Oppression Remedies for Minority Shareholders

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> *All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate would be oppression.*
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> **Thomas Jefferson**
> First Inaugural Address, 4 March 1801

1. Statutory Remedies for Minority Shareholders

The notion of majority rule is a fundamental concept in the corporate landscape but it contains an inherent risk of abuse. In closely held companies, where shareholders are often involved in the management of the company, there is a potential for conflict between the decisions of the majority shareholders and the interests of the shareholders as a whole.

Cases have shown that disputes between shareholders may result in an irretrievable breakdown in mutual trust and confidence or a deadlock in the management of the company. In such cases, the law provides some remedies for minority shareholders to ensure efficiency and fairness. One of the most widely used statutory remedies available to shareholders is found in Part 2F.1 of the *Corporations Act 2001* (Cth) ("the Act").

Under section 232 of the Act, the court is empowered to give relief against oppressive conduct of a company's affairs if it is of the opinion that:

(a) the conduct of a company's affairs (as defined in section 53); or
(b) an actual or proposed act or omission by or on behalf of a company; or
(c) a resolution, or a proposed resolution, of shareholders or a class of shareholders of a company;

is either:

(d) contrary to the interests of the shareholders as a whole; or
(e) oppressive to, unfairly prejudicial to, or unfairly discriminatory against, a shareholder or shareholders whether in that capacity or in any other capacity.

Section 461(1)(e) of the Act also provides a ground for compulsory winding up where the directors "have acted in the affairs of the company in their own interests rather than in the interests of the company as a whole".

2. What constitutes oppression?

A mere failure to agree between majority and minority shareholders, by itself, is not usually sufficient to demonstrate oppression. The court is required to examine all of the relevant facts and circumstances in order to determine whether the conduct under scrutiny has resulted in some harm or prejudice, which is not "reasonably or commercially justifiable": *Peter Exton & Anor v Extons Pty Ltd & Ors* [2017] VSC 14 at [48].

What constitutes conduct "contrary to the interests of the shareholders as a whole" is an objective test and determined by reference to "whether the conduct adheres to accepted standards of corporate behaviour or is in accordance with how reasonable directors would act in attending to the affairs of the company": *Goozee v Graphic World Group Holdings Pty Ltd* (2002) 42 ACSR 534; [2002] NSWSC 640 at [41].

For example, where a majority shareholder's dominant purpose in raising capital through a share issue is to reduce the proportional shareholding of the minority, unfairness and oppression may be established: *Strategic Management Australia AFL Pty Ltd & Anor v Precision Sports & Entertainment Group Pty Ltd & Ors* [2016] VSC 303 at [148]

Depending of the circumstances of the case, the following may also constitute oppressive and unfairly prejudicial conduct:

- Improper diversion of corporate business.
- Improper exclusion from participation in the management of the company.
- Misappropriation of company funds in breach of fiduciary duty.
- Payment of excessive remuneration to a controlling shareholder or associate.
- Failure to prosecute an action or improperly condoning a wrong done to the company.
- Denial of access to company books and records.
- Oppressive conduct of board meetings.
- Making decisions for the benefit of related companies rather than shareholders in the company.
- Improper action to remove or appoint directors.
- Dilution of shareholders' interests.
- Unfairly restricting dividends.
- Abusive of voting power by the majority in altering the company's constitution.
- Use of company funds to defend oppression proceedings.

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3. Who may apply for relief?

An application for an order under section 233 of the Act in relation to a company may be made by:

(a) a shareholder of the company, even if the application relates to an act or omission that is against:
  (i) the shareholder in a capacity other than as a shareholder; or
  (ii) another shareholder in their capacity as a shareholder; or
(b) a person who has been removed from the register of shareholders because of a selective reduction; or
(c) a person who has ceased to be a shareholder of the company if the application relates to the circumstances in which they ceased to be a shareholder; or
(d) a person to whom a share in the company has been transmitted by will or by operation of law; or
(e) a person whom ASIC thinks appropriate having regard to investigations it is conducting or has conducted into:
  (i) the company's affairs; or
  (ii) matters connected with the company's affairs.

4. What forms of relief are available?

Under section 233 of the Act, the court has discretion to make "any order that it considers appropriate" in relation to the company, including an order:

(a) that the company be wound up;
(b) that the company's existing constitution be modified or repealed;
(c) regulating the conduct of the company's affairs in the future;
(d) for the purchase of any shares by any shareholder or person to whom a share in the company has been transmitted by will or by operation of law;
(e) for the purchase of shares with an appropriate reduction of the company's share capital;
(f) for the company to institute, prosecute, defend or discontinue specified proceedings;
(g) authorising a shareholder, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;
(h) appointing a receiver or a receiver and manager of any or all of the company's property;
(i) restraining a person from engaging in specified conduct or from doing a specified act;
(j) requiring a person to do a specified act.

In choosing a remedy, the court will generally make an order "to put the company back on the rails and avoid the causes of conflict and oppression": *Vigliaroni & Ors v CPS Investment Holdings Pty Ltd & Ors* [2009] VSC 428 at [85]. The purpose of granting the remedy under the oppression provisions is to "bring an end to the oppression and to compensate the person oppressed fairly": *Vigliaroni* at [85].

A winding up order may not be the preferred remedy where the company is solvent and trading profitably. In that event, the court may make other orders including an order for the majority to purchase the shares of the minority at a value to be determined by the court.

Whether you are a minority or majority shareholder, it is important that you seek professional advice and take proactive steps to resolve any shareholder disputes as and when they arise. Our experienced lawyers can guide you through this process and provide the most appropriate legal advice for your circumstances.