Derivative claims and unfair prejudice petitions: Tactical and practical considerations

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Bending the rules?

- *Foss v Harbottle* (1843) 2 Hare 461: the "rule".

- s. 260 (*et seq.*) of the Companies Act 2006: the "derivative claim". (See also CPR rr. 19.14-2

- s. 994 (*et seq.*) of the Companies Act 2006: the "unfair prejudice petition".

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Balancing the options

***Ntzegkoutanis v Kimionis* [2024] Bus LR 339**

- *"…it was well recognised that the court had "a very wide discretion to do what is considered fair and equitable in all the circumstances of the case" … in unfair prejudice proceedings. …. redress benefiting the company could potentially be granted on an unfair prejudice petition."* (At [32].)

- *"True it is that [the petitioner] is seeking relief which, if granted, will benefit the Company, but he is asking for it in his own right rather than on behalf of the Company."* (At [38].)

Chime! Chime! Chime!

- At [55], considering the "*Chime*" case:
  - *"The court has power to grant relief in favour of the company on an unfair prejudice petition."*
  - *"At least generally, the court should not in unfair prejudice proceedings make an order for relief in favour of the company unless the order corresponds with an order to which the company would have been entitled had the relevant allegation been successfully prosecuted in an action by the company (or in a derivative action in the name of the company)..."*
  - *"It can potentially be an abuse of process for a petitioner to claim relief in favour of the company by way of unfair prejudice petition. I cannot envisage any circumstances in which a petition claiming only such relief would be proper.... Where, on the other hand, an unfair prejudice petition seeks both relief in favour of the company and relief that would not be available in a pure derivative claim, and the petitioner appears to be genuinely interested in obtaining the latter, I do not think that it would ordinarily be appropriate to strike out either the petition or any part of the relief sought."*
  - *"Where in unfair prejudice proceedings a petitioner asks for relief in favour of the company as well as relief that could only be granted on an unfair prejudice basis, case management issues should be addressed."*

Practical considerations

- Costs indemnities: ***Wallersteiner v Moir (No. 2)*** [1975] QB 373. But beware:
  - Traditional, post-trial type: *Wallersteiner*
  - Pre-emptive, 'advance' indemnity
  - 'Pay as you go' order: *Smith v Croft* [1986] 1 WLR 580, at 597D-H per Walton J:

    "It therefore appears to me that in order to hold the balance as fairly as may be in the circumstances between plaintiffs and defendants, it will be incumbent on the plaintiffs applying for such an order to show that it is genuinely needed, i.e. that they do not have sufficient resources to finance the action in the meantime. If they have, I see no reason at all why this extra burden should be placed upon the company."

Practical considerations

- Further authorities:
  - *Iesini v Westrip Holdings Ltd* [2010] BCC 420
  - *Tonstate Group Ltd v Wojakovski* [2019] BCC 990
  - *Re Arnbrow Ltd* [2023] EWHC 1771 (Ch)
- Importance of getting the right order: ***Humphrey v Bennett*** (ex tempore, 15 March 2024):

> *"However the application was framed, what it sought to do was to change the company's contingent liability into a present liability, and in my judgment in order to persuade the court to do that [the Claimants] had to submit evidence that they could not afford to pay the £15,000 now, or that, for some other reason, it was necessary for that payment to be made, and there is no such evidence submitted in support of the application."*

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Practical considerations

- Exclusion clauses: ***Dodson v Shield*** [2023] EWCA Civ 1391, [53]:

  "Seen in that light the no partnership clause 21 is striking. The parties have agreed that the contracts will govern their relationship, and one of the terms is that they are not in a partnership. Now of course in one sense, as the judge noted, it is a truism because a company is not a partnership of the shareholders anyway, however to read the clause in such a narrow sense is to rob it of contextual force. ***Seen with the whole agreement clause, this is a clear indication that an objective construction of the intention of the parties to these agreements was not to import concepts of a partnership as a source of obligations on top of what they have expressly agreed."***

Discussion