Feature

KEY POINTS

- Sections 994 and 996 of the Companies Act 2006 provide a wide and flexible remedy to minority shareholders.
- Relief can be granted under s 996 against anyone who is responsible for the unfairly prejudicial conduct, even if they are not (and never have been) either directors or shareholders of the company.
- Petitions seeking relief under s 996 of the 2006 Act are *"claims made under an enactment which allows proceedings to be brought"* within the meaning of para 3.1(20) of Practice Direction 6B to the CPR.

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Unfair prejudice petitions: long-range missiles for minority shareholders

This article considers the breadth and flexibility of the unfair prejudice remedy, which a recent case has demonstrated can lead to relief being granted against anyone who is responsible for the unfairly prejudicial conduct, even if they are not (and never have been) either directors or shareholders of the company, and even if they live outside the jurisdiction and none of their relevant actions took place in the jurisdiction.

An unfair prejudice petition is a powerful weapon for an aggrieved minority shareholder. And, as the recent judgment of Vos J in *Apex Global Management Limited v Fi Call Limited & Others* [2013] EWHC 1652 (Ch) (*"Fi Call"*) has made clear, it is a weapon which can be used against anyone who has been responsible for the unfairly prejudicial conduct of which the petitioner complains – including people who have never been either shareholders in or directors of the relevant company, are resident out of the jurisdiction and might have thought themselves safely out of range.

True it is that by s 994 of the Companies Act 2006 (the 2006 Act), the shareholder has to show that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members or that an actual or proposed act or omission of the company is or would be so prejudicial.

THE ELASTIC QUALITY OF THE JURISDICTION UNDER S 994

But, as Arden LJ pointed out in *Annacott Holdings Ltd, Re* [2012] EWCA Civ 998, [2013] Bus. L.R. 753, at [44], Parliament clearly intended the courts to adopt a flexible approach to proceedings under s 994, and to be flexible in the exercise of their powers in relation to these proceedings. Indeed, as Arden J (as she then was) noted in *In re Macro (Ipswich) Ltd* [1994] 2 B.C.L.C. 354, at 404, the jurisdiction under what is now s 994 of the 2006 Act *"has an elastic quality which enables the courts to mould the concepts of unfair prejudice according to the circumstances of the case"*. Furthermore, on numerous occasions the courts have stressed that each of the elements of s 994(1)(a), namely *"the company's affairs"*, *"conducted"*, *"unfairly prejudicial"* and *"the interests of members"* should be given a broad interpretation.

If the court makes a finding of unfair prejudice, it has extremely wide powers as to what relief it can grant and against whom. Section 996(1) of the 2006 Act provides: *"(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of"*. Section 996(2) then sets out, expressly *"Without prejudice to the generality of subsection (1)"*, some examples of the type of order which may be made under s 996, of which the most commonly made (at (e)) is that it may *"provide for the purchase of the shares of any members of the company by other members or by the company itself..."*.

THE WIDE RANGE OF POTENTIAL RESPONDENTS TO A S 994 PETITION

Vos J's judgment in June 2013 in *Fi Call* has confirmed the breadth of the categories of respondent against whom relief can be granted under an unfair prejudice petition presented under s 994 of the 2006 Act.

The statute itself does not place any limit on the classes of potential respondents. In most cases the principal respondents against whom relief is sought are current members of the company or LLP. But that need not be the case. In an appropriate case, relief may be sought against a former or non-member – in *Re a Company (No 005287 of 1985)* [1986] B.C.L.C. 68, the respondent alleged to be responsible for the conduct complained of had disposed of his shares – or a non-shareholder director (eg, *Atlasview Ltd v Brightview Ltd* [2004] 2 B.C.L.C. 191).

In *Lowe v Fahey* [1996] 1 B.C.L.C. 262, it was held that if the unfairly prejudicial conduct alleged was diversion of corporate funds, a petitioner could seek relief not only against members and former members, but also against directors involved or third parties who knowingly received or improperly assisted in the diversion, and in *Clark v Cutland* [2003] 2 B.C.L.C. 393 a trustee of the pension fund to which company monies had been improperly paid (by the other trustee, who was a member and director of the company) was included as a respondent. In that case, Arden LJ held that there was wide jurisdiction under s 996 for the court to grant the same relief against third parties in favour of the subject company as could be granted in a derivative claim.

In *Gamlestaden Fastigheter AB v Baltic Partners Ltd and others* [2008] 1 B.C.L.C. 468 (PC), at [27], [28], Lord Scott of Foscote noted that there is nothing in

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the wide language of s 996 to suggest a limitation that would exclude the seeking or making of an order for payment of damages to the company whose affairs have been conducted in an unfairly prejudicial manner.

The question of what principle governs whether relief can be granted against a respondent to a s 994 petition was explored in *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No 2)* [2011] EWHC 1731 (Ch); [2012] 3 W.L.R. 10. In that case, the issue arose as to what the relevant test of attribution of unfairly prejudicial conduct to a respondent to a s 994 petition should be.

Sales J stated, at [1096], that the test was whether the respondent "*is so connected to the unfairly prejudicial conduct in question that it would be just, in the context of the statutory regime contained in sections 994 to 996, to grant a remedy against [him] in relation to that conduct*". At a high level of abstraction, he stated, the standard of justice to be applied reflects the requirements of fair commercial dealing inherent in the statutory regime. However, in practice, he added, everything will depend upon the facts of the particular case and the court's assessment whether what was done involved unfairness in which the relevant respondent was sufficiently implicated to warrant relief being granted against him (or her). In considering that question, the court should not take a narrow legalistic view, but should look at the business realities of the situation.

It was a matter of some interest, following that decision, whether (and, if so, with what results) this test would be applied in other cases – and how frequently petitioners would seek to join as respondents to s 994 petitions persons who have never been either members or directors of the company in question.

FI CALL

In *Fi Call*, after extensively reviewing the relevant case law concerning the persons who can properly be made respondents to unfair prejudice petitions under s 994 of the 2006 Act, Vos J concluded, at [125], as follows:

> "In my judgment, these authorities all speak with one voice. They show that sections 994-6 provide a wide and flexible remedy where the affairs of a company have been conducted in a manner that is unfairly prejudicial to the interests of some or all of its members. A section 994 petition is appropriate where, for whatever reasons, the trust and confidence of the parties to a quasi-partnership has broken down. Relief can be granted to remedy wrongs done to the company, and in such a situation the alleged wrongdoers must be made parties to the petition. Non-members of a company who are alleged to have been responsible for such conduct can be joined as respondents, and, in an appropriate case, such non-members can be made primarily or secondarily liable to buy the petitioners' shares. Artificial limitations should not be introduced to reduce the effective nature of the remedy introduced by sections 994-6."

In *Fi Call*, two Saudi Arabian Princes, neither of whom had ever been either shareholders or *de jure* directors of the relevant company, failed to persuade Vos J that there was no real prospect of relief being granted against them. The petitioner had alleged conduct against each of the Princes (one of whom was alleged to be a shadow or *de facto* director of the company, and the other the ultimate puppet-master) which it claimed had led to a breakdown in trust and confidence between it and the respondents to the petition. Even though neither of the Princes was a shareholder in Fi Call, Vos J noted that the authorities clearly showed that that did not prevent relief being granted against them. The relief could take the form of orders that they restore money they had improperly caused to be paid away by the company or compensation for damage to the company caused by their wrongdoing, or an order that they buy the petitioner's shares in the company.

Vos J also stated that where serious allegations are in issue, it would be singularly inappropriate to proceed to trial without the main protagonists being joined as parties to the proceedings, unless there was no serious case to be tried or some legal inhibition to their joinder.

> Vos J's decision ... ensures that the wide range of potential respondents to s 994 petitions is not limited by where they are resident ...

SERVICE OF S 994 PETITIONS OUT OF THE JURISDICTION

In *Fi Call*, Vos J went on to decide – for the first time – that claims for relief under s 996 of the 2006 Act are "*claims made under an enactment which allows proceedings to be brought*" ("the enactment gateway") within the meaning of para 3.1(20) of Practice Direction 6B to the CPR.

In reaching this view, Vos J rejected the respondents' submission that the 2006 Act should not be regarded as being within the scope of the enactment gateway, because it was not one of the specific statutes listed under the old RSC Order 11, or even under the original CPR Part 6.20(18), which applied when "*a claim is made under any enactment specified in the relevant practice direction*".

Vos J's decision that claims for relief under s 996 of the 2006 Act are "*claims made under*" the enactment gateway ensures that the wide range of potential respondents to s 994 petitions is not limited by where they are resident – and it is not necessary for them to have carried out any of their relevant actions within the jurisdiction. ■