The use and abuse of unfair prejudice petitions: lessons from *Loveridge v Loveridge*

The two decisions that the Court of Appeal has now given in *Loveridge v Loveridge* ([2020] EWCA Civ 1104 and [2021] EWCA Civ 1697, the latter of which was handed down on 19 November 2021), in each of which Lance Ashworth QC and Dan McCourt Fritz succeeded on behalf of the Appellants, should caution against viewing unfair prejudice petitions (ss994-996 of the Companies Act 2006) as a panacea for the grievances of a minority shareholder. While the jurisdiction is rightly flexible, the Loveridge decisions have illustrated some of its outer limits, and as such they are likely to be of interest to any practitioner involved in bringing or defending unfair prejudice petitions. This article summarises some of the main lessons to be found in the judgments.

The litigation concerns a number of successful caravan parks run by Mrs and Mr Loveridge (Ivy and Alldey) and their children, including their eldest son Michael. Sadly, the relationship between Michael and his parents broke down, and Michael sought to oust his parents from the various businesses in which he was interested. These comprised separate caravan sites, which were run through discrete companies and partnerships. Michael brought parallel company and partnership proceedings, the former concerning 5 of the family companies.

The Court of Appeal's decision in Loveridge 1, allowing Ivy and Alldey's appeal against interlocutory injunctions excluding them from managing companies and partnerships of which they were majority owners, was discussed in an earlier SerleShare article (9 September 2020). Floyd LJ's judgment contains a salutary reminder that majority rule is the norm in company law, and that a minority shareholder wishing to establish a right to participate in management must positively plead and evidence some agreement or understanding that justifies that entitlement.

The criticisms of Michael's pleading in Loveridge 1 left amendment as the only option. In Loveridge 2, the Court of Appeal allowed Ivy and Alldey's appeal against a decision (1) allowing Michael's attempted rehabilitative amendments and (2) rejecting Ivy and Alldey's application to strike out the petitions. The result was that Michael's petition was struck out in respect of each of the 5 companies. Falk J gave the judgment, with which Newey and Bean LJJ agreed.

There are (at least) 3 lessons to draw from Falk J's judgment.

1: Companies cannot just be lumped together.

Michael's petition invited the court to treat all of the companies and partnerships as a composite group. It failed to give appropriate consideration to the separate positions of each of the 5 companies. Falk J reiterated Floyd LJ's comments on the need to respect the forms chosen by the parties to conduct their affairs (paragraphs [67]-[70]). Even if there has been a single business, it does not override the need to consider the position of each company in respect of which a petition is brought.

Michael had failed to do this, and so fell into fatal errors. For example, he failed to explain why he should be entitled to participate in the management of 2 of the companies ('Quatford' and 'Breton Park'), one of which was in deadlock and in fact controlled by Michael, and of the other of which Michael had never been a director (see paragraphs [76]-[82]). Michael's petition had also complained of his removal as a director of one company ('Riverside Stourport') when no steps (actual or proposed) had been taken to remove him (paragraph [85]). His complaints about exclusion from each of these companies were therefore unarguable.

2: Making and responding to reasonable settlement offers.

Falk J's decisions on management left only 1 company, Kingsford, against which Michael's exclusion complaint could stand (Loveridge 1 having decided that it was not arguably unfair for Michael to be excluded from managing the other company, 'Sales', from which he had misappropriated £1.25 million). However, in respect of this company Ivy and Alldey had made an offer to buy Michael out at fair market value, without minority discount (i.e. an '*O'Neill v Phillips*' offer).

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The judgment (at [124]-[138]) contains an interesting discussion of the proper approach to O'Neill v Phillips offers, and whether such an offer can properly deal with the position of only one company in an informal 'group'. The upshot is that a mechanical approach is inappropriate. Whether the rejection of a settlement offer will make a petition abusive depends on an analysis of whether the offer really addresses the unfairness complained of in the petition. Ivy and Alldey's did cure any possible unfairness in respect of Kingsford, in light of the conclusion on loans (considered below).

3: The treatment of 'soft loans'.

It is common place, particularly between parents and children, for money to be provided from one party to another on an informal basis. It is also common that the parties give little or no thought to when or how repayments are to be made (if at all). This invariably causes difficulties when courts are required to characterise the arrangements in law.

Ivy and Alldey made requests to call in, or have secured, loans made by 2 of the group companies, as well as a loan made to a company solely owned by Michael, which was not one of the 5 groups in respect of which the petition had been presented. Michael alleged that this amounted to the 'withdrawal of beneficial funding', and that this was a matter of which he could properly complain because the parties had agreed that the loans would not be called in without unanimous agreement between Michael and his parents.

The essential question was how to characterise what the parties had agreed. Falk J held (paragraphs [86]-[98]) that the most plausible understanding would be that "either party can bring the arrangement to an end at any time", or else that any tacit agreement not to call in the debt could be displaced by a change of circumstances, such as the commencement of hostile proceedings. Michael's case as to calling in or securing the loans being effectively barred, unless he agreed to this, was unarguable on this basis, but it was also contradictory and would be unworkable in practice.

Falk J went on to consider, without deciding, the question of how to separate the interests of a member in a creditor company from their interest in the debtor companies ([86]-[112]). It is difficult to see, in most cases, how the interests of a member of a creditor can be served by the company failing to get in its assets by calling in loans or providing for them to be secured. Equally it is difficult to see how the calling-in of a loan by a creditor company can

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amount to the conduct of the affairs of the debtor company. Falk J's judgment, while not ruling out the possibility of equitable constraints arising out of 'soft loans', shows that these points will have to be navigated extremely carefully by any party seeking to establish them.

Conclusion

The unfair prejudice jurisdiction is flexible, but its tensile strength is not unlimited. The Loveridge decisions have been a stress test and will doubtless be a reference point for practitioners involved in bringing and defending petitions in the future.

Andrew Gurr (author)

Lance Ashworth QC (co-author)

Dan McCourt Fritz