The flexible friend

Daniel Lightman QC highlights how versatile ss 994 & 996 of the Companies Act 2006 can be for minority shareholders presenting an unfair prejudice petition

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IN BRIEF

- The courts take a flexible approach to the requirements for an unfair prejudice petition to be well-founded under s 994 of the Companies Act 2006.
- The courts show similar flexibility in exercising the wide powers given to them as to what relief they can grant under s 996, and against whom.
- While a share purchase order is the most common relief granted, the courts are increasingly open to bespoke solutions tailored to the circumstances of the particular case.
- These factors make a s 994 petition—or the threat of presenting one—an increasingly powerful and flexible weapon for a minority shareholder.

Recent case law has emphasised just how versatile a weapon the power to present an unfair prejudice petition under s 994 of the Companies Act 2006 (CA 2006) can be for a minority shareholder.

The requirements of s 994

By s 994(1) of CA 2006, the petitioning shareholder has to show either: (i) 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 (including at least himself or herself); or (ii) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

Mindful that Parliament 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 such proceedings, the courts have taken the view that (in the words of Lady Justice Arden in *In re Macro (Ipswich) Ltd* [1994] 2 BCLC 354) the jurisdiction under s 994 "has an elastic quality which enables the courts to mould the concepts of unfair prejudice according to the circumstances of the case".

Accordingly, the courts have persistently stressed that the expressions "the company's affairs", "conducted", "unfairly prejudicial" and "the interests of members" should each be given a broad interpretation. So, for instance, the phrase "the company's affairs are being or have been conducted" has been found to be wide enough to cover unfairly prejudicial conduct by *anyone* who has taken or is taking part in the conduct of the affairs of the company, whether de facto or de jure—and conduct of the affairs of a subsidiary company can in an appropriate case be regarded as part of the conduct of the affairs of its holding company.

The court's wide powers under s 996

Just as much flexibility has been shown by the courts in exercising the extremely wide powers granted to them by s 996 of CA 2006 as to what relief they can grant and against whom. Under s 996(1) the court has a general power, if satisfied that a petition is well founded, to "make such order as it thinks fit for giving relief in respect of the matters complained of". Indeed, the court is obliged, if it makes a finding of unfair prejudice, to consider the whole range of possible remedies provided for in s 996 and then to choose the remedy or remedies (if any) which in its assessment is or are most likely to remedy the unfair prejudice and to deal fairly with the situation which has occurred. In the exercise of its wide discretion, the court must take into account all of the circumstances of the case.

The statute itself does not place any limit on the classes of potential respondents. While in most cases the principal respondents against whom relief is sought are current members of the company (or LLP), 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] 2 All ER 253, [1986] BCLC 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] EWHC 1056 (Ch), [2004] 2 BCLC 191).

In *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No 2)* [2011] EWHC 1731 (Ch), [2012] 3 WLR 10, Sales J stated that the relevant test of attribution of unfairly prejudicial conduct to a respondent to a s 994 petition was whether the relevant 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 ss 994 to 996, to grant a remedy against [him] in relation to that conduct". The court, he said, has to assess 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.

In *Apex Global Management Ltd v Fi Call Ltd* [2013] EWHC 1652 (Ch), [2013] All ER (D) 194 (Jun), Vos J stated that the authorities show that sections 994 to 996 "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…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 ss 994–996."

The breadth of the court's powers under s 996 is such that it can even grant relief which the petitioner has not sought—and does not actually want. As Stanley Burnton LJ pointed out in *Re Neath Rugby Ltd (No 2)* [2009] EWCA Civ 291, [2009] 2 BCLC 427: "The terms of s 996 are clear: once the court is satisfied that a petition is well founded, 'it may make such order as it thinks fit', not 'such order as is sought by the petitioner'". In *Patel v Ferdinand* [2016] EWHC 1524 (Ch), HH Judge Purle QC stated: "I have a wide discretion under s 996 of the Act to make such order as I think fit for giving relief in respect of the matters complained of. In my judgment, though neither side is asking for this, the unfair prejudice of which Miss Patel complains would be properly and fairly dealt with by a winding up order, given that both parties have another company through which their respective legal aid practices can now be carried on. This company was a vehicle for their joint enterprise, which has now come to an end."

Share purchase orders

Where there has been significant unfairly prejudicial conduct, especially if accompanied by a breakdown in trust and confidence between the company's shareholders, in most cases the court will make a share purchase order. "Ultimately, in a breakdown of relations between a majority and a minority shareholder", as HHJ David Cooke stated in *Harborne Road Nominees Ltd v Karvaski* [2011] EWHC 2214 (Ch), [2012] 2 BCLC 420, "the solution is likely to be that the minority shareholder must exit the company, or be offered the opportunity to do so on fair terms."

For the purpose of establishing the price payable under a buyout order, the courts adopt a flexible attitude to share valuation. Notably, actual share values can be adjusted to reflect the effect on the company of all or any wrongs which the respondents have committed against it: *Annacott Holdings Ltd, Re* [2012] EWCA Civ 998, [2013] 2 BCLC 567, per Arden LJ.

Whereas case law from the mid-to-late 2000s (eg *Strahan v Wilcock* [2006] EWCA Civ 13, [2006] 2 BCLC 555) suggested that in the absence of a quasi-partnership it is only in exceptional circumstances that a petitioner's shares should not be valued with a minority discount, there has recently been a move towards the position that the general rule should be that no discount is to be applied in the valuation for a minority shareholding, regardless of whether the company is a quasi-partnership. In *Re City Index Limited* [2014] EWHC 2680 (Ch), Robin Hollington QC (sitting as a deputy High Court Judge), stated: "The whole purpose of the unfair prejudice remedy is to grant the oppressed minority a remedy which it would not otherwise have. It would substantially defeat the purpose of the new remedy if the oppressing majority were routinely rewarded by the application of a discount for a minority shareholding." A similar approach was adopted by another deputy High Court Judge, Edward Bartley Jones QC, in *Re Addbins Ltd* [2015] EWHC 3161 (Ch).

> ***"The flexibility of the unfair prejudice regime was most recently illustrated by Wootliff v Rushton-Turner"***

Other bespoke remedies

Furthermore, there is a growing body of authorities pointing out the significance, and involving the actual exercise, of the wide powers given to the court to grant relief under s 996 other than a share purchase order. For example, in *Sikorski v Sikorski* [2012] EWHC 1613 (Ch), Briggs J stated that "the court should not close its mind to a bespoke solution to a particular form of unfair prejudice, other than by ordering a buy-out, at least in cases where a remedy that leaves the warring parties as shareholders in the same company does not of itself perpetuate an impossible relationship of joint management, or otherwise risk aggravating an existing dispute". On the facts of that particular case, Briggs J was satisfied that the conduct of the affairs of the company under the respondent's stewardship had been unfairly prejudicial to the petitioner's interests as a shareholder, but decided not to make a share purchase order. Instead, he directed that the respondent restore to the company the diminution in shareholders' funds attributable to his undercharging the company's tenant.

Subsequently, in *Thomas v Dawson* [2015] EWCA Civ 706, [2015] All ER (D) 106 (Jul), Briggs LJ (as he had by then become) noted that the first instance judge's "solution did not, of course, necessarily secure a clean break between Mr Thomas and Ms Dawson in relation to the affairs of the company, or necessarily put an end to a continuing deadlock in the management of its affairs", but in dismissing the appeal of the respondent to the s 994 petition stated that he was "satisfied that the judge's imaginative solution to the difficult problem of remedy facing him in September 2014 was well within the broad scope of the statutory discretion afforded to him".

Accordingly, in an appropriate case a shareholder can seek to persuade the court to adopt a bespoke solution to the matters of which he/she complains and not instead to make a share purchase order, especially if he/she can show that his/her complaints relate to their treatment as a minority shareholder and that allowing him/her to remain a shareholder in the company would not "of itself perpetuate an impossible relationship of joint management, or otherwise risk aggravating an existing dispute". Making a bespoke order would accord with the wide and flexible remedy which s 996 is intended to provide to minority shareholders and the importance of the court exercising its wide powers to produce a just result.

Under s 994 the court can order damages to be paid to the petitioner personally (*Atlasview Ltd v Brightview Ltd* [2004] EWHC 1056 (Ch), [2004] 2 BCLC 191) or to the company whose affairs have been conducted in an unfairly prejudicial manner (*Gamlestaden Fastigheter AB v Baltic Partners Ltd* [2007] UKPC 26, [2008] 1 BCLC 468).

The flexibility of the unfair prejudice regime was most recently illustrated in *Wootliff v Rushton-Turner* [2016] EWHC 2802 (Ch), where the petitioner sought a remedy in his s 994 petition that he be compensated for the loss of income for the remaining term of his service contract with the company, which had been summarily terminated. The respondents to the petition applied to strike out the wrongful dismissal head of claim from the petition. However, Mr Registrar Briggs refused to do so, stating with respect to what he described as a "novel" point: "The court may make such order as it thinks fit to grant relief. As the language is so wide it cannot be said in my judgment, it shuts out relief for compensation for breach of a service agreement." **NLJ**

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