

Shareholders and Directors' Disputes – Just and Equitable Winding Up Author: Lesly Ann Cho & Nicholas Fasullo

Disputes between company shareholders and directors are common place and can have a significant impact on a company's operation. It is also not unusual for protracted disputes to ultimately lead to irreconcilable situations that ultimately and significantly limit the ability of a company to continue to function. In such dire circumstances, while different exit strategies exist to assist parties in navigating through the dispute, more formal actions are often taken through Court processes to ultimately break the impasse. One of the more common relief sought, and yet the last resort a Court would often turn to, is to ultimately wind up the company on just and equitable grounds.

Just and Equitable Winding-Up

The circumstances in which a Court may make a winding up order on just and equitable grounds are not closed or rigid and are intentionally not limited in any way. Generally, the Federal Court or the Supreme Court of a state or territory is empowered to order that a company be wound up under s 461 *the Corporations Act 2001 (Cth) (the Act)*. Under that provision, the Court may wind up a company on numerous grounds. In the context of shareholders and directors' disputes, a Court may wind up a company:

1. when oppression is presented in the conduct of the company's affairs (see [Shareholders and Director's Disputes – A way forward](#)); or
2. if the Court is of the opinion that it is just and equitable that the company be wound up.

Common factors that a Court generally considers when winding up a company on just and equitable grounds include:

1. a failure of the main object of the company's formation;
2. a deadlock in the management of the company;
3. a breakdown in the relationship between its shareholders;
4. a lack of confidence in the conduct and management of the affairs of the company;
5. where there has been fraud, misconduct or oppression in relation to the affairs of the company;
6. where there are present serious concerns about the company's compliance with its statutory obligations, including the filing of tax returns;
7. where there have been breaches of the Act, including breaches of directors' duties or an inadequacy of accounts or recordkeeping;
8. questions of commercial morality in the conduct of the company's affairs; and
9. a risk to the public interest that warrants protection.

An application to seek a winding up order is by no means guaranteed and is generally considered as a remedy of last resort. A party seeking such an order must satisfy the Court that the breakdown in the parties' relationship is so significant that it has frustrated the commercially viable and sensible operations of the company. A Court would

not order a company to be wound up in circumstances where there are no restrictions to transfer the applicant's shares or there is satisfactory evidence that there will not be a refusal to make a transfer of shares to a proper transferee.

In fact, under s 467(4) of the Act, a winding up may not be ordered under the just and equitable ground on the application by members of the company if other less drastic relief is appropriate and the applicants are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

A Recent Example

The above principles were recently explored in the decision of the NSW Supreme Court *In the matter of Munja Bakehouse Pty Ltd* [2024] NSWSC 6. That case concerned the business of Munja Muffins, a muffin supplier based in Sydney.

Smith Street Marrickville Pty Ltd (ACN 632 121 129) (**Smith Street**) was the owner of a property located in Marrickville from which Munja Bakehouse Pty Ltd (ACN 168 272 071) (**Munja**) operated the business. Smith Street owned the Marrickville property as trustee for the 30Smith Unit Trust (**Trust**). A dispute arose between the respective shareholders of those companies and the individuals that stood behind them.

As part of the relief sought in the proceedings, the parties ultimately sought orders for Munja and Smith Street to be wound up on just and equitable grounds pursuant to s 461(1)(k) of the Act. In this regard, Black J made comments to the effect that:

- The "just and equitable" ground for winding up a company under s 461(1)(k) of the Act is not limited by particular categories.
- Where a company was established on a basis of relationships of mutual confidence, a winding up order may be made on the just and equitable ground under s 461(1)(k) of the Act where irreconcilable differences emerge between its members.
- The circumstances in which the Court may make a winding up order under s 461(1)(k) of the Act also include circumstances where the substratum of the company has failed – that is, where the company has not achieved the objectives for which it was formed.
- A winding up order sought on the just and equitable ground requires the Court to have regard to the availability of some other remedy and whether or not a plaintiff would be acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.
- There is no absolute rule that the Court will not wind up a solvent company, although winding up is a last resort.

In this case, the application was made on the grounds that Munja (and Smith Street) operated as a quasi-partnership and there was a breakdown in the relationship such that there was no longer mutual trust and confidence between the individuals ultimately behind those entities. In this regard, the parties did not put in place a shareholders' agreement to manage the conduct between them, were in dispute regarding their respective roles in the business, and the Court expressly noted several instances of personal conflict between them.

The Court also accepted that the continuation of the association between the disputing parties would be futile and that there was no reason to think the association would not continue to be beset by "*mistrust, disputes about pay and workloads, and personal animus.*" Ultimately, the Court found that a winding up order should be made in respect of Smith Street and Munja.

However, before making such an order to operate immediately, Black J noted that where a Court is otherwise minded to wind up a company on just and equitable grounds, it will often postpone a winding up order to allow the parties an opportunity to negotiate a buy-out of a disputing parties' interest in the relevant company. Accordingly,

Black J stayed the making of a winding up order and the appointment of a receiver for 14 days to allow the parties a final opportunity to resolve their differences in a manner which will avoid the liquidation of the companies and the winding up of the Trust.

Key Takeaways

It is not unusual or uncommon for companies to fall into disarray as a result of a falling-out or ongoing dispute between its key personnel. As demonstrated in the above case, there are various remedies available to the Court to resolve a deadlock in circumstances where there is a complete breakdown in the relationship of a company's members. This includes appointing a liquidator to a company with the intention that it be wound up on just and equitable grounds.

However, given the seriousness of a company having a liquidator being appointed and the significant costs and potential diminution of asset value which might come with that scenario, Courts are reluctant to make such an order unless the circumstances warrant the order and there is no other available remedy which might be utilised. With the inevitability of a company being wound-up, the parties in dispute may also be induced to ultimately act rationally to come to a commercial agreement for a buy-out of a parties' shares in that company, where no prospect of success to reach an agreement previously existed.

If you would like further information or require assistance with respect to any existing or pending director and shareholder disputes, please contact [Lesly Ann Cho](#), Partner, or your usual ClarkeKann contact.