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Personal property security law: where next?

Balance sheet insolvency: controversy in different jurisdictions

Challenges to collective action clauses

In Practice

Pre-IPO financing and cornerstone investors: Asian influences

Receivables financing: negotiation of documents

Derivatives litigation sets up collision between English and Italian courts

Cases Analysis

One Essex Court reports on the latest banking law cases

Market Movements

DLA Piper UK LLP reviews key market developments in the banking sector

Deals

Monthly round-up of industry news

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may render such a power expedient, even in the interests of the class of debenture holders as a whole. The provision is usually made in the form of a power, conferred by the instrument constituting the debenture security, upon the majority of the class of holders. It often enables them to modify, by resolution properly passed, the security itself. The provision of such a power to the majority bears some analogy to such a power as that conferred by s 13 of the English Companies Act of 1908, which enables a majority of the shareholders by special resolution to alter the articles of association. There is, however, a restriction of such powers, when conferred on a majority of a special class in order to enable that majority to bind a minority. They must be exercised subject to a general principle, which is applicable to all authorities conferred on majorities of classes enabling them to bind minorities; namely, that the power given must be exercised for the purpose of benefiting the class as a whole, and not merely individual members only. Subject to this, the power may be unrestricted."

While the approach adopted in relation to shareholders and creditors appears very similar, a distinction remains: the vote of a shareholder at the general meeting belongs to him as a right of property attached to his share, whereas the vote of a creditor is the power of controlling the rights of a minority of the class (see *Buckley on the Companies Act* (Issue 23, June 2012)). As the editors of *Buckley* observe, in the case of the creditor there is ground for saying that the voter is entrusted with his vote in his character of member of a class, that he is bound to exercise it *bona fide* for the benefit of the class including himself, and not for that of himself as opposed to the class. But it is debatable whether this distinction is more apparent than real: neither shareholders nor bondholders can oppress the minority through the exercise of their vote and, at least in relation to article amendments, shareholders have to exercise their votes for the benefit of the company, even though they are not subject to fiduciary duties.

In America the position is clearer: "In the case of arm's-length transactions between financial institutions, no fiduciary duty exists unless one was created in the agreement... [and] there is no automatic, status based fiduciary duty created in the transaction" (see *Banque Arabe et Internationale D'Investissement v Maryland Nat'l Bank* 819 F. Supp. 1282 (SDNY 1993). In the context of modern commercial bonds this is an obviously logical result.

However, as we have seen, it is nonetheless possible for good faith and inter-creditor obligations to arise by implication. The extent to which these duties can be implied was explored in *Redwood Master Fund Ltd v TD Bank Europe Ltd* [2002] All ER (D) 141, which usefully summarises the modern approach in England. There the claimant companies were involved in a range of investment activities and were a minority group within a syndicate of lenders which established a syndicated loan facility. The claimants challenged changes to the agreements stating that there had been a subjective lack of good faith on the part of the majority, who had acted in breach of their duty to act in the interests of the lenders as whole, and that no reasonable lender could have concluded that the changes were in the interests of the lenders as a whole. Rimer J dismissed the claim. There was no evidence that the majority of the lenders were motivated to consent by any considerations of bad faith. In relation to the duty to act in the interests of the lenders *as a whole*, it was held that an implied term in the agreement that the power would be exercised *bona fide* for the benefit of the lenders as a whole did not reflect the intention of the parties to the facility agreement. It would have been impossible for the majority to exercise its powers under the agreement in a manner which objectively could have been said to have been for the benefit of each of the lenders, because their interests were not those of one unified class. Instead, the starting point was to assess whether the power had been exercised in good faith for the purpose for which it was conferred. If so, the relative disadvantage suffered by the minority did not mean it had been exercised improperly. In such circumstances, "the vice against which control on the exercise of majority power is directed is the potential for a dishonest abuse of that power: whether the power is being exercised in good faith for the purpose for which it was conferred...

> "The starting point was to assess whether the power had been exercised in good faith..."

if the exercise of the power can be shown to have been motivated by a malicious wish to damage or oppress the interests of the minority adversely affected by it, then that too will vitiate the exercise, since that too will clearly amount to the commission of fraud on the minority, which is also obviously outside the scope and purpose of the power."

CONCLUSION

While the interests of shareholders and creditor bondholders are self-evidently different, the duties that arise in relation to the exercise of their respective powers are in some ways similar; in particular, neither can act in bad faith. But that said, it seems that, absent an express provision to the contrary, a bondholder may act in good faith other than in the interests of the bondholders as a whole in voting through a restructuring under a CAC. In contrast, a shareholder, voting at a class meeting or in favour of an amendment to the articles, is obliged respectively to act in the interests of the class as a whole or the company as a whole. The 19th-century characterisation of the duties owed by bondholders as fiduciary has not caused the courts since then to adopt a different approach. ■

a benefit at the expense of the company or the minority". However, although the broad principle can be easily stated, it is not always easy to determine the test that should apply in practice. In *Clemens v Clemens Bros Ltd* [1976] 2 All ER 268, for example, new shares were issued which reduced the claimant's holding in the company to under 25% (preventing her from resisting extraordinary and special resolutions). It was held by Foster J that "In such a case as the present, Miss Clemens [the aunt of the claimant] is not entitled to exercise her majority vote in whatever way she pleases. The difficulty is in finding a principle and obviously expressions such as 'bona fide for the benefit of the company as a whole', 'fraud on the minority' and 'oppressive' do not assist in formulating a principle." But any expectation that the jurisprudence in this area would be advanced was dashed by his conclusion that "it would be unwise to try to produce a principle, since the circumstances of each case are infinitely varied. It would not, I think, assist to say more than that in my judgment, Miss Clemens is not entitled of a right to exercise her votes as an ordinary shareholder. To use the phrase of Lord Wilberforce [in *Ebrahimi v Westbourne Galleries Ltd* [1973] Ac 360 at 379], that right is "subject...to equitable considerations...which may make it unjust... to exercise [it] in a particular way ... Whether I say that these proposals are oppressive to the [Claimant] or that no one could honestly believe they are for her benefit matters not. A court of equity will in my judgment regard these considerations as sufficient to prevent the consequences arising from Miss Clemens using her legal right to vote in the way she has."

Turning to resolutions to amend company articles of association, it is perhaps worth observing at the outset that a special resolution is required (see Companies Act 2006, s 21(1): the percentage required (75%)) is thus akin to the majorities customarily required in CACs. The duties on shareholders in voting on such a resolution were set out in *Allen v Gold Reefs of West Africa Ltd* [1990] 1 Ch 656:

> **"Wide however as the language of [CA 2006, s 21(1)] is, the power conferred by it must, like all powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by the law, but *also bona fide for the benefit of the company as a whole*... These conditions are always implied and are seldom, if ever expressed."** (emphasis added).

"The court took the view that the majority were in a fiduciary relationship to the minority, with a power in trust to be used only for the common good of all."

As was made clear in *Shuttleworth v Cox Brothers and Co (Maidenhead) Ltd* [1927] 2 KB 9, although it is not the court's job to take business decisions, if the alteration is so oppressive as to cast suspicion on the honesty of the person responsible for it "the Court is entitled...to say that the alteration of a company's articles shall not stand if it is such that no reasonable men could consider it for the benefit of the company...the absence of any reasonable ground for deciding that a certain course of action is conducive to the benefit of the company may be a ground for finding lack of good faith or finding that the shareholders, with the best motives, have not considered the matters which they ought to have considered."

Where no benefit for, or detriment to, the company is identified the court is more concerned with the relative rights of the different categories of shareholders. Thus in *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 the majority shareholder did not claim to have acted in the company's interest (motivation appeared to be emotional) but stated that it was not material as the company as a separate person had no interest in who its shareholders were. Evershed MR said:

> **"The case may be taken of an individual hypothetical member and it may be asked whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit...a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders, so as to give the former an advantage of which the latter were deprived."**

BONDHOLDERS

Since the late 19th century, under an appropriately drafted clause, English law debenture holder majorities could assent to a reorganisation with no provision for the minority other than pro rata participation.

However, as was noted by De Forest Billyou in 57 *Yale L J* 595, the English courts were astute to see that the attempted action was in conformity with the indenture provision and that those casting votes were motivated by interests of the class; not adverse interests (see *In re New York Taxicab Co* [1913] 1 Ch (1912)) or collateral matters (see *British America Nickel Corp v O'Brien* [1927] AC 369). Further, the scope of the power conferred will be construed "rigidly against the majority" (*Mercantile Investment & General Trust Co v International Company of Mexico* [1893] 1 Ch 484.)

In *Mercantile Investment & General Trust Co* the court took the view that the majority were in a fiduciary relationship to the minority, with a power in trust to be used only for the common good of all. It is not immediately apparent what is added by this "fiduciary" analysis. The same sentiments were expressed, without reference to fiduciary obligations, in *British America Nickel Corporation Ltd*:

> **"To give a power to modify the terms on which debentures in a company are secured is not uncommon in practice. The business interests of the company**

KEY POINTS

- Neither shareholders nor creditor bondholders can act in bad faith.
- It seems that, absent an express provision to the contrary – and despite a "fiduciary relationship" between majority and minority, a bondholder may act in good faith *other* than in the interests of the bondholders as a whole in voting through a restructuring under a collective action clause.
- In contrast, a shareholder, voting at a class meeting or in favour of an amendment to the articles, is obliged respectively to act in the interests of the class as a whole or the company as a whole.

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Challenges to collective action clauses: can any parallel be drawn with unfair prejudice petitions and oppression of the minority?

This article considers the extent to which the principles developed in the context of shareholders' unfair prejudice petitions differ from those which apply in relation to bondholder creditors squeezed out by collective action clauses.

Collective action clauses (CAC) to facilitate restructuring of company indentures were developed and accepted in English law in the late 19th century to provide a mechanism for orderly and timely reorganisation of the debtor and to provide an alternative to liquidation. In America the solution to this problem, after a brief dalliance with majority action clauses, was first a process of appointment of equity receivers and then later a precursor to what is now the Chapter 11 process (see Buchheit and Gulati: "Sovereign Bonds and the Collective Will" – *Emory Law Journal* 2002).

When entering into a bond, whether sovereign or corporate, which contains a CAC requiring a majority or super-majority for restructuring, the bondholder is accepting that at some time, without his consent, "some percentage of his class may grant away his personal and secured rights against the debtor" (Haines, 38 *Mich L Rev* 63, at 65).

The advantage, then as now, of CACs is that they "may save the majority from the tyranny by the minority" (as it was put in *Palmer's Company Law* (2nd ed.) 1881); specifically two minority creatures: the ruthless creditors who litigate at the expense of the majority, and the "hold-out" creditors who use the threat of liquidation to extract preferential treatment. As was neatly stated in *Hackettstown National Bank v Yuengling Brewing Co* (CCA 2.d. 1896): "they are intended to minimise the power of a fractious minority to thwart the general good."

While the purpose of CACs may be to prevent the tyranny of the minority, they also provide the opportunity for oppression of the minority by the majority. The question which arises is the extent to which the principles developed in the context of shareholders' unfair prejudice petitions differ from those which apply in relation to bondholder creditors.

SHAREHOLDERS

The starting point is that the duties owed by shareholders to each other are not fiduciary: "the shareholders' vote is a right of property and *prima facie* may be exercised by a shareholder as he thinks fit in his own interest" (Lord Maugham in *Carruth v Imperial Chemical Industries Ltd* [1937] AC 707, at p 765). However, this does not grant shareholders an unlimited right to use their votes to damage the interests of the minority. Thus in *Allen v Gold Reefs of West Africa* [1900] 1 Ch 565 it was held that, to prevent an abuse of power by the majority, members are required to vote *bona fide* in what they consider to be the best interests of the company; or, as it was put in *Re Western Mines Ltd* (1975) 65 DLR 3(d) 307), they must not exercise their voting power for an improper purpose.

While members are not fiduciaries, in two situations their duties have been expressed in essentially fiduciary terms, namely where they exercise their powers in relation to class meetings and where they are voting on amendments to the company's articles of association.

In relation to class meetings it has long been held that the power of the majority to bind the minority must be exercised for the purpose of benefiting the whole class, not particular members: the minority can accordingly challenge a decision of the majority not only on the ground that it is *ultra vires* or fraudulent but also that it is oppressive (see *MacDougall v Gardiner*[1875] 1 ChD 13). Thus, in *Re Holders Investment Trust* [1971] 1 WLR 583, the company sought to reduce its capital by cancelling all of its redeemable preference shares and issuing unsecured loan stock to the holders in exchange for their preference shares. This had been approved at a class meeting of the preference shareholders, but the majority of preference shareholders were also ordinary shareholders: the exchange improved their position as ordinary shareholders, to the detriment of those preference shareholders who were not. It was held that effective approval had not been given for the reduction of the capital.

In similar vein, Chadwick LJ commented in *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167: "equity imposes on majority shareholders an obligation not to use the powers attached to their shares to obtain