Overcoming Majority Rule: The Minority Oppression Remedy in Bermuda

The notion of majority rule is the basis on which almost all corporate affairs proceed. This concept reflects the doctrine of corporate democracy and was heartily endorsed by Sir James Wigram VC in Foss v Harbottle, which itself can be traced to certain early-nineteenth-century English decisions on the law of partnership.

But there is an inherent tension between majority rule and the protection of fundamental minority rights. This is particularly the case in closely held companies where the majority shareholders might also (directly or through their nominees) control the board. What recourse is available to minority shareholders who have been oppressed by the majority?

As one of the exceptions to the rule in Foss v Harbottle, the minority oppression remedy is one of the few avenues of recourse available to minority shareholders of companies domiciled in Bermuda when the conduct of the majority is oppressive or prejudicial to the interests of the minority or any one of them. This advisory examines the scope of the minority oppression remedy and the circumstances in which relief may be granted to a minority petitioner under Bermuda law.

Statutory basis for the minority oppression remedy

The statutory remedy against minority shareholder oppression is set out in section 111 of the Bermuda Companies Act 1981 (the "Act"), which substantively replicates section 210 of the English Companies Act 1948. In a 2004 decision of the New Zealand Court of Appeal, which has been cited with approval by the Bermuda Supreme Court, the historical underpinnings of the remedy were described in the following terms:

"The oppression remedy originated in Britain in s210 of the Companies Act 1948 (UK), as an alternative to winding up on the just and equitable ground. The argument was that winding up was much too drastic a remedy to utilise in many cases, and that it would be desirable to give courts wider powers to intervene to set matters to right, whether by ordering one party to buy the other out or otherwise regulating the affairs of a company".
Pursuant to section 111 of the Act, the following elements must be established for a petitioner to succeed in an application for relief:

1. that the affairs of the company are being conducted in a manner oppressive or prejudicial to the minority or to any one of them; and
2. that the Court would be prepared to make a winding-up order on the ‘just and equitable’ ground; but
3. that such winding-up would unfairly prejudice those members.

This second qualification is an important one and sets a high bar for relief to be granted. Thus, as Ground CJ stated in DE Shaw Oculus Portfolios LLC v Orient-Express Hotels Ltd:

“In order to achieve relief under section 111 of the Act the petitioners have to show that, were it not for the existence of the statutory remedy, it would otherwise be just and equitable to wind up the company”.

Once these elements have been established, the Court in determining the petition may "with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company’s affairs in future, or for the purchase of the shares of any members of the company by other members of the company…". The usual order sought by a petitioner is for its shares to be purchased by the majority for fair value, and the Court will typically endorse this approach in furtherance of achieving a ‘clean break’ between the parties.

What constitutes oppression?

Section 111 of the Act requires that the conduct complained of must be "oppressive or prejudicial".

The meaning of the term “oppressive” was considered by the House of Lords in Scottish Co-operative Wholesale Society v Meyer, in which Simonds VC took it to describe circumstances in which a majority power exercises its authority in a manner “burdensome, harsh and wrongful”. Plowman J, in the 1965 decision In re Lundie Brothers Ltd has held that a minority shareholder complaining of oppressive conduct must also establish “lack of probity or fair dealing to him in that capacity”.

As to the meaning of the term “prejudicial”, the Bermuda Supreme Court has drawn parallels with the ‘unfair prejudice’ doctrine in the current English statute, citing with approval the deliberately imprecise definition proposed by Lord Hoffman in O’Neill v Phillips:

“The concept of fairness must be applied judicially and the context which it is given by the courts must be based upon rational principles… Although fairness is a notion which can be applied to all kinds of activities its content will depend upon the context in which it is being used”.

When will the Court grant relief?

The minority oppression remedy is commonly referred to as the ‘alternative remedy’ for an aggrieved minority shareholder, the primary remedy being an application for the winding-up of the subject company on the just and equitable ground pursuant to section 161(g) of the Act. For this reason, there has been somewhat limited judicial consideration of the minority oppression remedy by the Bermuda courts, and few instances in which the remedy has been successfully sought. The following cases are instructive in their consideration of circumstances in which the Bermuda courts will not grant relief on the basis of alleged minority oppression:

1. In Gold Seal Holding Ltd v Paladin Ltd, Kawaley CJ held that a company’s convening of a Special General Meeting in accordance with its bye-

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5 [2010] Bda LR 32 SC at [64].
6 Section 111(1) of the Act.
7 Section 111(1) of the Act.
8 [1958] UKHL 721 at [12].
9 [1965] 1 WLR 1051.
laws could not be oppressive conduct even when the purpose of the meeting in practical terms was for the controllers of the company to reassert control over the composition of the board. 

2. In *Annuity & Life Re Ltd v Full Apex (Holdings) Ltd et. al.*, Kawaley J (as he then was) held that bare, unparticularised allegations that a certain transaction was entered into other than in the best interests of all shareholders will not ground a claim for relief. Similarly, His Lordship determined that a failure to provide a “satisfactory answer” to queries by a company’s minority shareholders about its detailed affairs does not amount to oppressive conduct.

3. In the first instance decision in *Annuity Re v Kingboard*, Kawaley CJ endorsed the English courts’ view that mere errors of judgment by management or poor business management without distinct elements of bad faith or self-interest cannot amount to oppression.

4. In *A Thomas v Fort Knox Bermuda Ltd*, Hellman J confirmed that there is “nothing prejudicial” about conduct which results in a certain member holding a majority, where the relevant action was taken “within the scope of [his] authority”.

5. In the Court of Appeal’s decision in *Kingboard v Annuity Re*, the Court of Appeal confirmed that companies were under no duty to negotiate with minority shareholders on corporate matters which affected the minority more than the majority, and that such failure to negotiate does not amount to oppression.

The English jurisprudence provides examples of conduct which is “unfairly prejudicial” (under the relevant English statute) and which in certain cases could amount to oppressive conduct as a matter of Bermuda law, including exclusion from management, the forced sale of shares at an artificially depressed price, and serious mismanagement at board level.

**Conclusion**

Minority shareholders have very limited ability to control the direction of the companies in which they hold an interest or to otherwise fetter the near-unlimited power possessed by the majority shareholders, who oftentimes also control or otherwise dictate the decision of the board. But despite this vulnerability, minority shareholders are not without options. As an alternative to the value-destructive just and equitable winding-up regime, the minority oppression remedy provides minority shareholders the opportunity to exit for value from shareholding positions which have become untenable due to the oppressive conduct of the majority.

Benjamin McCosker is an associate in the Insolvency and Dispute Resolution group of Taylors in association with Walkers, advising in relation to investment funds disputes, shareholder disputes and cross-border insolvency and restructuring matters.
Contacts
For further information please speak with your usual Taylors contact or one of the following:

Kevin Taylor
Partner
T: +1 441 242 1510
E: kevin.taylor@walkersglobal.com

Nicole Tovey
Partner
T: +1 441 242 1512
E: nicole.tovey@walkersglobal.com

Benjamin McCosker
Associate
T: +1 441 242 1521
E: benjamin.mccosker@walkersglobal.com

Kai Musson
Associate
T: +1 441 242 1532
E: kai.musson@walkersglobal.com

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