr Vanlandeghem a dominant position in its affairs, seems to me to be properly described as “burdensome, harsh and wrongful”.

Oppression – case law

Irish Press plc –v- Ingersol Irish Publications Ltd (No. 1)
[1995] 2 ILRM 270

- Partnership entered into re management of three newspapers in 1989
- Subscription Agreement, Shareholder Agreement and Management Agreement in place
- Partner claimed the other acted in furtherance of its own interest
- Action under s 205 of the Companies Act 1963 (now Section 212 of the Act)

Barron J. stated that *“where a deliberate plan to damage the interests of a Company is carried out by a shareholder in a manner by which it exercises its power to conduct the affairs of the Company, such behaviour is oppression”*.

Oppression – case law

In the matter of Rollville Limited (Bell –v- Bell) 2011 IEHC 79

- Large loan made to a related company
- Forging of the Petitioner's signature
- Wrongful creation of a charge over property
- Selling of property at an undervalue
- Dissipation of company funds

Herbert J. found that the transfer of the monies in question was fraud on the Petitioner as a member of the company as it was for the sole benefit of the Respondent and carried out in a manner oppressive to the Petitioner

The court ordered that the second named respondent purchase the petitioner's shares at a proper price

Oppression – case law

In the matter of Charles Kelly Limited (Kelly –v- Kelly) 2011 IEHC 349

- Use of company money to pay legal costs
- Laffoy J. noted Courtney on the law of private companies where it states:
 - “...it would be wrong for the company’s controllers to utilise the company’s resources in connection with the proceedings”.
 - “...incapable of acting in a sensible and constructive manner in order that the company’s statutory obligations be fulfilled and that its business be managed in such a way as to ensure viability”.

Oppression – Remedies

The Court may “*with a view to bringing an end to the matters complained of, make such Order as it thinks fit, whether directing or prohibiting any act or cancelling or varying a transaction or for regulating the conduct of the Company’s affairs in future or for the purchase of the shares of any member or for the payment of compensation*” (s 212 (3)).

Court can:

- Sever parts of the business
- Direct purchase of shares for fair price (usually by majority)
- Compensation now possible (although was previously built in)

NB - Ability to pay

- Position of creditors
- Position of bank

Oppression – Valuation of Shares

Donegal Investment Group plc v Danbywiske & Ors [2014] IEHC 615

- The principal issue was whether or not a discount should be applied to the petitioner's shareholding to reflect the fact that its holding was a minority interest.
- Objective for the Court was to determine a fair price in all the circumstances.
- When fixing the fair price, the Court has a discretion as to whether to provide for a minority discount. The Court will fix a fair price which will not necessarily be the open market price.

McGovern J. decided that as a matter of law, the shares should be valued without applying a minority discount.

Oppression – Valuation of Shares

In the matter of Rollville Limited (Bell –v- Bell) 2011 IEHC 79

Herbert J. stated that *“the proper price is the price which the Court, in its discretion determines to be proper, having regard to all the circumstances of the case”*.

Re Greenore Trading Company Ltd [1980] ILRM 94

Frequently, an element is built into the price to compensate for losses that the oppressed member previously suffered.



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Oppression – Valuation of Shares

Re Skytours Travel Limited [2011] IEHC 517

The court found that while a fair price might include an incidental element of compensation, there is no general right to such compensation, nor is it open to a court to award damages.

- Court now empowered to award compensation (s 212 (3)(d))

Court Ordered Winding Up (s 569)

Winding up on just and equitable grounds:

- where the Company is unable to carry on its business because of deadlock between the shareholders;
- where the control or management of the Company is being exercised under conditions of fraud, misconduct or oppression; or
- where the Company is in effect a quasi partnership and where the members and Directors are unable to co-operate with each other and run the business.

Court Ordered Winding Up – Case Law

Re Murph's Restaurants [1979] 1 ILRM 141

- Breakdown in business relationship
- Decision by two shareholder / directors (brothers) to remove the third shareholder / director (friend) from the Company

Gannon J. held that the conduct of the brothers was *"a deliberate and calculated repudiation by both of them [the brothers] of the relationship of equality, mutuality, trust and confidence between the three of them..."*.

Gannon J. ordered the winding-up of the Company under the just and equitable ground. He stated that if the Petitioner can *"....point to, and prove, some special underlying obligation of his fellow member(s) in good faith or confidence, that so long as the business continues, he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association be dissolved"*.

Court Ordered Winding Up – Case Law

Re Dublin Cinema Club Ltd [2013] IEHC 147

- Petition to wind-up the Company
- Two Director / Shareholders – family connection
- Irreconcilable differences

Charleton J. held that s.213(f) permits the winding-up of the company where there is a situation of deadlock within the management of a quasi-partnership.

Charleton J. also took the view that in considering whether it is just and equitable to wind up the company, the court must also consider whether there is any other order available which would be more just and equitable.

Court Ordered Winding Up – Case Law

Re Fuerta Limited [2014] IEHC 12

- Petitioner (Bank of Scotland Plc) sought to wind up Fuerta Limited (incorporated in 2006)
- Directors “*seriously in default*” of filing annual returns
- Struck off Register of Companies; Subsequently restored
- Bank of Scotland made a loan facility for up to €15m whereby the company held a 61% stake in the investment with individual investors making up 39%
- Enforcement of the bank’s security was mandated but a sale of control was only possible where the company complied or through liquidator control

The Court held that the invocation of section 213 (f) should not be undertaken lightly, only to be engaged in the “most intractable” situations.

Charleton J. ordered that it was both just and equitable that Fuerta Limited should be wound up.

Alternative Dispute Resolution

- Mediation
- Arbitration
- Expert Determination



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Litigation

- Adjudicative – imposed outcome
- Adversarial
- Compulsory
- High cost
- Lack of control
- Lawyer-centred
- Long process/years
- Public
- Retrospective
- Rights based
- Rules
- Win or lose

•Mediation

- Consensual – outcome by agreement
- Facilitative
- Voluntary
- Lower cost
- Retain control
- Client-centred
- Shorter process/weeks
- Confidential
- Forward thinking
- Interest based
- Flexible
- Range of options



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Shareholder Agreements

- Divorce
- Succession
- Deadlock
- Mediation



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Settlement Considerations

- Financial Assistance (s 82)
- What is the correct value of shares?
- What is the ability to purchase shares?
- Risk of Banks attaching a lien or garnishee?
Guarantees?
- Bank prior permission to change shareholding
required?
- Avoid winding up – imperative
- Costs of Litigation
- D & O Cover



Questions?



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